Articles

Faithful Unions

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We live in a moment of intense preoccupation with both marriage and federalism, one that is likely to persist well beyond the Supreme Court's ruling in Obergefell v. Hodges. *The decision served to reify marriage as a site of enormous cultural significance, an appropriate institution within which to fight over social meaning and its reflection in law. These battles are fought state by state, against a backdrop of unprecedented geographic mobility, raising profound questions not only about how states relate to their own citizens, but how states relate to each other. If it is true that states have an interest in marriages they have created, an idea often invoked but less frequently examined, then interstate marriage recognition is a matter not only of individual rights but also of state sovereignty. Yet the Full Faith and Credit Clause, the constitutional command that is seemingly most suited to managing marriage federalism, has never been called into action.*

This Article first suggests that this warrants explanation and then endeavors to provide one. It offers an account of contingent doctrinal evolution, demonstrating that the work the Clause might do in regulating interstate marriage recognition has so far been done by other doctrines. But it also explains why the Clause might nonetheless be useful for the marriage controversies of the future. The anti-animus principles that drove marriage equality forward are highly dynamic; they reflect and respond to social change in an iterative process that is neither linear, nor predictable, nor instantaneous. While this unfolds for any given marriage controversy, over a period that might take decades, we would advance our commitment to faithful unions—both marital and national—by developing an interstate recognition scheme with constitutional parameters.

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INTRODUCTION

This Article takes on a puzzle in the ongoing constitutionalization of marriage.[1] Marriage has become one of the central civil rights issues of our time, but the most intense national controversies over state marriage policy seem to deflect rather than facilitate resolution of interstate recognition issues. During the period that any given marriage controversy wends its way through state and federal courts and legislatures, yielding a patchwork of divergent state marriage laws, the question of interstate recognition is a very pressing one.[2] Nonetheless, the Supreme Court has never explained whether Article IV's Full Faith and Credit Clause requires states to recognize the marriage acts of other states. Instead, when a controversy over marriage reaches a certain point of national salience, the Court (after waiting it out for a while) goes

1. Numerous scholars have explored the idea that marriage and family law have become constitutionalized. *See, e.g.*, David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L. Q. 529, 529 (2008) (noting that "[a]mong the forces transforming American family law over the last fifty years, perhaps none has been more salient than the field's 'constitutionalization.'"); *see also* Mary Anne Case, *Feminist Constitutionalism and the Constitutionalism of Marriage*, *in* FEMINIST FUNDAMENTALISM AND THE CONSTITUTIONALIZATION OF MARRIAGE: GLOBAL PERSPECTIVES 48 (Beverly Baines et al. eds., 2012).

2. Other commentators have capably explained this urgency. *See, e.g.*, Joseph William Singer, *Same-sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 6 (2005) (explaining why it is "essential that we face squarely the arguments on both sides of this debate about whether states have a constitutional obligation to recognize same-sex marriages validly performed elsewhere."); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005).

directly to the substantive Fourteenth Amendment principles: what do Equal Protection and Due Process require of states in issuing marriage licenses? The Court has declined to impose any Article IV parameters on how states relate to each other during times of pervasive disagreement over the proper contours of the marriage relationship.[3]

That is not to say that this would be an easy or straightforward endeavor, as those familiar with choice of law doctrine will appreciate. Scholars in this field have long asserted, over some vigorous and persuasive objections,[4] that the Full Faith and Credit Clause has no bearing on the interstate recognition of marriage.[5] Distilled to its essential elements, the thesis is that in spite of its plain text, the clause's operational scope has historically been limited to the interstate recognition of *judgments*, and that the management of interstate marriage conflicts falls to ordinary, non-constitutional choice of law principles.[6] As one commentator has described, adherents of the

3. This is made all the more perplexing given the Court's emphasis on the importance of its role in enforcing federalism principles. *See, e.g.*, Printz v. United States, 521 U.S. 898, 919–20 (1997); United States v. Lopez, 514 U.S. 549 (1995) (holding a nationwide gun control act was an overreach of Congressional powers). To be sure, the Court has recently been more vocal about vertical federalism principles, the enforcement of the boundary between federal and state power. But it has also emphasized the importance of horizontal federalism, the appropriate management of interstate relationships, to the constitutional design. *See, e.g.*, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943) (describing the Full Faith and Credit Clause as a "nationally unifying force" transforming the states from "independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others . . . .").

4. *See, e.g.*, Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397 (1995); J. Stephen Clark, *Conflicts Originalism: The "Original Content" of the Full Faith and Credit Clause and the Compulsory Choice of Marriage Law*, 118 W. VA. L. REV. 547, 549 (2015) ("The Full Faith and Credit Clause has been left seriously underenforced as a constitutional constraint on state choice of law."); 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, 584 (1993); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1967 (1997) (asserting that "the Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or obnoxiousness of other states' policies."). Kramer's work is especially interesting in retrospect, having been written in the very early stages of legislative activity and ballot initiatives that targeted same-sex marriage for special rules of nonrecognition.

5. *See* Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 363 (2005) [hereinafter *Borchers*, The Essential Irrelevance]; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 2–3 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981). Arguments that states must recognize valid marriages performed in other states were treated in this literature as a kind of rookie mistake: "It always worries me a little when the Conflict of Laws suddenly seems interesting. When outsiders begin to visit this little corner of the legal universe, the results usually are not good." Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 147 (1998).

6. As neatly captured in one rendition: "Only judgments are entitled to near automatic recognition . . . a marriage is not a 'judgment' (at least of the relevant kind), but rather, it is a state

conventional wisdom project an air of certainty about this premise that is outright disdainful for suggestions to the contrary.[7]

If it is "preposterous"[8] to consider the application of the Full Faith and Credit Clause to the interstate recognition of marriage, no one told the Supreme Court. During the oral arguments in *Obergefell v. Hodges*, the justices repeatedly asked counsel to do exactly that. Justice Scalia, inverting the conventional wisdom sketched out above, proclaimed that it was the Full Faith and Credit Clause, rather than the Fourteenth Amendment, "that actually seems to be relevant."[9] Justice Roberts emphasized the lack of precedent directly considering the marriage question and pressed counsel to identify any case that could be said to dispose of the possibility that marriage licenses were entitled to Full Faith and Credit.[10]

In a high profile, ideologically fraught case that few expected to yield any real surprises, this line of questioning was unexpected and interesting. Had the conflicts scholars been wrong to conclude so forcefully that the Full Faith and Credit clause did not apply to marriage? Would the conservative justices find themselves bound by the text of the Full Faith and Credit clause to order the recognition of same-sex marriages? The moment passed with little lasting consequence, however, when the majority ruled that the Fourteenth Amendment imposed upon every state an obligation to issue marriage licenses to same-sex couples, completely overshadowing the question of interstate recognition. None of the dissenters who objected to the majority's view of Equal Protection and Due Process suggested that they would have required Ohio or Tennessee to recognize valid same-sex marriages from other states pursuant to the demands of the Full Faith and Credit Clause. It was difficult to know who, exactly, had been vindicated by the Justices' intense but short-lived interest in the relationship between marriage and the Full Faith and Credit clause.

The Full Faith and Credit clause's proper application to interstate marriage recognition thus remains unresolved, perhaps restoring to primacy the conflicts scholars' assessment that it is largely irrelevant. This supposed irrelevance, however, continues to be a bit puzzling,

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licensed and sanctioned arrangement entered into under the umbrella of a statute. A marriage, therefore, is a sister-state public act, and historically the Supreme Court has not required states to give full faith and credit to such acts." WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 125–26 (2005).

7. Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95 (2014).

8. Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 479 (2005) ("The subject of same-sex marriage has produced a seemingly endless set of preposterous ideas about why the Full Faith and Credit Clause requires states to give effect to marriages performed in other states.").

9. Transcript of Oral Argument at 26, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

10. *Id.* at 28, 35–36.

especially in light of the skepticism with which it was received by the justices during oral argument in *Obergefell*. One need not be a full-throated textualist to observe that the text of the clause is difficult to reconcile with the meager force of the Full Faith and Credit Clause as historically applied to marriages.[11] It bears some emphasis in a constitutional culture such as ours, where textualism still has such purchase, that this rewriting of the clause is particularly heavy-handed, rendering null two of the enumerated items in a list of three.[12] On the other hand, constitutional doctrines are replete with departures from textualism, and the Constitution itself includes some provisions for which the literal reading would be more or less absurd.[13] As has been noted, a literal reading of the Full Faith and Credit clause might be similar, in that requiring a state to give effect to all "Acts" of a sister state would eviscerate its authority to regulate in divergent ways.[14] Thus, the Supreme Court has imposed a rather minimal constitutional obligation when it comes to state choice of law decisions in cases involving tort liability, contract enforcement, and workplace regulation.[15] Marriage, however, presents some distinctive interstate recognition questions that are not necessarily answered by this line of cases.[16] The proper resolution of the question is not obvious, and there are reasons to wonder how the Court would (and should) ultimately resolve it. What this Article seeks to explain is why the Court has never done so. How has this gone unanswered for so long? To state the obvious, it is not for lack of opportunity.

In this Article, I seek to explain why these questions remain unanswered after such prolonged and intensive focus on the constitutional implications of state marriage policy. Questions of

11. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 290 (1992) (explaining the operation of the Clause as to interstate recognition of judgments, and observing that "[a]s a simple matter of constitutional text, the Clause must have the same meaning with respect to rules of law.").

12. Although one might accept that "Public Acts" includes the statutes of sister states, acknowledging the plain meaning of the text, and yet still posit that the "faith" or "credit" due to a sister state statute is different than what is due to a sister state judgment; in other words, that statutes are not read out of the Clause but simply require a different type of regard.

13. For a favorite example, see Amar's discussion of vice presidents presiding over their own impeachment trials. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 10–11 (2012).

14. *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1503 (2007) ("Read literally, the Full Faith and Credit Clause suggests 'the absurd result that, wherever the conflict [between different states' laws] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.'") (quoting Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935)).

15. *See, e.g.*, REYNOLDS & RICHMAN, *supra* note 6, at 43 (describing the Court's approach in these cases as one of "minimal scrutiny.").

16. It is a status determination with an utterly unique set of ramifications for individual rights and obligations. *See, e.g.*, Singer, *supra* note 2, at 40.

interstate marriage recognition implicate a tangled mix of principles drawn from different doctrines. Thinking about marriage federalism requires an understanding of the Full Faith and Credit Clause, layered upon "ordinary" (by which I mean non-constitutional) choice of law principles, operating against a backdrop of Due Process and Equal Protection guarantees.[17]

A conventional and perfectly valid appraisal of these doctrines would take them in isolation, noting that they serve different purposes, were borne out of different questions, and are appropriate to raise in different fact patterns.[18] These doctrines are not interdependent in any formal sense—what states choose to recognize under their ordinary choice of law rules operates independently of what they are obligated to do under the Full Faith and Credit clause,[19] and of course their obligations under that clause are not contingent upon their obligations under the Fourteenth Amendment, nor the reverse. So it might violate the Fourteenth Amendment to discriminate against same-sex couples in the provision of marriage licenses even though it does not violate the Full Faith and Credit Clause to refuse to recognize marriage licenses from other states. Conversely, it is possible to imagine a universe in which the Full Faith and Credit Clause required states to recognize marriage licenses from sister states even where there was no Fourteenth Amendment obligation to issue the same sort of license in the first instance.[20] It is thus entirely accurate to conceive of these doctrines as distinct and independent—not reliant on, nor substitutes for, one another.

This Article offers a different perspective, beginning with the observation that all three of these doctrines are tools that in some way serve to solve the social problem writ large: how to manage interstate marriage recognition in a morally pluralistic, structurally federalist

17. And, as I will explore later in the Article, it raises even broader trans-substantive questions about horizontal federalism and the role of Congress in resolving interstate conflicts.

18. William L. Reynolds and William M. Richman, for example, posit that the "essence" of the Due Process clause "is fairness to the individual, while the heart of full faith and credit is ensuring that each state respects the rights of other states." REYNOLDS & RICHMAN, *supra* note 6, at 39.

19. Justice Jackson cautioned against the temptation of treating the doctrines as interchangeable:

> In considering claims of foreign law for faith and credit courts of course find conflict of laws a relevant and enlightening body of experience and authority to provide analogies. But while the American law of conflicts is a somewhat parallel and contemporaneous development with the law of faith and credit, they also are quite independent evolutions, are based on contrary basic assumptions, and at times support conflicting results. We must beware of transposing conflicts doctrines into the law of the Constitution.

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

20. I acknowledge here the distinct contention that a couple validly married in one jurisdiction has a Fourteenth Amendment right, sounding either in due process or equal protection, to the continued validity of their marriage. *See, e.g.*, Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1425 (2012).

system with an increasingly mobile and inter-connected population.[21] These doctrines are not deployed or developed in isolation, and this Article will argue that what we are witnessing is a phenomenon of *contingent doctrinal evolution*, whereby seemingly independent doctrines develop or stagnate in response to what is happening in other areas of law.[22] The expansiveness of the "ordinary" choice of law principles and the expanding scope of the Fourteenth Amendment's protection for marriage decisionmaking have crowded out the Full Faith and Credit question. In a landscape where one has always been generous and the other is becoming more so, the Full Faith and Credit Clause has little to do[23]—not because it is textually or conceptually inapt, but because its practical, real-world work is being done by other doctrines. This Article describes this phenomenon and explores its implications—for rights, for federalism, and for both marital and national unions.

Part I briefly reviews the debate over whether the Full Faith and Credit Clause should apply to interstate marriage recognition. It provides an overview of the scholarly literature and a detailed look at the line of inquiry pursued by the Justices during the *Obergefell* argument, showcasing how profoundly unsettled the question continues to be. Part II explores why the issue remains unresolved, introducing and elaborating upon the concept of contingent doctrinal evolution. It explains that "ordinary" choice of law principles foster the recognition of most interstate marriages, making it unnecessary in the vast majority of instances to determine a state's constitutional obligations under the Full Faith and Credit Clause. As to those marriages that have fallen outside the scope of these decidedly pro-recognition rules—inter-racial and same-sex marriages chief among them—we have on the other hand an increasingly robust set of Fourteenth Amendment principles working to invalidate exclusionary marriage policies predicated on animus. Part II also highlights the challenging structural questions presented by Congress's role as interstate relations manager, showing that these issues complicate the development of interstate recognition principles grounded in the Full Faith and Credit Clause. Part III considers whether,

21. *Cf.* Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After* Lawrence v. Texas, 65 OHIO ST. L.J. 1265, 1274 (2004) ("The Jim Crow judges were horrifyingly wrong about many things, but they did understand the problem of moral pluralism in a federal system, and we can learn something important from the solutions that they devised.").

22. For an example from another area of constitutional law, consider one scholar's observation that there was little need to determine the boundaries of Congress's power to tax during the 60 years that it had virtually unlimited power under the Commerce Clause. *See* Barry Cushman, NFIB v. Sebelius *and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 161 (2013).

23. One scholar posits that the Full Faith and Credit Clause "sits there, seemingly with nothing to do—*because it has never been asked to do anything*." Sanders, *supra* note 7, at 101 (emphasis in original). I concur with and draw from his capable analysis but offer a different explanation for the Clause's apparent powerlessness.

in light of these phenomena, there will be work remaining for Full Faith and Credit in future marriage controversies. It concludes that the answer is yes, explaining that unconstitutional animus is not a terrain with fixed boundaries—it is contested, evolving, and responsive to social change. Most importantly, such animus is easier to see in retrospect than while social and legal change is unfolding. While the chronology of marriage equality seems to reinforce the assumption that we can expect the Fourteenth Amendment to do most of the work in policing state marriage policy, we might nonetheless find it useful to call upon the Full Faith and Credit Clause while the Fourteenth Amendment principles are being worked out.

I. THE ROLE OF FULL FAITH AND CREDIT IN INTERSTATE MARRIAGE RECOGNITION

A. THE CONVENTIONAL WISDOM

The outline of the problem is familiar: a couple gets married in one state, then moves to another.[24] Their union features some quality that would render them ineligible to receive a marriage license in the second state were they seeking to wed there in the first instance, but they are not seeking the issuance of a new license. They simply seek to have the second state recognize what the first state has already done, to give effect to the status they have already achieved. What are the obligations of the second state to honor an existing marriage license that it would have refused to issue?

It seems that the Full Faith and Credit Clause pertains to this very question.[25] The text could hardly be more apt, ordaining that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Surely a state-issued marriage license qualifies as a "public Act," or at least a "Record?" Perusing the minutia of state marriage procedure confirms the intuition, revealing all manner of detail regarding the state's matrimonial record keeping.[26] And

24. As we will explore in much greater depth, the "migratory" couple described here is different in profoundly important ways than a couple contracting an "evasive" marriage.

25. Kramer, *supra* note 4, at 1976 (the clause "looks on its face as if it were written for precisely this sort of problem.").

26. *See, e.g.*, COLO. REV. STAT. § 14-2-109 (2017). Notwithstanding this apparent fit, however, FFC scholars have asserted that:

> [T]he meaning of the term full faith and credit shifts as the focus changes from judicial proceedings and acts to records. To give full faith and credit to another state's judicial proceedings is to give them preclusive effect according to the law of the rendering state. . . . By contrast, to give full faith and credit to 'records' means simply to admit them routinely into evidence in the courts of the forum.

REYNOLDS & RICHMAN, *supra* note 6, at 13 (emphasis omitted). The fuller context reveals the assumption that the records in question are judicial records. Reynolds and Richman treat the "records" component (in combination with Congress's implementing statute) as the mechanism by which courts

when the issue of same-sex marriage was brought into the national spotlight by litigation in Hawaii,[27] reporters and commentators opined that the Full Faith and Credit clause would require other states to recognize such marriages.[28]

But Professor Andrew Koppelman, in what is perhaps the definitive modern guide to interstate marriage conflicts, described this idea as a "fundamental misconception."[29] The chapter devoted to the Full Faith and Credit Clause proclaims the clause's "irrelevance" to interstate marriage recognition, using the same striking language as an article on interstate marriage recognition from the previous year.[30] The assertion is defended by noting the dearth of judicial decisions imposing full faith and credit obligations on states refusing to recognize out of state marriages. Koppelman observes that "there is not a single judicial decision that holds that full faith and credit requires states to recognize marriages that violate their own public policies concerning who may marry."[31] Instead, he explains, the force of the clause has historically been

admit and authenticate evidence of what a sister court has rendered.

27. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

28. ANDREW KOPPELMAN, SAME-SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 117 (2006) (describing such assertions as "feckless."). It is worth noting that for scholars and advocates sympathetic to the cause of marriage equality, as Koppelman certainly was, and therefore eager to dispel the panic that accompanied the developments in Hawaii and Massachusetts, there may have been strategic reasons to assure observers that the Full Faith and Credit Clause would not spring into action. *See, e.g.*, Jay Michaelson, *An Often-Overlooked Clause in the Constitution Points the Way to Same-sex Marriage*, DAILY BEAST (Apr. 2, 2013, 4:45 AM), http://www.thedailybeast.com/articles/2013/04/02/an-often-overlooked-clause-in-the-constitution-points-the-way-to-same-sex-marriage.html (opining that conservatives opposed to same-sex marriage were invoking the Full Faith and Credit Clause as a "scare tactic.").

29. KOPPELMAN, *supra* note 28, at 118.

30. Koppelman criticized the media coverage of the same-sex marriage controversy for "fecklessly" repeating "the claim that the full faith and credit clause will require every state to recognize same-sex marriages." KOPPELMAN, *supra* note 28, at 117. Such claims, it should be noted, were heard in no less hallowed halls than the United States Congress, as Mark Strasser captures nicely in his article on DOMA: "Members of Congress apparently feared that Hawaii would recognize same-sex marriage, and that domiciliaries of other states would go to Hawaii, marry their same-sex partners, and then return to their domiciles demanding that their marriages be recognized." Mark Strasser, Windsor*, Federalism, and the Future of Marriage Litigation*, 37 HARV. J. L. & GENDER ONLINE 1, 7 (2013); *see also id.* at 7 n.64 (citing 142 CONG. REC. H7480-05, H7490) (Rep. Canady):

> The idea of the gay rights legal advocacy community is that they will have same-sex marriages recognized in the State of Hawaii, and then folks will go there from around the country, be married under the laws of the State of Hawaii, and then go back to where they came from and attempt to use the full faith and credit clause to force those States to which they have returned to recognize the legality of that same-sex union contracted in the State of Hawaii.

(citing 142 CONG. REC. H7480-05, H7486) (Rep. Buyer) ("When one State wants to move towards the recognition of same-sex marriages, it is wrong. The full faith and credit of the Constitution would force States like Indiana to abide by it. We as a Federal Government have a responsibility to act, and we will act."); *see also* Borchers, *The Essential Irrelevance*, *supra* note 5; Whitten, *supra* note 8, at 486.

31. KOPPELMAN, *supra* note 28, at 118. The explanatory footnote, however, tells a slightly more complicated story, listing counter examples. *Id.* at 185 n.11. Koppelman notes that these exceptions

limited to *judgments*. Marriage licenses, of course, no matter how intricate the procedures used to formalize the union, simply cannot be categorized as judgments. While states are constitutionally obligated to give effect to the judgments of sister state courts, they are otherwise free, for the most part, to apply their own choice of law principles to any given dispute, with the result of choosing their own state's substantive law.[32]

Koppelman and other conflicts scholars cite landmark cases such as *Sun Oil* and *Allstate* for the principle that a state may apply its own law to a dispute if the state "had a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[33] Scholars often cite *Nevada v. Hall* for the proposition that states may refuse to apply a sister state's law when doing so would violate the forum state's "legitimate public policy."[34] *Nevada v. Hall*, it must be noted, was a personal injury case concerning a state's authority to apply its own damages law to a dispute with a sister state defendant, thereby allowing a higher recovery against the sister state defendant than the sister state's own law would allow. Similarly, treated as instructive is language—most recently reiterated in a products liability action brought against an automobile manufacturer—asserting that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[35] The use of such cases in this context reveals the pervasive and usually unexplained assumption that the recognition of marriages is conceptually equivalent to the other choice of law problems that confront a court adjudicating a case with interjurisdictional contacts. This assumption has proliferated beyond the academic literature, showing up

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were limited to common law marriages, which he describes as presenting a formal rather than substantive objection. But common law marriage was on occasion denied recognition on the grounds that it was offense to the forum state's "strong public policy," suggesting substantive and not just technical opposition. *See, e.g.*, *Borchers*, The Essential Irrelevance, *supra* note 5, at 354 n.11 (citing Metro. Life Ins. Co. v. Chase, 294 F.2d 500 (3d Cir. 1961)) (refusing to recognize common-law marriage because it would violate strong public policy of the forum). Another commentator identifies one case in which a court applied full faith and credit principles to interstate marriage recognition, but that case seemed to involve a common law marriage adjudicated to judgment. Balian, *supra* note 4, at 403 n.27 (citing Ram v. Ramharack, 571 N.Y.S.2d 190 (N.Y. Sup. Ct. 1991)) (holding that a common-law marriage validly consummated in another state or jurisdiction can be recognized in New York under the doctrine of full faith and credit).

32. Note that the inquiry is often phrased to collapse two distinct questions: (1) which choice of law methodology does a state use, and is that a fair method when assessed independently of which law is ultimately selected; and (2) is it appropriate for a forum state to apply its own law?

33. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981). Cited in Koppelman, *supra* note 28, at 118 n.18 and REYNOLDS & RICHMAN, *supra* note 6, at 27.

34. Nevada v. Hall, 440 U.S. 410, 422 (1979).

35. Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) (internal quotations omitted).

in lower court rulings,[36] opinion letters,[37] and other discussions of the Full Faith and Credit Clause's application to interstate marriage recognition.[38] As will be explored in further detail, whether this assumption will bear out remains an open question.

In any event, it is against this backdrop that eminent choice of law scholars have concluded that questions of interstate marriage recognition are choice of law problems, not constitutional ones; that this is a realm in which state law reigns supreme and pretty much unhindered. William L. Reynolds and William M. Richman, for example, describe it as "quite unlikely that the Supreme Court [would] strike down any decision rendered by a state court that has conscientiously applied any of the dominant choice of law methodologies," noting the Court's "veneration of choice of law traditions" and the "ease" with which it "manufactures" the requisite contacts.[39]

When it comes to the recognition of out-of-state marriages, the choice of law tradition most prominent among the states[40] is the "place of celebration" rule, or *lex loci contractus*.[41] The essential premise of the place of celebration rule is that a marriage which is valid where it was performed or celebrated will be treated as valid everywhere, unless it violates the "strong public policy" of the state that had "the most significant relationship to the spouses and the marriage at the time of the marriage."[42] Aside from the obvious fact that states can choose, revise, or abandon choice of law methodologies at will, it is this exception, which

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36. *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1302 (M.D. Fla. 2005).

37. *See, e.g.*, Richard S. Madaleno, Jr., *Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, 95 MD. OP. ATT'Y. GEN. 3 (2010).

38. As, for example, during the interstate recognition portion of the Obergefell oral argument. *See supra* note 9.

39. For an overview of these dominant methodologies, see REYNOLDS & RICHMAN, *supra* note 6, at 28. As will be explained *infra*, there is a more specific method used for marriages.

40. Koppelman describes the Restatement approach as extant in "approximately half the states." KOPPELMAN, *supra* note 28, at 86; *see also* Goldman v. Dithrich, 179 So. 715, 717 (1938) (Brown, J., dissenting) (citing to a collection of cases and observing "[t]he general rule is that the validity of a marriage is governed by the law of the place of its celebration.").

41. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (AM. LAW INST. 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."). The state with the most significant relationship is typically the state where the couple is domiciled. *See* KOPPELMAN, *supra* note 28, at 18. Koppelman's alternate phrasing nicely captures the Second Restatement's requirement that the marriage policy being enforced is that of the state with the most significant connection to the couple at the time they are wed: "a marriage valid under the law of the most interested state at the time of the marriage is . . . valid everywhere, even if the parties later move to a state where that marriage could not have been entered into." *Id.* at 86.

42. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (AM. LAW INST. 1971). This formulation encompasses what is sometimes described as an exception to the place of celebration rule for evasive marriages, where the parties went to the place of celebration for the sole purpose of evading their home state's prohibition on their marriage. *See, e.g.*, Kramer, *supra* note 4, at 1969.

allows states to reject out-of-state marriages on public policy grounds, that distinguishes the ironclad rules of Full Faith and Credit from the flexibility of state choice of law methodology.[43]

Nonetheless, the place of the celebration rule, even with its exception for marriages that violate the "strong public policy" of the forum state, is typically quite generous in recognizing out of state marriages. As one treatise reports, "the overwhelming tendency in American conflicts cases is to validate the marriage."[44] For the public policy exception to apply, it is not enough that the laws differ, as that would categorically be the case whenever a question of interstate marriage recognition reached the choice of law stage.[45] Rather, a sister state's law must diverge from the forum state's law in an unusually offensive way.[46] One leading case, *In re May's Estate*, illustrates how sparingly courts have historically treated the exception, even in the face of a consanguineous relationship from which many contemporary observers would still recoil.[47] There, the high court of New York applied the place of celebration rule, rather than the public policy exception, in recognizing a marriage validly contracted in Rhode Island between an uncle and half-niece—in spite of the fact that such marriages were considered incestuous, void, and indeed criminal under New York law.[48] That the court nonetheless declined to invoke the public policy exception, proceeding instead to recognize the marriage because it was valid where celebrated, shows the exception's truly limited reach.

Moreover, under the Restatement formulation, only the state with the *most significant connection to the spouses*, typically the couple's domicile at the time of the marriage, is entitled to invoke a public policy exception to refuse recognition.[49] A number of states did away with the exception altogether, adopting a categorical approach to the place of celebration rule modeled on the Uniform Marriage and Divorce Act. The relevant provision states "All marriages contracted . . . outside this state,

43. Baker v. Gen. Motors Corp., 522 U.S. 222, 233–34 (1998) (full faith and credit permits no public policy exception to the recognition of judgments); *see also* V.L v. E.L., 136 S. Ct. 1017, 1020 (2016) (per curiam) ("A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits.").

44. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 402 (3d ed. 2002).

45. *See, e.g.*, Ghassemi v. Ghassemi, 998 So.2d 731, 743 (La. Ct. App. 2008).

46. For a discussion of the difficulty in discerning the exact boundaries of the public policy exception, *see* KOPPELMAN, *supra* note 28, at 20–27.

47. *In re* May's Estate, 14 N.E.2d 4 (N.Y. 1953).

48. *Id.* at 6–7.

49. *See* Sanders, *supra* note 7, at 101 (observing that the public policy exception is only supposed to apply to evasive marriages, meaning those in which the couple traveled out of their home state for the sole purpose of evading their state's marriage laws). This limitation on the public policy exception is not universally observed. *See Ghassemi*, 998 So.2d at 731 (considering the public policy of the state of Louisiana regarding first cousin marriages even though the parties married in Iran and then moved to Louisiana).

that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this state."[50] This version of the place of celebration rule requires recognition of validly contracted interstate marriages without any exception for the forum state's public policy objections.

The overwhelming generosity of the place of celebration rule over the long course of conflicts history is something to which we will return; for our immediate purpose, what is essential to understand is that courts have invoked the public policy exception, refusing to recognize an out-of-state marriage, *without* being reversed by the Supreme Court on grounds that the Full Faith and Credit Clause required recognition even where the place of celebration rule did not.[51] In this sense, it is quite true that the Full Faith and Credit Clause has not yet seemed to require interstate marriage recognition. To be fair, these cases are well outnumbered by the cases in which recognition was granted. Further, in very few (if any) of these non-recognition cases was the Court asked to weigh in on the Full Faith and Credit question.[52] The operative data set, it bears emphasizing, is vanishingly small.

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50. UNIF. MARRIAGE AND DIVORCE ACT § 210 (Nat'l Conference of Comm'r's on Unif. State Laws 1970). The comment specifies that it "expressly fails to incorporate the 'strong public policy' exception of the Restatement . . . [t]his section will preclude invalidation of many marriages which would have been invalidated in the past." According to one inventory, seventeen states have "essentially similar" language. *See* Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1066–67 (1994). Notably, in the years between *Baehr* and *Obergefell*, most of these states amended their laws to deny recognition to same-sex marriages, *see* KOPPELMAN, *supra* note 28, at 179 n.24, a phenomenon of profound relevance for the animus analysis.

51. *See, e.g.*, Metro. Life Ins. Co. v. Chase, 294 F.2d 500 (3d Cir. 1961) (refusing to recognize common law marriage); Wilkins v. Zelichowski, 140 A.2d 65, 65 (N.J. 1958) (refusing to recognize underage marriage, although it appears that the marriage wasn't even valid under Indiana law due to lack of parental consent (*see* KOPPELMAN, *supra* note 28, at 159 n.11)); Osoinach v. Watkins, 180 So. 577 (Ala. 1938) (refusing to recognize marriage between one adjudicated guilty of adultery and the paramour). *Ex parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va. 1879) is particularly illustrative in that the Full Faith and Credit claim was specifically raised and rejected by a federal court considering a habeas petition, challenging a Virginia state criminal conviction for an inter-racial marriage validly contracted in Washington DC. The district court set forth to assess whether the conviction violated any federal constitutional provisions, including the Fourteenth Amendment, privileges and immunities, and the Full Faith and Credit clause. *Id.* at 607. As to the latter, the court ruled that even if marriage certificates were "public records" within the meaning of the Clause, a proposition the court found "doubtful," that the consequence at most would be to render "indisputable the fact of the marriage and of its legality in the place of contract. *Id.* To give to public records 'full faith and credit, is to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied any more than in the state where they originated." What it would not do, the court opined, was "convert the fact of validity there into validity here, contrary to the express local law." *Id.* For a persuasive rejection of the "evidentiary" view of the Clause, *see* Laycock, *supra* note 11, at 301–05. Nonetheless, the ruling was never reviewed much less overturned by the Supreme Court.

52. Certiorari was never sought in any of the cases mentioned in the foregoing footnote.

Nonetheless, in view of this history, a number of influential conflicts scholars have been quite adamant that "the question of whether or not to recognize a foreign marriage has almost always been treated as a question of state law."[53] According to Koppelman and concurring conflicts scholars, the Full Faith and Credit Clause simply imposes no duty on states to recognize another state's marriage license.[54] At the risk of being portrayed "as something close to a dimwit," other scholars voiced challenges to the conventional view, emphasized the uniqueness of marriage in our legal tradition[55] and noted that the absence of case law resolving the Full Faith and Credit question meant that the question continued to be an open one.[56] Indeed, much to everyone's surprise, when it came time to consider the interstate recognition of same-sex marriages, the Justices seemed to agree, at least for an hour or so.

B. A MOMENT OF PROMISE FOR FULL FAITH AND CREDIT?

When the Supreme Court finally announced that it would consider marriage equality for same-sex couples, the questions presented focused exclusively on state obligations under the Fourteenth Amendment.[57] Even the second question, which explicitly addressed a state's obligation to recognize existing marriages performed and licensed in other states, was phrased to limit the inquiry to recognition obligations arising from the Fourteenth Amendment's Due Process and Equal Protection principles.[58] Yet during oral argument, the Justices quickly signaled their interest in the application of the Full Faith and Credit Clause to questions of interstate marriage recognition. Counsel for Respondents opened his remarks by asserting that the Fourteenth Amendment did not require

53. Borchers, *The Essential Irrelevance*, *supra* note 5, at 354.

54. For a noteworthy critique of the idea that choice of law methodologies lack constitutional import, see Laycock, *supra* note 11. Laycock explains that this position inverts our expectations about the relationship between state law and the Constitution: "For most contemporary choice-of-law scholars, the Constitution does not control choice of law so much as choice-of-law theory informs the meaning of the Constitution. Most of them have little or nothing to say about constitutional text, history, or structure." And yet in Laycock's own work there is some mitigation for these scholars, as he demonstrates that the Supreme Court "has all but abandoned" any effort to identify constitutional limitations on state choice of law decisions: "It has never considered a Privileges and Immunities Clause challenge to a state choice-of-law rule, and it has removed most of the content from the Full Faith and Credit Clause." Laycock, *supra* note 11, at 257.

55. *See, e.g.*, Sanders, *supra* note 7, at 96; *see also* RICHMAN & REYNOLDS, *supra* note 44, at 401 ("The peculiar nature of the family's legal status . . . creates special conflicts problems.").

56. *See, e.g.*, Grossman, *supra* note 2, at 454.

57. Obergefell v. Hodges, 135 S. Ct. 1039, 1040 (2015) (granting petitions for writs of certiorari limited to the following questions: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same-sex? (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same-sex when their marriage was lawfully licensed and performed out-of-state?).

58. *Id.* For further discussion of a state's Fourteenth Amendment obligations to recognize marriage licenses granted in other states, see Sanders, *supra* 7, at 95.

"states with traditional marriage laws to recognize marriages from other States between two persons of the same-sex."[59] Justice Scalia's immediate (and inimitable) response:

> What about Article IV? I'm so glad to be able to quote a portion of the Constitution that actually seems to be relevant. 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.' Now, why doesn't that apply?[60]

In the colloquy that followed, Respondents' counsel hewed to the conventional wisdom outlined above, arguing that a state's obligation under the Full Faith and Credit Clause was primarily to recognize sister state judgments.[61] Justice Scalia pressed counsel on the clause's plain text, "Public acts? It would include the act of marrying people, I assume."[62]

Counsel resisted the proposition, and Justice Scalia asked him to confirm his view that "there's nothing in the Constitution" that requires a state to recognize a marriage from a sister state.[63] Counsel characterized that as "essentially correct," prompting a skeptical one-word response from Justice Scalia: "Really?"[64] Digging in, counsel took a rather absolutist position, affirming the proposition that the Full Faith and Credit Clause would permit a state to recognize only those marriages conducted under its own laws.[65] Justice Scalia once again expressed skepticism, at which point the other Justices joined in the exchange.[66] Justice Roberts asked counsel which case he would cite for the proposition that a state had no obligation to recognize marriages from other states. Counsel replied initially with some confusion, and eventually cited *Nevada v. Hall*.[67] Counsel drew from *Nevada v. Hall* the principle that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."[68] In doing so, counsel implicitly assumed that a marriage license from another jurisdiction should be treated in the same fashion as another state's statutory laws, a point that would not be explored until later in the argument.

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59. Transcript of Oral Argument, *supra* note 9, at 26.
60. Transcript of Oral Argument, *supra* note 9, at 26.
61. Transcript of Oral Argument, *supra* note 9, at 26–27.
62. Transcript of Oral Argument, *supra* note 9, at 27.
63. Transcript of Oral Argument, *supra* note 9, at 27.
64. Transcript of Oral Argument, *supra* note 9, at 27.
65. Transcript of Oral Argument, *supra* note 9, at 27.
66. Counsel referenced *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) and *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935), for the proposition that there was a "minimal due process requirement to decline to apply another state's substantive law." Transcript of Oral Argument, *supra* note 9, at 27. In *Pac. Insurance*, the Court held that California was not precluded from imposing greater responsibilities on an employer than a sister state would have done.
67. Nevada v. Hall, 440 U.S. 410 (1979).
68. Transcript of Oral Argument, *supra* note 9, at 30.

Justice Breyer then asked counsel to comment on the types of policies that a state might invoke in refusing to recognize a marriage from a sister state, and counsel appeared to posit the existence of some sort of restriction that would require the policy to qualify as "legitimate."[69] As he began to elaborate on his view that such a criterion would be satisfied by a policy that simply sought to "maintain a traditional man-woman definition of marriage," Justice Scalia interjected, observing that "none of this has anything to do with Article IV, right? None of this has anything to do with Article IV? Full faith and credit, right?"[70] Justice Scalia's impatience can be read to convey a particular view of the Full Faith and Credit Clause, one that does not turn on substantive policy assessments.[71]

Counsel's response was somewhat vague, offering that "full faith and credit provides the background for the . . . states to be able to assert that, indeed, we have the right to decline to recognize the out of state marriage . . ." With the discussion foundering as to the role of interstate policy assessment in Full Faith and Credit applications, Justice Ginsburg reintroduced the distinction between judgments and choice of law, noting that under the Full Faith and Credit Clause there was no allowance to "reject a judgment from a sister State because you find it offensive to your policy," but that "full faith and credit has never been interpreted to apply to choice of law."[72] Counsel readily agreed.[73]

Any reprieve, however, was short-lived, as Justice Sotomayor challenged counsel to acknowledge the "fundamental difference between creating a marriage and recognizing a marriage."[74] Elaborating, she observed that states had typically not determined that any deviation from their own "prerequisites" for marriage constituted a violation of public policy.[75] She asked counsel to justify the highly unusual nature of what the states had done in targeting same-sex marriage for special rules of non-recognition.[76] Counsel replied, somewhat tautologically, that the kind of interstate variation in marriage policy that existed "before there was any idea of same-sex marriage" simply could not be compared to the phenomenon of same-sex marriage.[77] He went on to posit that the place of celebration rule, with its "liberal" approach to marriage recognition,

69. Transcript of Oral Argument, *supra* note 9, at 30.

70. Transcript of Oral Argument, *supra* note 9, at 31.

71. For all the perils of making such a claim, it nonetheless brings to mind Justice Jackson's view of the Full Faith and Credit Clause: "Its interpretation is less involved than that of most constitutional provisions with social and political considerations. It is concerned with the techniques of the law. It serves to coordinate the administration of justice among the several independent legal systems which exist in our Federation."

72. Transcript of Oral Argument, *supra* note 9, at 31—32.

73. Transcript of Oral Argument, *supra* note 9, at 32.

74. Transcript of Oral Argument, *supra* note 9, at 32.

75. Transcript of Oral Argument, *supra* note 9, at 32.

76. Transcript of Oral Argument, *supra* note 9, at 32.

77. Transcript of Oral Argument, *supra* note 9, at 33.

evolved from a landscape in which "all States are on the same page about what marriage is . . . every State had the same definition."[78] While Justice Scalia seemed ready to reject this demonstrably untrue proposition,[79] Justice Sotomayor shifted her focus to the type of legal construct that best captures the qualities of a marriage decree. She asked counsel whether he thought "marriage decrees are closer to laws than they are to judgments?"[80] She noted that couples need a judgment to divorce, and suggested that this contributed to her assessment that a marriage decree is "much closer to a judgment than it [is] to a law."[81] Counsel explained his contrary view that:

> the performing of a marriage is closer to law . . . because, in essence, when the marriage is performed, all the rights that flow from that State's laws evolve to that couple. And it's different than judgments and so does not deserve the same kind of treatment that judgments would, under the full faith and credit jurisprudence . . . .[82]

After counsel labored to keep marriage out of the protected domain of judgments, Justice Sotomayor turned her attention to the other categories itemized in the Clause, and the textual question re-emerged: what does the Clause instruct with regards to Acts and Records?[83] Counsel, echoing the prevailing view discussed above, proffered that "marriages have always been treated as a conflict of law matter throughout all the years."[84] Chief Justice Roberts then sought some historical context, asking Counsel, "[o]utside of the present controversy, when was the last time Tennessee declined to recognize a marriage from out of state?" Counsel identified a 1970 marriage involving a stepfather and a stepdaughter.[85]

Perhaps uncomfortable with the implications of this chronology, counsel hastened to explain that there was something "unprecedented" about States "changing the rules of the game" to include same-sex couples in the institution of marriage; that before this development, "States were all playing along with the same definition of marriage."[86] Chief Justice Roberts quickly called the fallacy: "Well, but they weren't playing along with the same definition. There have always been

78. Transcript of Oral Argument, *supra* note 9, at 33.

79. *See* Transcript of Oral Argument, *supra* note 9, at 33 ("That's just not—").

80. Transcript of Oral Argument, *supra* note 9, at 33.

81. Transcript of Oral Argument, *supra* note 9, at 33—34.

82. Transcript of Oral Argument, *supra* note 9, at 34.

83. Transcript of Oral Argument, *supra* note 9, at 34 ("How do you separate out the terms that Justice Scalia gave you?").

84. Transcript of Oral Argument, *supra* note 9, at 35. Counsel in fact opined that it was interstate marriage recognition that actually "gave rise to the entire conflict of law doctrine." *Id.* at 35 (citing JOSEPH STORY, COMMENTARIES ON CONFLICTS OF LAWS (1834)).

85. Transcript of Oral Argument, *supra* note 9, at 35. The reference seems to be to *Rhodes v. McAffee*, 457 S.W.2d 522 (Tenn. 1970).

86. Transcript of Oral Argument, *supra* note 9, at 35.

distinctions based on age and family relationship. So they weren't playing along under the same definition. And still, despite that, it apparently is quite rare for a State not to recognize an out-of-state marriage."[87]

In response, counsel persisted with the idea that there was something about gender qualifications that was categorically different than age or familial relationships.[88] Counsel asserted, in essence, that nothing in the history of marriage conflicts could be considered precedential or illuminating for the challenge of same-sex marriage; that there was some implied limitation on the range of conflicts that the place of celebration rule, with its instinct for generosity, was equipped to handle.[89]

Justice Alito, noting the posture of the case and the relationship between the two questions presented,[90] observed that the Court would only reach the question of interstate recognition if it had first decided

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87. Transcript of Oral Argument, *supra* note 9, at 36.

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> Refusal to recognize an out of state marriage "was and is quite rare, so long as we're talking about what marriage is, so long as we're talking about the fundamental man and woman marriage. And that—and that's my point, is that as soon as States were confronted with the reality that some States were going to redefine marriage or expand the definition of marriage to include same-sex couples for the first time, then it's unsurprising that they would determine, in keeping with their own laws, that they would not recognize those other States' marriages in—in Tennessee.

Transcript of Oral Argument, *supra* note 9, at 36.

89. For a discussion of the intense emotional conflict over miscegenation, see Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 149 n.130 (1998) (referencing the Justices' fear that addressing the anti-miscegenation statutes "would inflame the political environment in which they sought to implement *Brown*."). Note that this history, focusing on the Justices' refusal to consider *Naim v. Naim*, 350 U.S. 891 (1955), includes a brief reference to whether the case might be resolved on Full Faith and Credit grounds. *Id.* at 154. And although the other interstate recognition conflicts haven't reached the same degree of national salience, the language from opinions rejecting out of state marriages as contrary to the state's strong public policy reveals an intensity that doesn't square with Counsel's suggestion that the same-sex marriage controversy was the first real discrepancy between states over marriage policy. Take, for example, *Pennegar v. State*, 10 S.W. 305 (Tenn. 1889), illuminating in part because it involves an archaic restriction on the remarriage of divorcees that has long since fallen out of use—it takes a bit of effort even to recall this as an area of divergence between states. But the language very stridently expresses a strong public policy, negating the suggestion that this wasn't an area of real difference between the states: The Tennessee Supreme Court found it to be:

> [D]ecided state policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of avoiding our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto, as upon the inherent right of the rule itself.

Id. at 308.

90. Transcript of Oral Argument, *supra* note 9, at 36.

that the Fourteenth Amendment did not require every state to issue marriage licenses to same-sex couples. When ruling on the interstate recognition issue, then, the Court would be operating against a backdrop in which it had already held that "a State has a sufficient reason for limiting marriage to opposite-sex couples."[91] Justice Alito made clear that for him, the import of this observation was the prospect of a middle ground: "So the question is whether there could be something in between . . . a sufficient reason to—for the State to say, we're not going to grant these licenses ourselves, but not a strong enough reason for us not to recognize a marriage performed out of state. I suppose that's possible, isn't it?"[92]

Justice Alito's phrasing suggested something a bit tentative, a sort of tenuous center that would not hold, and indeed, Counsel rejected the possibility of a federalist marriage compromise, insisting that "man-woman marriage" was a necessary ingredient of any pro-recognition regime.[93] Otherwise, he opined, couples could simply travel to a state that permits same-sex couples to get married, and then return to their home state demanding recognition. Justice Sotomayor pointed out that this phenomenon was hardly limited to same-sex couples, and that returning couples evading a variety of home state marriage restrictions have succeeded in having their marriages recognized under the place of celebration rule.[94] The clear implication was that this dynamic thus failed to explain why divergence in state marriage policy regarding the gender composition of the couple was categorically different than other marriage conflicts in the nation's history. Counsel reiterated what he viewed as the self-evident "fundamental distinction," to which Justice Sotomayor pushed back: "The prerequisites are always a State's judgment about marriage, about what should be a recognized marriage." Counsel then attempted a variation on the theme, noting that "Tennessee, Ohio, Kentucky, and other States with a traditional definition of marriage have

91. Transcript of Oral Argument, *supra* note 9, at 37.

92. Transcript of Oral Argument, *supra* note 9, at 37. It is interesting to note that this is virtually a mirror image of the question he asked Petitioners' counsel, the first question asked regarding Question 2. Justice Alito expressed surprise that the Petitioners' briefing on Question 2 was "largely a repetition of the arguments" that Petitioners proffered on Question 1. Transcript of Oral Argument, *supra* note 9, at 4–5. He then queried: "I thought the point of Question 2 was whether there would be a–an obligation to recognize a same-sex marriage entered into in another State where that is lawful even if the State itself, constitutionally, does not recognize same-sex marriage. I thought that's the question in Question 2. Is–am I wrong?" Transcript of Oral Argument, *supra* note 9, at 5.

93. Transcript of Oral Argument, *supra* note 9, at 5. "Let me be clear. The–the justifications that have grown over time and the requirement for a strong public policy reason to decline to recognize a marriage have grown up around the man-woman definition. Our position is that so long as we're talking about a marriage from another State that is not the man-woman definition, that it is simply the State's interest in maintaining a cohesive and a coherent internal State policy with regard to marriage that justifies not recognizing those marriages." Transcript of Oral Argument, *supra* note 9, at 37—38.

94. Transcript of Oral Argument, *supra* note 9, at 38.

done nothing here but stand pat.[95] They have maintained the status quo. And yet other States have made the decision, and it certainly is their right and prerogative to do so, to expand the definition, to redefine the definition." Counsel concluded emphatically that to require holdout states to "recognize those marriages imposes a substantial burden on their ability to self-govern."[96]

Justice Ginsburg noted that this was similar to the landscape surrounding divorce: "it is odd, isn't it, that a divorce does become the decree for the nation? A divorce with proper jurisdiction in one State must be recognized by every other State, but not the act of marriage."[97] Counsel acknowledged the point, but reiterated the "Court's recognition of a distinction between judgments and laws," asserting that only the latter was at issue with interstate marriage recognition. Having again characterized marriage licenses as laws, he proceeded to argue that requiring interstate recognition "would allow . . . a minority of States to legislate fundamental State concern about marriage for every other State quite literally . . . an enormous imposition and an intrusion upon the State's ability to decide for itself important public policy."[98] And with some additional exchanges between counsel and the Justices regarding the ripple effects of marriage recognition on a state's other domestic relations policies, the case was submitted.[99]

C. FULL FAITH AND CREDIT AGAIN RECEDES FROM VIEW

Justice Kennedy, who had shown minimal interest in the interstate recognition question,[100] wrote the historic opinion, blending concepts

95. Transcript of Oral Argument, *supra* note 9, at 39. This is a disputable proposition, in the sense that many of the states that didn't permit same-sex couples to marry did more than simply "stand pat" and eschew the profound policy changes taking place around them. They amended their constitutions and made specific, single issue exclusions to their choice of law rules. *See, e.g.*, Sheldon D. Pollack, *Same-Sex Marriage and Conflict of Law: The "Other" Constitutional Issue*, 13 GEO. J.L. & PUB. POL'Y 477, 479 n.11 (2015). But putting these reservations aside, it is an assertion with interesting implications—that there is something less robust about interstate marriage recognition when it comes to policies that *change* the status quo. It isn't clear, under the principles that have usually been thought to inform interstate recognition analysis, why would there be this preference against change.

96. Transcript of Oral Argument, *supra* note 9, at 39.

97. Transcript of Oral Argument, *supra* note 9, at 39.

98. Transcript of Oral Argument, *supra* note 9, at 39.

99. Transcript of Oral Argument, *supra* note 9, at 41–47.

100. Justice Kennedy did not ask a single question of Respondents' counsel during the argument on Question 2. He did ask one question of Petitioners' counsel. Transcript of Oral Argument, *supra* note 9, at 9. He reiterated the point that Justice Alito led with, that the Court would only reach Question 2 if it had first determined that the state had a sufficient reason for excluding same-sex couples from their marriage regime, and asked Counsel to explain why that reasoning wouldn't then carry over to the question of whether a state was required to recognize a valid same-sex marriage from another state. Transcript of Oral Argument, *supra* note 9, at 9. Counsel argued that a state would have to assert different, presumably stronger, reasons for undoing the marital status a couple had already

drawn from Equal Protection and Due Process to conclude that states were not permitted to exclude same-sex couples from the institution of marriage. As had been amply canvassed in the oral argument, this ruling effectively mooted the interstate recognition issue presented in Question Two.[101] Each of the four dissenting justices wrote their own opinion objecting to various aspects of the majority's Fourteenth Amendment ruling, but none of them endeavored to sketch out an alternative path illuminated by the guideposts of the Full Faith and Credit Clause.[102] When the Court announced its decision, the public reaction was intense, emotional, and overwhelmingly celebratory,[103] although it was certainly decried and even resisted in some quarters.[104] But no one, it might be surmised, was missing the interstate recognition discussion.

So what, if anything, is there to glean from what we might call the phantom Full Faith and Credit Clause issues that emerged so resoundingly, only to disappear from the scene with no further ado? At the very least, it is fair to describe the Court's questioning as an expression of skepticism towards the received wisdom that the Full Faith and Credit Clause is irrelevant to interstate marriage recognition. This itself is significant, given the conviction with which conflicts scholars pronounced this very idea. On the contrary, especially in light of the posture of the case, which formally was focused exclusively on Fourteenth Amendment issues, the Justices seemed eager to pursue the intuition that the Full Faith and Credit Clause is relevant to questions of marriage, that the Clause might have something to say about what appears to be, most of the time, the domain of state choice of law rules, and that there may be constitutionally significant principles of interstate recognition apart from whatever the Fourteenth Amendment requires.

The observation that the text of the Clause encompasses more than just judgments, the notion that there might be something meaningful about the three distinct legal constructs itemized in the Clause, was taken seriously rather than treated as a rookie mistake. To the extent that the Full Faith and Credit doctrine has so far suggested a remarkable difference between the treatment of judgments and the choice of law problems that confront, say, a trial court deciding which state's damages

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achieved in another state. Transcript of Oral Argument, *supra* note 9, at 9.

101. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

102. *Id.* at 2611—2631 (dissenting opinions of Chief Justice Roberts, and Justices Scalia, Thomas, and Alito).

103. *See, e.g.*, Rachel Brody, *Views You Can Use: Love Wins*, U.S. NEWS (June 26, 2015, 3:45 PM), http://www.usnews.com/opinion/articles/2015/06/26/reactions-to-the-supreme-court-legaliz ing-gay-marriage.

104. *See, e.g.*, Robin Fretwell Wilson, *"Getting the Government Out of Marriage" Post* Obergefell: *The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. 1445 (2016); *see also* Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1029–32 (2016) (describing both celebratory and condemnatory reactions on social media, including from political elites).

cap to apply to a personal injury suit, the discussion included some meaningful reflection on how best to categorize marriage licenses in such a binary scheme. While there were certainly further depths to explore, the Justices pushed counsel on the idea that a couple's marital status, while neither the result of nor equivalent to a judgment, is also different in some fundamental ways from simple choice-of-law problems. At a minimum, the transcript vindicates the idea that the application of Full Faith and Credit principles to interstate marriage recognition is truly an open question, and not a frivolous one. It might, however, be an eternally ephemeral one, as once again it disappeared without yielding any answers.

But why? Why is it never the right time to answer these questions, even during national controversies over marriage policy, when it might be most useful to know what obligations states owe to one another regarding marriages they would not have licensed?[105] The answer may have something to do with what some commentators have observed is the Court's tendency to follow rather than lead on divisive social issues. Contrary to the often-romanticized image of a Court at the vanguard of social change, the Court does not weigh in until public opinion has shifted in a decisive and discernable direction.[106] Jumping in at the midpoint to

105. Consider the eleven years that passed between the Court's refusal to hear *Naim v. Naim*, 350 U.S. 891 (1955), concerning Virginia's refusal to recognize an interracial marriage validly contracted in North Carolina, and the decision in *Loving v. Virginia*, 388 U.S. 1 (1967), invalidating Virginia's anti-miscegenation statutes. In *Naim*, the Court dodged its obligatory jurisdiction because it simply wasn't ready to weigh in on the inflammatory question of inter-racial marriage, not even to address whether Virginia was required under Full Faith and Credit to recognize such marriages validly performed in other states. *See Naim*, 350 U.S. at 891. The Justices discussed this in conference, apparently, but decided not to pursue it. Eleven years later, by the time the Court got to Loving, it was ready to go all the way. The query is not why Loving was decided in the way that it was, as anything else is now inconceivable, but why the Full Faith and Credit question wasn't taken up during the interval.

106. Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 443 (2005) (noting that "[t]he Justices in *Brown* did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces. By the time the Court struck down school segregation, polls revealed that a narrow majority of Americans approved of the decision."); *see also* R. A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Anti-miscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 856–57 (2008):

> The U.S. Supreme Court actively avoided addressing the constitutionality of bars on interracial marriage—widely regarded as the third rail of race relations—for years, and then only did so after they had already decided comparatively less controversial issues, such as those concerning racial segregation in public schools, parks, restaurants, hotels, housing, transportation, and voting, among other things. By the time the Court decided *Loving*, nearly half of the states that had anti-miscegenation laws on their books when Andrea and Sylvester filed their lawsuit had repealed them. In many respects, some of the hardest work had already been done.

John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 HOW. L.J. 15, 16 (2007):

> But, at the time *Loving* was decided, anti-miscegenation laws were already on their way out. Only sixteen states still had such laws on the books, although all but twelve had once banned such marriages. Indeed, Maryland had voluntarily repealed its anti-miscegenation law just

provide a technocrat's answer to an emotionally charged problem might be at odds with the practices of an institution responding in this way.[107]

Nor was an incrementalist, comity-inspired solution necessarily the driving motive of those involved in the litigation.[108] While a full portrait of the marriage equality movement is beyond the scope of this Article, a few basic observations are in order.[109] Many of the parties who appeared before courts raising questions related to same-sex marriage were not lone litigants seeking merely an adjudication of their own marital status—they were part of a coordinated strategy being developed and advanced by a national civil rights movement. While Full Faith and Credit Clause claims were raised where applicable,[110] a constitutionalized set of interstate recognition obligations was not the primary goal that movement advocates were seeking. Its beneficiaries would, obviously, be

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a few months before the ruling in *Loving* was handed down, just as fourteen other states had done in the fifteen years prior. And, although the Supreme Court had never addressed the constitutionality of interracial marriage bans prior to *Loving*, two state courts had already struck down such laws on constitutional grounds. So while the Supreme Court's ruling certainly hastened their demise, the criminalization of interracial marriage had already suffered a cultural blow that was more wounding than the constitutional one.

107. Josh Blackman & Howard M.Wasserman, *The Process of Marriage Equality*, 42 HASTINGS CONST. L.Q. 243, 322—23 (2016) (observing that the Justices were intent on "taking the cases when they thought the country was ready for nationwide same-sex marriage").

108. Consider one revealing moment that arose during oral argument on Question 2, when Chief Justice Roberts seemed to have some difficulty envisioning how the Court could rule against Petitioners on Question 1 and then rule for Petitioners on Question 2. *See* Transcript of Oral Argument, *supra* note 9, at 20–21. The concern was some perceived tension between the Court accepting a state's reasons for not wanting to grant marriage licenses in the first instance, but then rejecting the state's reasons for not wanting to recognize an existing marriage from another state. As others have argued in various forms, it is possible to answer these questions within the confines of Fourteenth Amendment principles, by invoking a couple's liberty interest in retaining their existing marital status and emphasizing the truly unusual nature of the non-recognition measures taken by states such as Ohio and Tennessee. It seems quite analytically tenable to conclude that states don't have to grant marriage in the first instance if they choose not to, but neither may they disregard the marital status conferred upon a couple by an equally sovereign sister state. And to the extent there is any real difficulty there, it is one that would be ameliorated by addressing the interstate recognition problem under the Full Faith and Credit Clause. But instead Petitioners' Counsel was somewhat reluctant to help the Chief Justice out of his difficulty, conceding that "I—I think that that actually highlights one of the problems of trying to decide the—the two cases differently, because, of course, deciding against Petitioners on Question 1, even if the Court decides in favor of Petitioners on Question 2, would forever relegate those marriages to second class status and would raise all kinds of questions whether those marriages could be subjected to laws that are not quite so favorable." Transcript of Oral Argument, *supra* note 9, at 21. Counsel took a bit of a gamble, sacrificing an opportunity to persuade one of the likely dissenters as to the interstate recognition issue.

109. For one particularly careful account, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); *see also* Anthony Michael Kreis, *Marriage Demosprudence*, 2016 U. ILL. L. REV. 1679 (2016); Patricia A. Cain, *Contextualizing* Varnum v. Brien: *A "Moment" in History*, 13 J. GENDER RACE & JUST. 27 (2009).

110. *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); Smelt v. Cty. of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (applying abstention and standing doctrines to avoid ruling on federal constitutional questions); Bradacs v. Haley, 58 F. Supp. 3d 514 (D.S.C. 2014); Jesty v. Haslam, No. 3:13-CV-01159, 2014 WL 1117069, at *4 (M.D. Tenn. Mar. 20, 2014).

the very specific subset of same-sex couples who had been able to marry in one jurisdiction, and then traveled to another. There was also no guarantee that even this middle ground would be easy to secure. In one of the earliest cases brought in such a posture, shortly after Massachusetts became the first state to legalize same-sex marriage, the court rejected the Full Faith and Credit claims with a thinly reasoned explanation that provided little motivation to replicate the effort in other courts.[111]

While there is much to learn from such accounts, I instead focus here on doctrinal explanations: specifically, a phenomenon I will call contingent doctrinal evolution. I clarify and elaborate on the core principles of choice of law doctrine and Fourteenth Amendment doctrine, to show that the marriages that would most acutely raise Full Faith and Credit questions are increasingly being covered by these other doctrines. I also point out that the Full Faith and Credit questions presented by the issue of same-sex marriage were more complex than is first apparent, raising distinctive and truly novel questions of congressional power under Article IV.[112] In the next Part I explore these issues.

II. CONTINGENT DOCTRINAL EVOLUTION

To understand the perennial elision of the Full Faith and Credit Clause in the interstate marriage context, we need to bring into the same frame the key doctrinal principles that characterize state choice of law methodology and constitutional marriage jurisprudence respectively. This is because the Full Faith and Credit question is *practically* important in the gap between the "place of celebration" rule (covering those interstate marriages that states will recognize "voluntarily" pursuant to their own choice of law methodology) and the area of marriage decisionmaking that is covered by the Fourteenth Amendment (consisting of those marriages that states must not only recognize but instantiate themselves).[113] Marriages fall into the gap when states deem them contrary to public policy, and therefore ineligible for interstate

111. *Wilson*, 354 F. Supp. 2d at 1303. The district court made no effort to distinguish marriage from other areas of state regulation, and in a conclusory assessment of two or three sentences determined that the federal Defense of Marriage Act was an appropriate exercise of Congress's power under the Full Faith and Credit Clause. *Id.*

112. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1474 (2007) (noting that the Court has not provided much guidance on such issues: "Despite the mountain of federalism precedent accumulated in the over two hundred years since the Constitution's adoption, the Court has scarcely addressed the question of Congress's powers in the interstate context."). Professor Metzger went on to posit that "the issue of whether DOMA's § 2 exceeds Congress's powers may well come before the Supreme Court in the near future." *Id.*

113. Note how different this is from saying that interstate recognition questions are choice of law questions rather than Full Faith and Credit questions; or from the similar assertion that the Full Faith and Credit Clause is satisfied whenever the place of celebration rule is applied.

recognition under the place of celebration rule, but the Supreme Court has not (yet) identified a universal state obligation under the Fourteenth Amendment to grant such licenses in the first place. This gap is where it really matters whether states are obligated under the Full Faith and Credit Clause to recognize marriages from other states. As this section shows, that gap is shrinking as the Supreme Court's animus jurisprudence continues to expand.

Bringing choice of law principles into the same frame as the Fourteenth Amendment also gives us another insight into the Court's doctrinal path selection: the unusual departures states took from their ordinary choice of law methodology revealed, perhaps as profoundly as anything else, the sort of animus that invalidates government decisionmaking. The specialized rules of non-recognition applied to same-sex marriages were so clearly marked by animus that the Fourteenth Amendment made sense as the most appropriate corrective instrument, even as to the interstate recognition questions that might have been addressed alternatively through the Full Faith and Credit Clause.

We then need to unearth the complicated structural and institutional questions that pervade this area, teasing out not only the way that states ought to relate to each other regarding such matters, but also Congress' role in managing those relationships, and the role of federal courts in evaluating how Congress is performing as interstate relations manager. Congress, by enacting the Defense of Marriage Act, purported to weigh in on the interstate recognition of same-sex marriages, using authority assertedly granted to it under the Full Faith and Credit Clause. To rule on the interstate recognition obligations arising from the Full Faith and Credit Clause, the Court would thus have had to determine not only what the Clause requires of its own force, but the permissible scope of congressional activity in this area. Against this backdrop, the eclipse of the Full Faith and Credit Clause becomes much easier to understand—but the picture is entirely different than the one advanced by the conflicts scholars.

A. THE SHRINKING GAP BETWEEN THE PLACE OF CELEBRATION RULE AND THE FOURTEENTH AMENDMENT

As explained above, the ordinary conflicts law approach to interstate marriage recognition is quite expansive. The public policy exception was invoked to refuse recognition so rarely that some commentators were moved to question its existence.[114] As Justice Jackson observed as early

114. *See, e.g.*, Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996). As expressed by the courts: the public policy exception "has been applied rarely and only when the strongest of public policies is implicated." Surnamer v. Ellstrom, No. 1 CA-CV 11-0504, 2012 WL 2864412, at *1 (Ariz. Ct. App. July 12, 2012)

as 1945, this very generosity "has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause."[115] The importance of this dynamic in preventing exposition of the meaning and demands of the Full Faith and Credit Clause, while perhaps somewhat obvious, can hardly be overstated.[116] Where states are self-enforcing comity and stability values through a consistently generous application of the place of celebration rule, there is no need to determine what the Full Faith and Credit Clause would demand in the same scenario, and no viable avenue for such exploration.

Crowding out the Full Faith and Credit Clause from the other direction is the expanding scope and force of the Fourteenth Amendment as applied to state marriage policy. Over the past sixty years, the Supreme Court has become increasingly skeptical of state authority to discriminate in the provision of marriage licenses, finding such discrimination to violate Due Process and Equal Protection guarantees. The landmarks in this area are well known and require little additional exposition here: through a series of cases including *Loving*, *Zablocki*, *Turner*, *Windsor*, and *Obergefell*, the Court has repeatedly treated marital decisionmaking as a fundamental right protected against discriminatory and burdensome government control.[117] In requiring states to confer the benefits and status of marriage upon couples who do not conform to race and gender prerequisites, the Court's marriage jurisprudence has blurred the otherwise
"time-honored distinction" in American constitutional law between positive rights and negative liberties; while this may have "radical implications" for the future of substantive due process doctrine, it may simply reveal a certain "marriage exceptionalism" at work in this line of

(citing Vandever v. Indus. Comm'n, 714 P.2d 866, 869 (Ariz. Ct. App. 1985)) ("The only marriages validly contracted in another jurisdiction that are denied recognition in Arizona are those involving the marriage of persons with a certain degree of consanguinity.").

115. Jackson, *supra* note 19, at 17–18. Jackson wasn't speaking exclusively of interstate marriage recognition, but of the broader tendency among state courts to be "hospitable to pleas that public acts or decisions of another state be taken into account." Jackson, *supra* note 19, at 17–18.

116. It bears noting that Jackson viewed the Full Faith and Credit question in domestic relations cases as a thorny one: "The whole issue of faith and credit as applied to the law of domestic relations is difficult, and the books of the Court will not be closed on it for a long time, if ever." Jackson, *supra* note 19, at 14. He observed that most of the time it comes up with regards to judgments; but that in many such cases it might just have plausibly emerged as a choice of law problem had the issues been raised earlier in the litigation. Jackson, *supra* note 19, at 14.

117. Obergefell v. Hodges, 570 U.S. 744 (2015); United States v. Windsor, 570 U.S. 744 (2013); Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 147 (2015) (describing *Obergefell* as having "achieved canonical status even as Justice Kennedy read the result from the bench."); *see also* Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1212 (2016) ("From start to finish, the majority opinion in *Obergefell* reads like a love letter to marriage.").

cases.[118] The entrenchment of marriage's special status in constitutional jurisprudence is perhaps best illustrated by the emergent scholarly literature describing *Obergefell* as a "conservative" decision[119] and criticizing the prioritization of marriage above other forms of relationships.[120]

Yet even as marriage has achieved a perhaps troubling pride of place in the constitutional order, the doctrinal developments that have pushed it to the top of the family form hierarchy have a broader reach. As the Court has been developing the fundamental right to marry, it has also been refining its approach to animus, clarifying that it is "an independent constitutional force" fatally tainting the results of majoritarian processes that target unpopular groups for special burdens and harms.[121] The animus principle requires "a reasoned, public-regarding basis" for lawmaking, and will invalidate a "law that purposefully inflicts injury on its targets out of sheer disdain for them."[122] This has truly powerful implications for the marriage controversies of the future. Individuals will be able to claim protection from animus-based state policy without needing to show that their relationships fit neatly into the facts and reasoning of *Obergefell* and its predecessors, which relied at least in part on the degree to which same-sex couples fit into the traditional template for state-sanctioned relationships.[123] If the challenged policy can be shown to have the "purpose and effect to disparage and to injure," the anti-animus principle will render it invalid.[124]

One of the most powerful qualities of the anti-animus principle is that it does not require the same sort of "fit" with relevant precedent that fundamental rights jurisprudence is thought to demand.[125] As scholars have noted, normative and predictive questions remain about the reach

118. Yoshino, *supra* note 117, at 168; *see also* Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691 (2016).

119. *See* Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 124 (2015–2016); *see also* Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015).

120. *See, e.g.*, Murray, *supra* note 117, at 1207–08; Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 5 CALIF. L. REV. 1277 (2015).

121. Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 188 (2013) (positing that "*Windsor* refined and enlarged the concept of unconstitutional animus").

122. *Id.* at 223.

123. As has been noted elsewhere, both *Windsor* and *Obergefell* emphasized the extent to which same-sex couples "shared values and interests . . . with more traditional families." *Id.* at 220; *see also* Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 925 (2016) (describing *Obergefell* as a "triumph of the assimilationist approach" in its "rhetoric about the universality of marriage and its stories of the named plaintiffs' shared lives, in sickness and in health and through the difficulties of chosen commitments, from parenting to military service.").

124. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

125. Washington v. Glucksberg, 521 U.S. 702 (1997).

of the anti-animus principle.[126] Nonetheless, the descriptive case for an emerging "Windsor Products" jurisprudence, so named to emphasize the connection to anti-animus concerns expressed as far back as *United States v. Carolene Products*,[127] is persuasive, and helps explain the atrophying of the Full Faith and Credit Clause as applied to interstate marriage recognition. There may not be much daylight between the sort of sentiment that has qualified as "strong public policy" for choice of law purposes and the kind that is now prohibited by Fourteenth Amendment anti-animus principles.

If we look back at the few cases in which out of state marriages were denied recognition on the grounds of "strong public policy," we see how substantially that expression is infused with the type of conclusory, disparaging sentiment we are now likely to deem invalid, or at least inadequate to survive a Fourteenth Amendment challenge.[128] This is manifestly clear with the interracial marriage cases, where the policy being advanced was the promotion of white supremacy; it requires little additional exposition to demonstrate the conclusive application of the Fourteenth Amendment's central and most important anti-animus principle.[129] But even as to the prohibitions on subsequent remarriage that succumbed to obsolescence, or the incest and polygamy restrictions that have not (yet) been invalidated under the Fourteenth Amendment, we see little more in the way of public policy discussion than expressions of visceral disgust with certain types of relationships.[130] Indeed, perhaps one of the more revealing passages in this set of cases is one in which the judge seeks to justify the refusal to recognize an interracial marriage by

126. *See, e.g.*, Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 205 (2013) (noting three questions that remained unanswered after *Windsor*, including the definition of animus; what would be accepted as evidence of animus; and what the relationship would be between animus and rational basis review); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2073 (2015) (challenging the view that "animus is the critical factor that triggers rational basis with bite.").

127. *See* Carpenter, *supra* note 121, at 183–84 (observing that the roots of anti-animus doctrine grounding the holding in *United States v. Windsor* reach back more than seventy years to the concerns articulated in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938), about prejudice against "discrete and insular minorities").

128. *See, e.g.*, Pennegar v. State, 10 S.W. 305, 307 (Tenn. 1889) (considering an out of state marriage between a divorced woman and her partner in the adulterous affair that ended the marriage, and expressing "the very pronounced convictions of the people of this State as to the demoralization and debauchery involved in such alliances").

129. *See, e.g.*, Pace v. State, 69 Ala. 231, 232 (Ala. 1881) (prohibition of interracial marriage grounded on "sound public policy" of preventing "the amalgamation of the two races, producing a mongrel population and a degraded civilization"); Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (state's interest in prohibiting miscegenation is 'to preserve the racial integrity of its citizens,' prevent 'corruption of the blood,' 'a mongrel breed of citizens,' and the 'obliteration of racial pride').

130. *See, e.g.*, MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 8 (2010). Nussbaum uses the term "Devlinesque," after Lord Patrick Devlin, to characterize arguments that "widespread disgust at a practice is sufficient reason to forbid that practice through law." *Id.* at 8, 82.

invoking a laundry list of *other* offensive relationships to which the purported recognition obligation might then apply. Allow interracial marriages to go unpunished[131] on the grounds that the marriage was valid where celebrated, the judge argued, and:

> we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed the relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.[132]

This lumping together of stigmatized, outcast marriages, without even the slightest effort to explain the particularized harm the state is seeking to prevent with each respective prohibition, falls short of what we now expect states to be able to muster when defending a challenged marriage policy.

To survive a Fourteenth Amendment challenge under any standard of review, states need to articulate public policy goals more concretely and ascertainably grounded on "a reasoned, public-regarding basis" than the appeals to disgust that permeate the applications of the public policy exception.[133] While states might be able to improve on the efforts to articulate specific legitimate goals with the benefit of sixty years of equal protection jurisprudence,[134] the language in the older cases reminds us of the sense of revulsion, the idea that some types of relationships are just self-evidently "revolting," that underlies a great deal of marriage controversy. Not only do such sentiments no longer stand alone as adequate grounds to justify state marriage policy, they more likely do the opposite—perhaps not quite as a "silver bullet,"[135] but as reminders that courts must search for meaningful ways that a challenged policy actually advances public welfare.

I do not mean to gloss over the difficult conceptual and predictive questions that remain open in this area, including the challenge of distinguishing impermissible animus, typically directed against discrete and insular minorities,[136] from the legitimate proscription of harmful

131. Sometimes, states converted their choice of law rule into a criminal prohibition. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

132. State v. Bell, 66 Tenn. 9, 11 (Tenn. 1872).

133. Carpenter, *supra* note 121, at 224.

134. As we'll see in the next Subpart, *infra* Part II.B.

135. *Cf.* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889, 930 (2012).

136. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Tobias Wolff's work, arguing that prohibitions against same-sex marriage exclude gays and lesbians from marriage much more categorically than other types of restrictions. Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2248–49 (2005).

conduct.[137] Notwithstanding Justice Scalia's protests to the contrary, animus doctrine in its current form leaves open the possibility of *permissible* animus—and perhaps state laws prohibiting marriages between close relatives, as one example, would fall into exactly this domain.[138]

The point is simply that at the juncture where states refuse to apply the place of celebration rule, citing "strong public policy," we might very well see the sort of animus that draws in the equal protection guarantee, even if it is better disguised than in past cases applying the public policy exception. When we look specifically at the extraordinary lengths to which states went in refusing recognition to out-of-state same-sex marriages, we can make an even stronger point. As explained in the next section, the reactionary suspension of the states' own choice of law principles for one class of disfavored marriages falls so squarely in the animus heartland as to all but demand assessment under the Fourteenth Amendment.

B. THE ANIMUS OF TOTAL NON-RECOGNITION

To understand how profoundly the nonrecognition of same-sex marriages was motivated by animus, we must return to the pronounced generosity of the place of celebration rule as it was applied before the same-sex marriage controversy. It bears repeating that in the face of forum law disallowing the marriage in question, "the overwhelming tendency" nonetheless had been "to validate the marriage."[139] This longstanding tradition of recognition threw into stark relief the unprecedented manner in which states targeted same-sex couples for specialized rules of non-recognition. As lucidly summarized in an amicus brief filed by family law and conflicts scholars:

> The statutory and constitutional bans on recognition of marriages by same-sex couples are historically unprecedented in that they create overlapping and categorical rules rather than allowing for individualized, fact-based determinations; they shift decision-making power from courts, where it had largely resided, to the legislature; they draw no distinction between marriages contracted in a particular state to evade restrictions of the couple's home state ("evasive marriages") and those contracted by residents of another state; and, finally, they enshrine the rule of non-recognition in the state's constitution.[140]

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137. For some thoughts on the difference, see NUSSBAUM, *supra* note 130, at 57–59, discussing ways in which sexual behavior might affect the interests of others, and differentiating between coercive harm, public nuisance type concerns, and merely "constructive disgust"; *see also* Yoshino, *supra* note 117, at 167–68 (noting the trouble with a distinction between status and conduct).

138. Romer v. Evans, 517 U.S. 620, 644 (1996) (J. Scalia, dissenting) (protesting "that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct.").

139. RICHMAN & REYNOLDS, *supra* note 44, at 397.

140. *See* Brief for Family Law and Conflict of Laws Professors as Amici Curiae Supporting

The consequences of this categorical approach, absolutely barring recognition of any claims arising out of a same-sex relationship, included scenarios that were downright irrational: courts repeatedly refusing, for example, to consider divorce petitions filed by same-sex couples because doing so would "give effect" to the disfavored relationship.[141] As Professor Koppelman observes, "it is odd for a state to oppose same-sex marriages by making it virtually impossible to end them."[142]

What is the most appropriate doctrine with which to evaluate the extraordinary measures that states took to deny recognition to couples with valid marriage licenses from other states? On the one hand, it requires a thorough grounding in state law conflicts precedent, with its overwhelmingly pro-recognition bent, to appreciate how extraordinary these measures were. It thus made sense that that during the argument in *Obergefell*, we saw discussion of these phenomena in conjunction with the Full Faith and Credit Clause, given the closely intertwined relationship between the Clause and state choice of law principles. However, while the unusual hostility directed at one class of disfavored marriages was threaded through the interstate recognition discussion, it was difficult to know what relevance it would have for a Full Faith and Credit analysis. This was in part because marriage recognition under the Full Faith and Credit Clause is uncharted territory, but also because of a sense that whatever analytical framework that would emerge might not have a place for the animus concept.

Conversely, we know quite well, with more insight all the time, how consequential it is under the Fourteenth Amendment when an unpopular group is targeted for unequal burdens.[143] As Professor Koppelman has observed, the stridency and totality of the non-recognition policies directed at same-sex couples exceeded even what the Southern courts of the Jim Crow era had applied to interracial

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Plaintiffs-Appellees, De Leon v. Perry, 2014 WL 4796335 *3 (No. 14-50196); *see also* Brief for Conflict of Law Scholars as Amicus Curiae Supporting Petitioners and Reversal, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (listing examples from Louisiana and Virginia), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-556_amicus_pet_conflict.authcheckdam.pdf.

141. *See, e.g.*, *In re* Marriage of J.B. and H.B., 326 S.W.3d 654, 666–67 (Tex. App. 2010) (dismissing a divorce petition on grounds that adjudication on the merits would give effect to a claim arising from a same-sex marriage, thus violating Texas public policy, expressed in state constitution, against same-sex marriage); *see also* Ellen Shapiro, *'Til Death Do Us Part: The Difficulties of Obtaining A Same-Sex Divorce*, 8 NW. J. L. & SOC. POL'Y 208, 210 (2013) (noting that courts in Nebraska, Indiana, Texas, and Pennsylvania had denied same-sex divorces to couples legally married in other states); Tracy A. Thomas, *Same-Sex Divorce*, 5 CAL. L. REV. CIRCUIT 218, 219 (2014) (noting that Georgia expressly bans same-sex divorce for out-of-state marriages); Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011).

142. Koppelman, *supra* note 21, at 105.

143. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996) (expressing disfavor for "discriminations of an unusual character"); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (same).

marriages.[144] The Fourteenth Amendment, therefore, does and probably should exert a sort of gravitational pull on these questions. In light of the hostility brought into stark relief by the interstate recognition issue, there might be something tepid, sterile or unconvincing about a superficially "neutral"[145] marriage federalism grounded primarily in the Full Faith and Credit Clause and policed by strong categorical rules of interstate recognition.[146]

Even if the Court were inclined to impose constitutional recognition requirements as a middle of the road approach to resolving national marriage controversies, it could do so via Fourteenth Amendment equal protection and due process principles, an avenue with expressive qualities that are missing from the Full Faith and Credit domain. To illustrate, consider the lower court decision that eventually provided the caption for the consolidated appeals in *Obergefell*.[147] Ohio residents James Obergefell and John Arthur had traveled to Maryland and were validly married there, so the only issue in Obergefell's challenge to Ohio's marriage scheme was interstate recognition.[148] The same was true for co-plaintiff David Michener, who had married in Delaware and sought to have Ohio issue a death certificate for his late spouse that accurately reflected their marital status.[149] The district court's determination that Ohio was constitutionally obligated to honor these out of state marriages was based entirely on Fourteenth Amendment principles. The district court first determined that the right to *remain* married was a

144. Koppelman, *supra* note 21, at xiv.

145. I put this in scare quotes to demonstrate my understanding that there was no neutral vantage point here. To rule against the Petitioners would have been to affirmatively and deliberately embrace a meager, and in my view impoverished, view of the Fourteenth Amendment. But it is possible, at least in the abstract, to imagine a strictly pro-recognition marriage federalism that is neutral, or at least silent, as to the policy questions surrounding a state's marriage regime. When we shift our focus to the Full Faith and Credit Clause, we are reminded that it requires states to accept the judgments of sister state courts without any independent assessment of underlying substantive policy questions. It is precisely this doctrinal feature that distinguishes it so consequentially from the place of celebration rule. A moment during the argument gestures at this; after an extended discussion about what type of policy objections a state should be required to invoke before refusing to recognize an out of state marriage, Justice Scalia interjected with "[n]one of this has anything to do with Article IV, right? None of this has anything to do with Article IV? Full faith and credit, right?" Transcript of Oral Argument at 31, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556). The comment simultaneously revealed an impatience with the seemingly irresolvable policy questions and a bit of optimism that an analytical framework grounded in Article IV might offer an escape hatch. The moment was particularly revealing in light of the fact the Full Faith and Credit Clause, strictly speaking, hadn't really been teed up for the Court's assessment.

146. Reacting to *Windsor*, scholars characterized the federalist approach as a "way station" on route to greater articulation of rights. *See, e.g.*, Neil S. Siegel, *Federalism as a Way Station*: Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 87 (2014).

147. Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

148. *Id.* at 976.

149. *Id.*

fundamental right under Due Process,[150] and then observed that against a long-standing practice of applying the place of celebration rule to out of state marriages, Ohio's decision to single out same-sex marriages for non-recognition violated the Equal Protection clause.[151] The district court emphasized that Ohio had "historically and unambiguously provided that the validity of a marriage is determined by whether it complies with the law of the jurisdiction where it was celebrated."[152]

Ohio had thus recognized a number of out-of-state marriages that could not have been lawfully solemnized within Ohio, including marriages between first cousins and marriages involving minors.[153] The district court's opinion left no room for doubt that the strength and longevity of Ohio's pro-recognition tradition underscored the impermissible animus at work in its singular treatment of same-sex marriages.[154] As animus evolves into a more robust, more mature, and more developed doctrine,[155] it may leave little room for a policy-free marriage federalism helmed by the demands of the Full Faith and Credit Clause.

C. CONGRESS AS AN ADDED COMPLICATION

Resolving the controversy over same-sex marriage entirely through Fourteenth Amendment principles also allowed the Court to avoid difficult questions about the appropriate role for Congress in administering an interstate recognition regime. While the first provision of the Full Faith and Credit Clause speaks directly to the states, requiring each to give due effect to the public acts, records, and judicial proceedings of other states, the second provision, often called the "Effects" clause, gives Congress the authority to "prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."[156]

150. *Id.* at 978.

151. *Id.* at 983–96.

152. *Id.* at 983.

153. *Id.*

154. *See* Henry v. Himes, 14 F. Supp. 3d 1036, 1040 (S.D. Ohio 2014), *rev'd by* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (four same-sex couples sought to compel Ohio to recognize their out-of-state marriages; district court emphasized the consistency with which Ohio had applied the place of celebration rule to heterosexual marriages, even as to marriages entered into with the intent to evade Ohio marriage law.). The court noted that "prior to 2004, the Ohio legislature had never passed a law denying recognition to a specific type of marriage solemnized outside of the state." *Henry*, 14 F. Supp. 3d at 1040. Full Faith and Credit was mentioned only in passing, and only with regards to the recognition of an out of state adoption decree. *Id.* at 1058; *see also* Baskin v. Bogan, 983 F. Supp. 2d 1021, 1027 (S.D. Ind. 2014) (same-sex couple married in Massachusetts challenging Indiana's refusal to recognize their marriage; court noted that "as a general rule," Indiana recognizes valid marriages performed out of state even when those could not have been solemnized in Indiana).

155. *But see* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 151 (2016) (locating *Obergefell* and *Windsor* in a phenomenon of LGBT exceptionalism).

156. U.S. CONST., art. IV § 1.

Congress purported to be doing exactly that in the second section of the federal Defense of Marriage Act, which endeavored to release the states from any obligation to recognize a same-sex marriage or any claim arising from one:

> 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.[157]

Against this statutory backdrop, any conclusion that the Full Faith and Credit Clause requires interstate marriage recognition would have required engagement with the Effects Clause, determining not only whether the Full Faith and Credit Clause of its own accord requires states to honor sister state marriage licenses, but also whether the Effects Clause allows Congress to suspend or supersede obligations that states would have in the absence of congressional action.[158] Resolving a Full Faith and Credit challenge to a state's refusal to recognize an out of state marriage would thus have required two distinct analytical steps, neither of them straightforward. Even if the Full Faith and Credit Clause requires interstate marriage recognition when operating directly on the states, does Congress have the power under the Effects clause to ordain a different result?[159] As to the first part of the inquiry, the analysis would require resolution of the questions that emerged during the *Obergefell*

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

158. *See, e.g.*, Metzger, *supra* note 14, at 1496 ("It may be that, nonetheless, giving fair weight to the Full Faith and Credit Clause precludes Congress from *entirely* legislating away interstate comity, but congressional relaxation of the credit due particular classes of laws and judgments does not rise to that extreme."); *see also* Michael DiSiena, Note, *Eluding the Grim Reaper: How Section 2 of the Defense of Marriage Act Could Survive Strict Scrutiny*, 19 WASH. & LEE J. C. R. & SOC. JUST. 151, 154 (2012) ("According to the reasoning of DOMA's drafters, the Effects Clause enables Congress to contract the extent of the faith and credit requirements imposed on the states by the Full Faith and Credit Clause, even to the point of eliminating them altogether.").

159. One commentator suggests that this would have been true even after *Windsor*, in which the Supreme Court invalidated § 3 of DOMA defining marriage for all federal purposes as composed of one man and one woman, because the Court didn't consider § 2, the provision assertedly enacted pursuant to Congress's Article IV power. William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 NYU J.L. & LIBERTY 150 (2013); *see also* Bradacs v. Haley, 58 F. Supp. 3d 514, 527 (D.S.C. 2014), *appeal dismissed* (July 20, 2015) (recognizing that section 2 was not at issue in *Windsor*, and therefore "appears to still be an appropriate exercise of Congressional power to regulate conflicts between the laws of two different States."). Although it is of course indisputable that *Windsor* left intact whatever power Congress thought itself to enjoy under the effects clause, only in an abstract or provisional way can we say that § 2 continued in full force after *Windsor*. Congress cannot, of course, violate Equal Protection and Due Process guarantees even when legislating pursuant to one of its enumerated powers, and § 2 very likely reflects the same impermissible animus that invalidated § 3. Scholars made this argument well before *Windsor*. *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 24, 32 (1997).

oral argument: does the Full Faith and Credit Clause impose upon states an inflexible obligation to honor the marriage licenses of sister states, even when the marriage rests on statutory provisions deemed offensive by the forum state? Is there a public policy exception to the demands of the Full Faith and Credit Clause that echoes the exception to the place of celebration rule?[160] Are marriage licenses more like judgments, falling within the settled core of the Clause's mandate, or like laws, where the Court has given up trying to establish constitutional parameters for the application of one state's laws versus another's?[161]

The second step of the inquiry is to determine whether Congress may set aside what would otherwise be the self-executing demands of Full Faith and Credit. We know that Congress does not have this power with regards to Equal Protection, of course,[162] but some scholars of interstate relations, such as Professor Metzger, view the obligations of the Full Faith and Credit Clause as constitutional default rules that Congress may choose to override, "rather than constituting the unalterable demands of union."[163] In this view, "[w]hile these provisions are judicially enforceable against the states, their enforceability is contingent on the absence of congressional authorization of interstate discrimination."[164] Against this scholarly backdrop, it is particularly interesting that Section Two of DOMA was never once mentioned during the interstate recognition discussion in *Obergefell*. The Justices seemed to assume that the judiciary, rather than Congress, would be the authoritative arbiter of interstate disputes. But again, given the posture of the interstate recognition issue and its ultimate resolution on Fourteenth Amendment grounds, there is only so much we can infer—maybe the Justices assumed that section 2 would be rendered invalid by the same animus that had felled section 3 in *United States v. Windsor*,[165] rather than assuming that an otherwise valid

160. Note that one of the married couples in *Obergefell* who were seeking sister state recognition had migratory rather than evasive marriages, as they were domiciled in the jurisdictions where they married. The discussion didn't reflect this distinction, even though it is a material one in place of celebration jurisprudence. Under these circumstances, and especially considering that the Full Faith and Credit Clause wasn't even formally presented, it would probably be a stretch to infer any sort of consensus that the difference between migratory and evasive marriages is or is not relevant for Full Faith and Credit purposes.

161. Laycock, *supra* note 11, at 290.

162. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 382 (1971) ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.").

163. Metzger, *supra* note 14, at 1469; *see also* Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2210 (2005) (asserting that "no federal constitutional full faith and credit challenge is availing" with regards to state anti-recognition laws because of the federal DOMA).

164. Metzger, *supra* note 14, at 1475.

165. United States v. Windsor, 133 S. Ct. 2675 (2013) (invalidating the provision of the Defense of Marriage Act defining marriage for all federal purposes as consisting of one man and one woman, without considering the provision purporting to allow states to refuse recognition to same-sex

congressional enactment under the Effects Clause was irrelevant to the interstate recognition issue. In any event, if Professor Metzger is right, then the Full Faith and Credit Clause is limited in operative effect not only to the narrow category of marriages that fall between the place of celebration rule and impermissible animus, as previously described, but in the further circumscribed area where Congress has not acted.[166]

Professor Metzger draws on a rich array of sources in support of the thesis. As a textual matter, she notes that "[a]t the same time as it prohibits state discrimination in absolute terms, Article IV also grants Congress broad control over aspects of interstate relations without expressly subjecting Congress itself to equivalent antidiscrimination requirements."[167] She notes that "nothing in the phrase 'the effect thereof" precludes Congress from determining that certain state laws and judgments should receive more or less credit than they would absent such congressional action. Indeed, on its face this language would allow Congress to prescribe that some laws and judgments should be given no effect; after all, it is perfectly compatible with standard usage to reply 'none' or 'no effect' when asked to specify the effect something should have."[168] Nor do we have guidance from the Court as to these interpretive questions. As Metzger notes, "little precedent exists on the scope of Congress's power under that clause, particularly regarding congressional power to contract the credit otherwise due state laws and judgments."[169]

Turning to normative and functional arguments in support of congressional authority over interstate relations, Professor Metzger asserts that allowing Congress to legislate in this role can result in "positive good."[170] In discussing the idea that "a variety of legitimate national considerations might lead Congress to allow a state to favor its own, such as allowing states to protect themselves from "harmful externalities of other states' actions,"[171] Professor Metzger offers DOMA as an example, bringing us to the very heart of interstate marriage conflicts."[172] By referencing the "harmful externalities" imposed on a state by another state's decision to recognize a certain type of marriage, the argument raises, but does not answer, a crucial question: which states need protection? Do the non-recognition states need protection from the

marriages from other states). *See supra* note 157.

166. Although we might surmise that where an issue of interstate marriage recognition has become so salient as to prompt Congress to act, there likely is to be the sort of animus at work that we saw underlying DOMA and that invalidates government action under the 14th Amendment.

167. Metzger, *supra* note 14, at 1475–76.

168. Metzger, *supra* note 14, at 1495.

169. Metzger, *supra* note 14, at 1493.

170. Metzger, *supra* note 14, at 1501.

171. Metzger, *supra* note 14, at 1501.

172. Metzger, *supra* note 14, at 1501 (citing H.R. Rep. No. 104-664, at 6–10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910–14 (stating one purpose of DOMA is to protect states from the effects of Hawaii's recognition of same-sex marriage)).

marriage-expansive states? Or do the marriage-expansive states need protection from the holdouts? Any regime striving for a coherent approach to interstate marriage recognition must be grounded upon an answer to this question, and yet a fully satisfactory answer is missing from the existing literature, which has not been sufficiently attentive to the concrete reasons states concern themselves with the institution of marriage. Appeals to state sovereignty will not get us far, because at best we have the makings of a zero sum game—marital status is, of course, binary, and where two states disagree about whether a particular couple is married or not, one of the states is deprived of their regulatory prerogative.[173] Whether it is Congress or the Court that picks the winner, we ought to be satisfied that the winner is the state with the strongest claim to regulatory authority over the marriages in question. In the next Part, I explore what this analysis would look like.

D. THE CENTRAL QUESTION FOR MARRIAGE FEDERALISM

The relief from recognition obligations purportedly conferred by DOMA is a "legitimate national consideration"[174] for Article IV purposes only if we can agree that it offers protection where protection is needed in a federal union. This, however, is far from clear. As Professor Gerken and Ari Holtzblatt describe, "[t]he conventional worry in horizontal federalism, with its focus on territoriality and sovereignty, is that states that favor marriage equality will impose that preference on states that don't. But it might be just as important to a state to have the same-sex marriages it has blessed recognized outside of its territory."[175]

This crucial insight—that state sovereignty interests run in both directions—is an important rejoinder to the recurring concern that mandatory interstate recognition allows one state to set policy for the entire nation.[176] But it also paves the way for an even more foundational

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173. As Laycock argues so persuasively, when it comes to interstate disputes, "[s]tate law cannot supply the answers, because the questions are about interstate relations and no state is empowered to answer for any other." Laycock, *supra* note 11, at 259; *see also* Jackson, *supra* note 19, at 30, explaining the fundamental difference between state choice of law rules and constitutionalized obligations:

> [Choice of law rules] extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self-interest. The constitutional provision extends recognition on the basis of the interests of the federal union, which supersedes freedom of individual state action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit. States under their voluntary policy may extend recognition when they could not constitutionally be required to do so; and sometimes, of course, they have interpreted the law of conflicts to refuse credit when the constitutional mandate is held to require it.

174. Metzger, *supra* note 14, at 1501.

175. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 78 (2014).

176. *See, e.g.*, Transcript of Oral Argument, *supra* note 9, at 15 ("We live in a very mobile society, and people move all the time . . . one state would basically set the policy for the entire nation."); *see also* Wilson v. Ake, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005).

point: resolving interstate marriage conflicts in a way that is consistent with federalism values[177] requires a much more searching inquiry into the respective state interests in recognition and non-recognition than has previously been fully appreciated.[178] We ought not to simply assume some sort of neutralizing symmetry between the interests of the holdout states and the marriage expansive states, between one state's interest in having its marriage determinations recognized by other states and another state's interest in refusal.[179] The interests are not only unevenly weighted but not even commensurate in the first place. Furthermore, such interests are not even articulable without specifying the recurrently important question of the state to which the couple is most significantly connected, as that is the starting point for determining which state has the strongest regulatory claim.[180] The only way forward in a faithful union is twofold: first, to hone in on which state has the most persuasive claim to regulate the marital status of the couple in question, and second, to accept that this state's regulatory authority must travel with the couple in any regime that claims fidelity to the core principles of both federalism and marriage.

How do we determine which state has the most persuasive claim to regulate a particular couple's marital status? What is easy to see is a state's interest in the marital status of its own domiciliaries. Both the case law and the literature are replete with elaborations on the practical reasons that a couple's marital status is an appropriate concern for the state in which they live, including property rights, financial obligations, and stability in caretaking arrangements for children.[181] This is why the

177. For the view that federalism is best thought of as a means to an end rather than an end in itself, see Gerken & Holtzblatt, *supra* note 175, at 68 n.22.

178. And when we do this, we will further see how completely and categorically different these interests are than the ones that get weighed in workers' compensation, tort liability, and other kinds of interjurisdictional disputes.

179. Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005) (discussing a state's interest in expressing moral condemnation of disfavored relationships).

180. *Id*. at 2237 (asserting that "states have a legitimate interest in preventing their domiciliaries from entering into evasive out-of-state marriages for the purpose of circumventing a prohibition contained in local law. . . . [M]any courts concluded that evasive marriages directly undermine the laws of the domiciliary forum and encourage other states to show disrespect for forum policies, to the detriment of interstate relations.").

181. Williams v. North Carolina, 317 U.S. 287, 298–99 (1942):

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there . . .

But see Singer, *supra* note 2, at 27 (explaining that a place of celebration rule gives much more predictability in a multistate system than a domicile rule).

conflicts scholars have been right to focus on issues of domicile when attempting to determine sensible choice of law rules for interstate marriage recognition.[182] But where they have fallen short is in explaining how these concrete interests translate into constitutional questions.[183] As Professor Laycock urges, the Full Faith and Credit Clause "assumes the existence of some basis for recognizing which state's law applies," and then requires that each state act in accordance.[184] For marriage disputes, domicile is a centrally important basis for recognizing which state's law applies."[185]

If there is consensus about a domicile's interest in the marital status of its domiciliaries, the problems arise when a couple's domicile changes, because there is then a contest between domiciles. Professor Strasser has argued persuasively that in a contest over marriage policy between a couple's current domicile and their future domiciles, the domicile at the time the couple was married should prevail.[186] His arguments emphasize the gravity of the personal interests at stake for the couple upon migration; he does not address whether the first domicile itself has interests that support the continuance of its regulatory authority over the couple in question.[187] The argument therefore relies largely on Fourteenth Amendment principles but does not solve the perpetually elusive federalism puzzle taken on here: whether there is a legitimate national consideration justifying Congress's decision to relieve states of their recognition obligations. To answer that question, we need to push harder on the set of interests that states have in regulating marriage, being careful to distinguish between a couple's interest in the formal recognition of their relationship and a state's interest in offering such

182. Silberman, *supra* note 163.

183. For one important exception, see Gene Shreve, whose original and thought-provoking argument is that the interests driving conflicts analysis are too readily identifiable as appropriate constitutional concerns—take one step and the entire field would need to be constitutionalized. Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 272 (1996) ("Constitutional justifications for Supreme Court intervention so fully partake of the mainstream values of choice of law that, should the Court begin to give serious weight to the former, it would find no logical stopping point short of constitutionalizing the entire subject.").

184. Laycock, *supra* note 11, at 301. Even *Ex Parte* Kinney, rejecting all constitutional challenges to a conviction for violating Virginia's anti-miscegenation prohibition, observed that the case would have a different tenor if the petitioners had been DC residents when they married, who then moved to Virginia expecting to retain their marital status. Laycock, *supra* note 11, at 606. This question of the jurisdiction with the most significant connection to the couple is revealing, because while we are accustomed to seeing it in cases applying the place of celebration rule, this judge finds it significant for federal constitutional purposes. Although he mentions it in analyzing the privileges and immunities claim, perhaps it is a key to unlock the dilemma of the Full Faith and Credit Clause's application to marriage licenses.

185. Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 606 (1947) ("[M]arriage looks to domicile.").

186. Strasser, *supra* note 30, at 12 ("[T]he domicile is understood to have a great interest in the marital status of its domiciliaries.").

187. And not coincidentally, he thus doesn't pursue Full Faith and Credit questions.

recognition. The suite of benefits accorded to married couples has been repeatedly inventoried[188] and characterized as "vast,"[189] and a great deal of attention has been lavished on the interest that couples have in accessing this suite of benefits on equal and nondiscriminatory terms.[190] Our purpose here is to hone in on why states bother to create and administer these regimes in the first place, and then to assess whether these state interests travel with a couple outside of the state's territorial boundaries.[191]

Paeans to marriage have long been plentiful in our legal culture, but much of the language is too lofty and idealized to illuminate the real interests at work.[192] To weigh the competing state sovereignty claims we have to dig a bit deeper to determine what concrete state purposes the institution serves. An idea developed in one influential account is the essential place to start: marriage, as the central organizing institution of family law, is a distributive mechanism for "social goods of an immense variety of kinds: material resources like money, jobs, nutrition; symbolic resources like prestige and degradation; psychic resources like affectional ties, erotic attraction and repulsion . . ."[193] By marrying, individuals sort themselves into arrangements that are thought to signal to the state the appropriate conditions for the distribution of these social goods; the central and most essential of these conditions are permanence and exclusivity. These qualities justify the reciprocal package of rights and responsibilities that characterize marital status.

188. As described in one influential taxonomy, marriage is comprised of "two characteristics: the expressive legitimacy that comes from the public institution of marriage; and the panoply of material benefits, both economic and non-economic, that the marital relationship confers." Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005).

189. Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Countermarriage*, 99 CALIF. L. REV. 235, 258 (2011) (canvassing "vast" array of privileges and obligations).

190. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), United Sates v. Windsor, 133 S. Ct. 2675 (2013).

191. Similarly, I note that others have spoken eloquently about a couple's interest in keeping their marriage intact as they move. Given the ease with which those concerns are encompassed within Due Process and Equal Protection frameworks, I focus here on the state interests in maintaining its regulatory authority over a couple that moves away. Joseph William Singer, *Same-sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R & C.L 1, 38 (2005) (describing the Court's view that "it is crucial to have a single answer to the question of whether a person is or is not married in a federal union.").

192. Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 41 (2011).

193. *Id.* at 5–6 (describing the family as "a legally regulated private welfare system."); *see also* Anne L. Alsott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3 (2010) (explaining the ways in which family support obligations function as a form of social insurance); Appleton, *supra* note 123, at 966 (describing the privatization of dependency as "the essence of family law—a goal that animates the field and runs through its different elements."); Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL FORUM 225, 229 (2004) ("Through marriage, government can delegate to the family some of society's collective responsibility for dependency.").

Professor Rosenbury emphasizes the state's interest in the distribution of material goods, asserting that "the ultimate value underlying legal recognition of family" is the privatization of dependency. As she elaborates,

> the government affirmatively recognizes certain intimate relationships, to the exclusion of others, in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another . . . . [E]ven as our understandings of family roles and composition have changed, legal recognition of family status remains rooted in the privatization of dependency . . . . The government therefore recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers.[194]

A state's interest in distributing social goods, managing dependence, and enforcing legal obligations seems attenuated for couples no longer in its territorial reach: why not let the next domicile decide whether to recognize the marriage, or instead risk derogation of familial responsibility and the ensuing depletion of the state's coffers? At first blush it would seem that one domicile has to yield to the next, and that only the current domicile can claim these kinds of interests. However, that is to overlook something essential about the nature of marriage and what is required to effectively advance the state interest in privatized dependency. The first domicile's interests are in conferring a permanent status, or at least one that cannot be undone without a fair amount of state involvement.[195] Perhaps paradoxically, divorce proceedings confirm the permanence of marital status by requiring couples to engage the state's judicial machinery in ways that are not only extensive and intrusive but anomalous in legal culture.[196] Permanence is to marriage what finality is to judgments: even the departures from the premise confirm it. It is this permanence, as aspirational as that might seem in the era of no-fault divorce, which is essential to the meaningful advancement of the very interests that motivate the state to administer a marriage regime.

Marriage as a "legally regulated private welfare system" depends on its supposed permanence.[197] This characteristic both provides moral authority for the state's explicit favoring of marital relationships (this couple deserves special benefits because they have made a unique and enduring commitment to each other) and provides the rough proxy for

194. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866–67 (2014).

195. Boddie v. Connecticut, 401 U.S. 371 (1971) (emphasizing the state's monopoly on the dissolution of marriage).

196. Even in a post-fault world, the specification of financial and parental responsibility requires extraordinary state involvement. *See* Scott, *supra* note 193, at 229 ("[W]ithin a properly structured legal framework, even marriages that end in divorce can serve quite effectively to provide a measure of financial security for dependent family members.").

197. Halley, *supra* note 192, at 5–6.

reliable mutual support that the system depends on (it is more or less reasonable to assume that this couple's needs will be met by each other, rather than the state, because of the exclusive and enduring nature of the commitment they've made to each other).

It is essential to understand that these expectations of permanence and exclusivity are not only the justifications for the marriage regime; they are intended, through intense social pressure, to shape the behavior of the couples within marriage. The permanence expectation is critical to reinforcing the daily conduct on which the system of privatized dependence relies—including the pooling of resources, the possibility for specialization in the types of labor that each spouse performs, and the investment of resources in the family enterprise rather than in pursuing individual endeavors. To allow that marital status might be contingent, unpredictable, and vulnerable to uncontrollable forces beyond the territorial boundaries of the state where the couple makes their home when they marry is a contraction of the first state's authority to instantiate and oversee an institution whose functioning depends on expectations of permanence.

Perhaps all of this seems somewhat abstract, but the question is how it fares in contrast to a state's interest in *refusing* to recognize the marriage of a migratory couple. And let us, for now, take the marriage of an uncle and niece to avoid the specific political valence of interracial or same-sex marriage. No matter how sincerely, vigorously, even *justifiably* the second state may believe that the union in question is deficient, harmful, or simply ineligible for formal state sanction; no matter how appropriate the state's conviction that the union ought not to be an administrative unit for the private welfare system, the second domicile cannot prevent the financial, social, sexual, and emotional joinder that the couple *has already undertaken* in reliance on the legal status they achieved in their first domicile. Faced with an existing marriage from another state, a state is simply not in the position to achieve the objectives it seeks to pursue when deciding whether to initiate a marriage in the first place. To borrow from a classic of the domestic relations literature, the second state does not have a meaningful opportunity to perform a channeling function for a migratory couple seeking recognition of their relationship.[198] By the time the second state's legal framework becomes relevant to the couple they have already entered into the institution of marriage; their behavior and expectations have been shaped, at least in part, by that institution's norms. The second state's refusal instead serves an expressive function: it communicates moral

198. Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992) (describing the channeling function as the aspect of family law that encourages and incentivizes people to enter into and sustain institutions thought of as socially beneficial, and to forego those thought of as harmful).

disapproval of the couple's relationship. The second state's expressive interest, in my view, should rank beneath the first state's interest in the perpetual reinforcement of the permanence norms that are essential to the entire regime.

The next step is to see that the differential weight of the respective state interests is something that matters for horizontal federalism; having discerned that the first state has a stronger regulatory claim by virtue of its superior interests, this understanding should inform the interstate relations issues of Article IV. We are now in a position to return to the appropriate role for Congress to play. Is Congress so powerful under the Effects clause of Article IV that it can mandate a choice of law regime that subordinates the interests of the state with the stronger claim to regulatory authority?[199] I posit that the answer is no, but readers need not agree with that conclusion to see how laborious this inquiry would have been, requiring a fairly profound engagement with the nature of legal marriage and the state interests in regulating it.

Professor Metzger's discussion reveals a central insight for horizontal federalism that goes well beyond the question of Congress's role in managing interstate relations: that a satisfactory interstate recognition scheme will be predicated on a clear-eyed assessment of what the respective state interests are. And the thesis, whether right or wrong, adds an important dimension to evaluating the view of conflicts scholars that the application of Full Faith and Credit to interstate marriage recognition was conclusively a dead letter or a "feckless" simplification. Instead, it suggests exactly the opposite: perhaps there were simply too many open questions—thorny ones, implicating the complicated multilateral relationship between Congress, federal courts, state courts, and state legislatures—for this to be the most sensible avenue for the Court's resolution to the same-sex marriage controversy.[200]

Against this backdrop, we have a fresh and entirely different perspective on the supposed irrelevance of the Full Faith and Credit Clause to questions of interstate marriage recognition. It is true that the role of the Clause in resolving such disputes has so far been virtually nonexistent, but not because there is something categorically or conceptually inapt about it, or because there is any sort of settled consensus on how marriage licenses fit into what otherwise seems to be

199. *See* Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflict Law*, 32 CREIGHTON L. REV. 1063 (1999).

200. *See* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1392 (2012):

> [T]o constitutionally eliminate the major interstate conflicts, courts would have to simultaneously hold: (1) that the Full Faith and Credit Clause requires interstate recognition of marriages of its own force, (2) that Congress cannot (pursuant to the Full Faith and Credit Clause) alter that recognition rule, and (3) that this rule cannot be affected by the public policy exception that states have long exercised.

a binary scheme dividing laws from judgments and enforcing only the latter. Rather, the work the Clause might do in managing interstate marriage recognition has been done by other doctrines, allowing the Court to avoid complicated questions about Congressional power to override the default commands of Article IV, and to do so in a way that lacks sensitivity to the actual weight and nature of the state interests involved. In light of this past, the question that naturally emerges is whether the Clause has any possible future. I briefly take this on in the next Section.

III. FAITHFUL UNIONS OF THE FUTURE

I start from the premise that we are unlikely to have seen the last of our national controversies over state marriage policy. While we might have difficulty forecasting when the next major controversy will unfold or which social movements it will encompass, I nonetheless posit that it is premature to declare that the constitutionalization of marriage has reached its endpoint. There would be some hubris in doing so, considering the speed with which marriage equality claims for same-sex couples went from facing dismissal for lack of a federal question to successful articulations of a constitutional right.[201] That said, is there reason to think that the future of Full Faith and Credit will be any different than its past? Under what conditions would the Clause be sufficiently useful to overcome the obstacles previously identified to its application and elaboration?

In light of the approach I have taken so far, it might seem that the Clause has practical importance in a truly limited category of marriages—those that might be ineligible for recognition under the place of celebration rule as contrary to the forum state's strong public policy, but where we do not see the sort of impermissible animus that draws in the Equal Protection and Due Process guarantees. While that is true, it is essential to understand that this is something we can identify more readily *in retrospect* than *ex ante*. Unconstitutional animus is not a terrain with fixed boundaries—it is contested, evolving, and responsive to social change. While the chronology of marriage equality seems to reinforce the assumption that we can expect the Fourteenth Amendment to do most of the work in policing state marriage policy, it also reveals how long that might take, and the potential for backlash to threaten or at least complicate forward progress.[202] We might indeed find it useful to call upon the Full Faith and Credit Clause while the Fourteenth Amendment principles are being worked out.

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201. Baker v. Nelson, 409 U.S. 810 (1972) (dismissing gay couple's challenge to exclusionary marriage law "for want of a substantial federal question").

202. *See* Klarman, *supra* note 106, at 450.

Consider polygamy, for example. Some have suggested that plural marriage is the "next frontier" in family law,[203] and serious efforts have been made to examine and critique the currently universal requirement that no more than two people may join in state-sanctioned matrimony.[204] Although reliable statistics are difficult to obtain, there is reason to believe that polyamorous families are increasingly common.[205] Public opinion on the issue is changing perceptibly,[206] reflecting what one commentator describes as "an increasingly libertarian or laissez-faire view that many younger Americans take toward sex, marriage, and family life."[207] In response to a constitutional challenge brought by the polygamous family portrayed in the television show Sister Wives, Utah walked back enforcement of its criminal bigamy prohibitions, publicly announcing that it would only pursue bigamy prosecutions against those who induced a spouse to marry through misrepresentation or were suspected of collateral crimes such as fraud or abuse.[208] Can we imagine a future in which a state legalizes plural marriage, and then a migrating "throuple" might seek to have their marriage recognized in another state?

Difficulties arise immediately in using the issue of plural marriage to suggest that there may be work to do in the future for Full Faith and Credit. First, as to what we might call the rule of two, there is absolutely no divergence in state law at the moment, making the prospect of interstate recognition issues remote at best. Of course, this was also true of same-sex marriage until 2003, when Massachusetts became the first state to strike down prohibitions on same-sex marriage as invalid under the equality and liberty guarantees of the state constitution. Perhaps we ought to recognize that momentum was already gathering a few years

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203. *See* MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW (Brandeis University Press, 2017).

204. *See* Ronald C. Den Otter, *Three May Not Be A Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 54 (2014); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1961 (2010) (considering commercial partnerships as a source of inspiration for the regulatory challenges of marriage multiplicity); *see also* Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J. L. & GENDER 269 (2015).

205. ELISABETH SHEFF, THE POLYAMORISTS NEXT DOOR, INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES xi (2014). She also notes, however, that not all such families would seek legal formalization of these relationships even if permitted to do so.

206. Nate Carlisle, *Poll: American Public Finds Polygamy More Acceptable but Is Still Opposed*, SALT LAKE TRIB. (June 3, 2015, 11:38 AM), http://www.sltrib.com/blogs/polygamy/2584240-155/poll-american-public-finds-polygamy-more (a 2015 Gallup poll found that a mere sixteen percent of American find polygamy "morally acceptable," but as one reporter observed, that number was up from five percent in 2006—not a "tidal wave," but a needle moving perceptibly.).

207. Samantha Allen, *Polygamy Is More Popular than Ever*, DAILY BEAST (June 2, 2015, 5:15 AM), http://www.thedailybeast.com/articles/2015/06/02/polygamy-is-more-popular-than-ever.html.

208. Brown v. Buhman, 822 F.3d 1151, 1155 (10th Cir. 2016).

prior, when Vermont decided in 1999 that gay couples could not be excluded from the set of legal rights and government benefits extended to heterosexual couples.[209] Even if we set the clock back to 1993, prior to the Hawaii Supreme Court's ruling in *Baehr v. Lewin*,[210] we can see that interstate recognition issues may arise fairly rapidly out of a landscape that has not seemed fertile for them. In fact, looking back to 1993 illustrates two seemingly conflicting points: while twenty-two years seems like a short period for such a major transformation in law and society, it was plenty of time for a constitutionalized interstate recognition scheme to have been practically useful.[211]

The other difficulty is not so much with legal status as with social practice: how prevalent are the various forms of plural relationships with marriage-like commitments? More precisely, how prevalent would it be absent government disapproval of such relationships?[212] Every time I teach Family Law I ask my students whether people they know would practice plural marriage if the government permitted them to do so. Students struggle to discern whether the rule of two is foreclosing arrangements that people would otherwise choose, or rather reflecting durable and fairly widespread social preferences that exist independently of law. The answer is probably both, as law and norms reflect and reinforce each other. The point is that the rule of two strikes people as less exclusionary than other marriage restrictions simply because of the perception that fewer people feel meaningfully affected by its constraints.[213] It can seem premature to assess whether polygamy is likely to be our next national marriage controversy, as we can hardly imagine the coalition that will call for it. But that puts us right back to the point about interstate recognition issues arising in ways that feel unexpected during periods of profound social transformation.[214]

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209. Baker v. State, 744 A.2d 864 (Vt. 1999).

210. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (court determining that the law was a gender based restriction and therefore subject to heightened scrutiny).

211. As one scholar has observed, "in constitutional controversies, public opinion can shift rapidly." Otter, *supra* note 204, at 2042.

212. RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 65 (2015). Noting the prevalence of traditional, religiously motivated patriarchal polygamy, Otter posits that "the polygynous relationships in contemporary America are but a subset of the wide range of plural marriages that would probably exist if states were to legalize polygamy . . ."

213. Arin Greenwood, *Who Are 'The Polyamorists Next Door'? Q & A with Author Elisabeth Sheff*, HUFFINGTON POST (Mar. 5, 2014, 10:43 AM), http://www.huffingtonpost.com/2014/03/05/elisabeth-sheff-polyamory_n_4898961.html. As one expert on polyamorous families has noted, "poly people are not organized politically around the issue like folks in same-sex relationships have organized around marriage equality because many polys can marry in dyads and get the goodies that come with marriage even without poly marriage."

214. Indeed, one account of marriage equality posits that "the LGBT movement was brought to the fight for marriage equality by the anticipatory countermobilization of social conservatives who opposed same-sex marriage before there was a realistic prospect that it would be recognized by the courts or political actors." Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an*

Plural marriage is a useful example for our purposes precisely because the application of Fourteenth Amendment principles does not, at least from the current vantage point, yield obvious conclusions. While a thorough assessment of the rule of two's constitutionality is well beyond the scope of this project, I offer a few quick observations. First, the rule of two burdens (at least) three different groups whose demographic and ideological distance from each other can hardly be overstated: fundamentalist Mormon sects cast out by the Church of Latter Day Saints;[215] Muslim communities, in turn comprised of immigrants from West Africa and the Middle East[216] as well as African-American members of orthodox congregations in urban areas such as Philadelphia;[217] but also avowedly secular groups whose very interest in plural marriage lies in resisting compulsory sexual norms.[218] The first two groups are religious minorities, whose practice of plural marriage is inextricable from a commitment to traditionalist—and explicitly patriarchal—norms regarding gender and sexuality. The third is a group we could describe as a sexual minority, allied with and sympathetic to queer politics,[219] whose attitude towards sexual relationships might be considered, at the very least "rebellious."[220] To reflect on how little these communities have in common, other than their rejection of compulsory dyadic marriage, is to understand the challenges that lie ahead for courts trying to examine whether the rule of two burdens a "discrete and insular minority" in a way that ought to trigger heightened scrutiny.[221] Will the fact that plural marriage is practiced by such a diverse set of communities make it more likely to be considered conduct rather than status?

Perhaps the anti-animus principle can circumvent some of this difficulty, by focusing the inquiry on the intent to disparage rather than the social and political profile of the group being burdened; but still, courts will have to contend with a set of justifications states can offer in

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Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena, 39 LAW & SOC. INQUIRY 449, 449 (2014).

215. *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014 (Tex. App. May 22, 2008).

216. Andrea Useem, *What to Expect When You're Expecting a Co-Wife*, SLATE (July 24, 2007, 12:12 PM), http://www.slate.com/id/2170977/; Pauline Bartolone, *For These Muslims, Polygamy is an Option*, S. F. GATE (Aug. 5, 2007, 4:00 AM), http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/08/05/INTBR8OJC1.DTL; Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008, 12:49 AM), http://www.npr.org/templates/story/story.php?storyId=90857818.

217. Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn to Polygamy*, NPR.COM (May 28, 2008, 10:59 AM), http://www.npr.org/templates/story/story.php?storyId=90886407.

218. *See* Aviram & Leachman, *supra* note 204, at 375.

219. *See* Aviram & Leachman, *supra* note 204, at 375.

220. Greenwood, *supra* note 213 (noting the race and class privilege prevalent among the polyamorous families in her research, and positing that "social privilege makes it safer to be openly sexually unconventional.").

221. *See* Carpenter, *supra* note 121, at page 184.

defense of the rule of two that do not convey impermissible animus as transparently as other prohibitions have done. Among the justifications scholars have proffered include the concern that polygamy, at least as practiced in traditionalist religious communities, is inherently oppressive to women, and that the government is entitled to issue marriage licenses to relationships that are more likely to advance gender equality.[222] Additional concerns include the administrative hurdles that would attend the extension of marriage benefits to what one critic calls "ludicrously large marriages."[223] To be sure, other scholars have labored passionately to critique these justifications and have done so persuasively, allowing us a preview of how contested the landscape is and will likely continue to be. The point here is neither to judge the respective merit of the two positions on normative grounds nor to make predictive claims about how the courts will ultimately rule, but to think about what this means for the range of doctrinal instruments that might be applied to questions of marriage federalism.

The uncertainty about how the Fourteenth Amendment claims will be received as they wend their way through state and federal courts, and the hesitation the Court is likely to manifest in deciding whether and when to weigh in, suggest an opportunity to consider a constitutionally obligatory interstate recognition scheme under the purview of the Full Faith and Credit Clause. Especially if Congress sits this one out, allowing for a direct examination of the Clause's self-executing requirements rather than the more challenging assessment of Congress's override power, courts might finally find reason to break new ground under Article IV, setting out recognition obligations that states have to each other in the face of pervasive disagreement over marriage policy.

CONCLUSION

We live in a moment of intense preoccupation with both marriage and federalism, one that is likely to persist well beyond the Supreme Court's ruling in *Obergefell*. The decision served to reify marriage as a site of enormous cultural significance, an appropriate institution within which to fight over social meaning and its reflection in law. These battles are fought state by state, against a backdrop of unprecedented geographic mobility, raising profound questions not only about how states relate to their own citizens but how states relate to each other. Because if it is true that states have an interest in marriages they have created, an idea often invoked but less frequently examined, then interstate marriage

222. *See* John Witte, Jr., *Why* Two *in One Flesh? The Western Case for Monogamy over Polygamy*, 64 EMORY L.J. 1675 (2015).

223. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 310 (2010).

recognition is a matter not only of individual rights but also of state sovereignty.

And yet, the Full Faith and Credit Clause, the constitutional command that is seemingly most suited to managing marriage federalism, has never been called into action. This Article first suggests that this warrants explanation, and then endeavors to provide one. It offers an account of contingent doctrinal evolution, demonstrating that the work the Clause might do in regulating interstate marriage recognition has been done by other doctrines. The Article has shown that the historically generous place of celebration rule, and the increasingly robust protection for marriage decision-making provided by the Fourteenth Amendment, has so far covered most of the terrain.

But it also explains why the Clause might nonetheless be useful for the marriage controversies of the future. Polygamy, for example, has already sparked a sustained discussion in the legal scholarship as well as popular media, with some forcefully arguing that its legalization is compelled by the same principles of liberty and equality upon which marriage equality for same-sex couples is grounded. Others however, have maintained that plural marriage is different and harmful in constitutionally significant ways, and ought to remain outside of the realm of state sanctioned marriage. The ultimate resolution of this and other marriage controversies is far from apparent where we currently stand. The anti-animus principles that drove forward marriage equality are highly dynamic; they reflect and respond to social change in an iterative process that is neither linear, nor predictable, nor instantaneous. While this unfolds for any given marriage controversy, over a period that might take decades, we would benefit by having in place a working interstate recognition scheme with constitutional parameters.

It is beyond the scope of this project to lay out the precise contours of such a regime, other than to assert that it should be grounded on a searching inquiry into the respective state interests at stake. As we observed when examining Congress's authority under the Full Faith and Credit Clause, state sovereignty interests run in both directions. Upon examination, however, these interests are more compelling for the state that first exercised regulatory authority over a domiciled couple and less so for a subsequent state to which the couple has moved, suggesting a reasoned basis to favor the first domicile. The essential point at this stage is to acknowledge that a constitutionalized set of recognition obligations—non-abrogable and not subject to refusal on substantive policy grounds—offers a lot of promise for strengthening our commitment to faithful unions, both marital and national.