# ABANDONING BEDROCK PRINCIPLES?: THE MUSGRAVE AMENDMENT AND FEDERALISM

*Activist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.*

—President George W. Bush, January 2004[1]

## I. INTRODUCTION

In the wake of a surge of judicial activism aimed at creating a constitutional right to same-sex marriages, prominent conservatives and traditionalists have called for an amendment to the federal Constitution prohibiting same-sex marriages nationwide.[2] Representative Marilyn Musgrave of Colorado has introduced an amendment proposal that reads:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.[3]

For those who view the separation of powers between states and the national government as fundamental to our constitutional structure, how should such a proposal be received? Is it the only tenable response to the usurpation of legislative authority by an increasingly activist, liberal, and secularist judiciary and the concomitant problems posed by the Full Faith and Credit Clause? Or is it a misguided and

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1. President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

2. *See, e.g.*, William Kristol & Joseph Bottum, *For the Marriage Amendment*, WKLY. STANDARD, Feb. 23, 2004, at 9.

3. S.J. Res. 30, 108th Cong. § 2 (2004). The cited proposal is slightly different than the initial proposal because the language has recently been amended to omit the previously included phrase "state or federal law." Some worried that without the change states would not be permitted to allow civil unions. *See* Zachary Coile, *Feinstein Rejects Revised Marriage Amendment Bill*, S.F. CHRON., Mar. 24, 2004, at A3.

rash surrender of rightfully localized authority to the national government at the expense of core federalist principles?

The growing interest in a constitutional amendment prohibiting same-sex marriages was provoked by the Supreme Judicial Court of Massachusetts's decision in *Goodridge v. Department of Public Health*,[4] in which the court ruled that a state law prohibiting same-sex couples from obtaining a civil marriage violated the state constitution. Although the court did not consider whether the law violated the federal Constitution, it employed rational basis tests under both due process and equal protection jurisprudence. Employing reasoning[5] similar to that of the Supreme Court in *Romer v. Evans*,[5] the court found that the only state interest served by excluding same-sex couples from marriage rights was an unwarranted animosity towards homosexuals. As the Massachusetts court wrote,

> the absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices[6] against persons who are (or who are believed to be) homosexual.

It rejected a litany of rational bases proffered by the government and its amici, including the argument that the state's interest in promoting marriage is to foster stable environments for procreation and the rearing of children.[7]

From the perspective of originalism, the decision in *Goodridge* cannot be justified, no matter one's position on the desirability of same-sex marriage as a social policy. While proponents of an activist judiciary see the ruling as the first step in a "legal revolution,"[8] those

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4. 798 N.E.2d 941 (Mass. 2003).

5. 517 U.S. 620 (1996).

6. *Goodridge*, 798 N.E.2d at 968.

7. *Id.* at 968.

> The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be 'excellent' parents. These couples (including four of the plaintiff couples) have children for the reasons others do—to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.

*Id.*

8. Editorial, *A Victory for Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A30 ("When the rights of disadvantaged groups are newly recognized, there is often opposition, some of

who subscribe to the belief that constitutional provisions should be interpreted in accordance with their framers' intent should shudder at the decision. The court's expansion of equal protection was "not an adjustment of an old principle to a new reality but the creation of a new principle by *tour de force* or, less politely, by sleight of hand."[9] No legislator who passed the equal protection and due process components of the Massachusetts Constitution could possibly have envisioned that they were legalizing same-sex marriage.[10] The court created a new law that was never voted on, that was never debated in the halls of a legislature, and that now requires a state constitutional amendment to repeal. The *Goodridge* decision may lead to even more daring acts of legislative usurpation. Already in some states, local officials have defied state law and begun issuing marriage licenses to same-sex couples.[11] Some officials who will not go as far as to marry same-sex couples have decided to recognize same-sex marriage licenses obtained out of state.[12] There is little doubt that same-sex partners married in Massachusetts will soon seek recognition in other states under the Full Faith and Credit Clause of the United States Constitution.

At the federal level, the conservative response to this mounting storm has been to propose the Musgrave Amendment. Constitutionally, this approach is sound. It is through the Article V amendment process—and not the unchecked power of judges to rewrite the law in accord with what they perceive as shifts in social mores—that new rights and duties should be incorporated into the Constitution. The Musgrave Amendment, however, is not the most principled way to address the problem. Removing from the states' jurisdiction an issue as fundamental to the domestic sphere as the definition of marriage does not comport with ideals of federalism that conservatives treasure. While not confronting the morality or

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it fierce, and the road ahead may be rough. But like the early court rulings striking down segregation, this has the feel of a legal revolution beginning.").

9. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1991) (referring to the decision establishing a constitutional right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

10. In his dissent to *Goodridge*, Judge Cordy observed that "the right to marry someone of the same sex is [not] found in the unique historical context of our Constitution." 798 N.E.2d at 988 (Cordy, J., dissenting). Judge Sosman complained that the majority had "tortured the rational basis test beyond recognition." *Id.* at 982 (Sosman, J., dissenting).

11. *See, e.g.*, Joe Dignan & Rene Sanchez, *San Francisco Opens Marriage to Gay Couples*, WASH. POST, Feb. 13, 2004, at A1; Lynn Marshall & Elizabeth Mehren, *Same-Sex Marriage Battle Moves to Seattle*, L.A. TIMES, Mar. 9, 2004, at A11.

12. *See* Gene Johnson, *Seattle Mayor Recognizes Employees' Gay Marriages*, WASH. POST, Mar. 9, 2004, at A3.

desirability of the legalization of same-sex marriage, this note will argue that the Musgrave Amendment fails to coincide with the fundamental tenets of federalism. Part II explicates the underlying rationales for the Founders' model of federalism and explains why these principles continue to be relevant today. Part III argues that the Musgrave amendment is inimical to the core federalist model. Part IV addresses and refutes the strongest argument for the Musgrave Amendment: that the Full Faith and Credit Clause of the Constitution could allow one state's legalization to effectively force same-sex marriage on the other forty-nine. Finally, Part V proposes an alternative amendment that, if checks on judicial activism currently in place fail,[13] would ensure that states retain the power to decide this vital issue for themselves.

## II. THE CONTINUING RELEVANCE OF FEDERALISM

The fundamental characteristic of American federalism, as articulated by the Founders, was a limited national government.[14] The Constitution set the loci of most governmental powers in the state governments. Madison stated succinctly that "the powers delegated . . . to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[15] The boundaries of national power were to be defined by the powers specifically enumerated in the Constitution.[16] These enumerated powers particularly concerned "external objects, as war, peace, negociation, and foreign commerce."[17] Reserved to the states were "the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[18] Tench Coxe, a constitutional advocate who became Assistant Secretary of the Treasury in 1789, argued in favor of the proposed Constitution by explaining that the federal government could not legislate on any

13. For example, Massachusetts legislators are moving to pass an amendment to the state constitution overriding the *Goodridge* decision and the California Supreme Court halted the San Francisco mayor's issuing of marriage licenses to same-sex couples. *See* Rick Klein, *The Constitutional Convention,* BOSTON GLOBE, Mar. 12, 2004, at A1; Suzanne Herel, *Court Halts Gay Vows*, S.F. CHRON., Mar. 12, 2004, at A1. These events suggest that an amendment may not be necessary.

14. *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 64 (1987).

15. THE FEDERALIST NO. 45, at 227 (James Madison) (Terence Ball ed., 2003).

16. BERGER, *supra* note 14, at 65.

17. THE FEDERALIST NO. 45, *supra* note 15, at 227.

18. *Id.*

"matter or thing appertaining to the internal affairs of any state, whether legislative, executive or judicial, civil or ecclesiastical."[19] It is thus clear that the fundamental model of government on which the Constitution was based entailed a narrow and precisely defined sphere of authority for the federal government.[20]

The methodology of the Founders was to reserve to the federal government only those necessary functions that states could not accomplish individually, eliminating the collective action problems that plagued the Articles of Confederation.[21] Nicholas Collin, a supporter of ratification who wrote twenty-nine essays under the pen name "A Foreign Spectator," provided a lively illustration of this principle:

> Suppose thirteen families are settled upon an island in this river, that is liable to be overflowed. . . . They must erect a strong bank, and keep it at all times in good repair. . . . [A] sudden storm may destroy the hay, grain, provisions, household goods; drown the cattle and the people themselves. Will they not then naturally appoint overseers, to inspect this bank, and with the most scrupulous attention keep it in order. . . . [T]hose overseers must have greater powers. Suppose the case so bad, that one family keep loitering in their beds, while the water rises rapidly . . . the overseers must have power adequate to any eventual situation.[22]

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19. Tench Coxe, *A Freeman: Essay I, reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 88, 93 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

20. Pelatiah Webster, a Philadelphia merchant and proponent of ratification, described the sphere of state authority in less than pleasant terms:

> [The states] will indeed have the privilege of oppressing their own citizens by bad laws or bad administration; but the moment the mischief extends beyond their own State, and begins to affect the citizens of other States strangers, or the national welfare,—the salutary controul of the supreme power will check the evil, and restore strength and security, as well as honesty and right, to the offending state.

Pelatiah Webster, *Reply to Brutus by Pelatiah Webster, reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 117, 128-29 (Paul Leicester Ford ed., 1888).

21. Noah Webster wrote that

> the convention have labored to draw the line between the federal and provincial powers—to define the powers of Congress, and limit them to those general concerns which *must* come under federal jurisdiction, and which *cannot* be managed in the separate legislatures—that in all internal regulations, whether of civil or criminal nature, the states retain their sovereignty, and have it guaranteed to them by this very constitution.

Noah Webster, *Examination by Noah Webster, reprinted in* PAMPHLETS ON THE CONSTITUTION, *supra* note 20, at 27, 48.

22. Nicholas Collin, *An Essay on the Means of Promoting Federal Sentiments in the United States XXIV, reprinted in* FRIENDS OF THE CONSTITUTION, *supra* note 19, at 44, 47-48.

In this model, the federal government is the "overseer" that solves those collective problems that states are unable to successfully address as individual actors. Justice James Wilson articulated how the enumerated powers could serve this purpose: "Whenever an object occurs to the direction of which no state is competent [e.g., war, treaties], the management of it must, of necessity, belong to the United States."[23] In discussing the Constitution specifically, he observed that "War, Commerce, & Revenue were the great objects of the Genl. Government. All of them are connected with money,"[24] as opposed to "morals or social welfare."[25] John Dickinson described the United States as "a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the union."[26] The national government was to retain only those powers that the states were incapable of exercising. Hence, wartime powers, the production of a uniform currency, and regulation of interstate commerce were enumerated, while the organization of internal state affairs, including moral and familial law, was reserved to the states.

Several justifications underlie the fundamental notion that federal power should be limited to failures of collective state action. The first is that federalism increases democratic choice by localizing the centers of legislative decision-making. The Supreme Court elucidated this core purpose in *Gregory v. Ashcroft*:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[27]

A federal system in which states retain as much power as possible optimizes governmental responsiveness to preferences. In a decentralized government, "local laws can be adapted to local conditions and local tastes . . . . So long as preferences for

23. THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 15 (A.T. Mason ed., Oxford Univ. Press 1972) (1964).

24. 2 THE RECORDS OF THE FEDERAL CONVENTION 1787, at 275 (Max Farrand ed., 1911).

25. BERGER, *supra* note 14, at 72.

26. 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 24, at 304.

27. 501 U.S. 452, 458 (1991).

government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority."[28] Localities "create the type of social and political climate they prefer."[29] The result is that communities conform to the ideals of their constituents rather than to an aggregate of the entire nation's preferences: "The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking."[30] This rationale for federalism is arguably stronger today than it was during the eighteenth century due to the exponential increase in mobility engendered by technological advances. Today, citizens whose preferences more closely coincide with another state can relatively easily move there—a prime example being "the migration of individuals from Massachusetts to New Hampshire to escape high rates of taxation."[31]

Moreover, federalism instills a culture of democracy by encouraging individuals' involvement in law-making. Through participation in local government institutions, "the citizen is educated in the value of civic participation."[32] Local accountability also increases confidence in the democratic system, as Thomas Jefferson observed when he wrote that loyalty to the state is strongest "where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day."[33] Therefore, preserving the authority of local governments not only heightens the degree to which government responds to the preferences of citizens, but also tightens and renews citizens' patriotic bonds with government.

A second advantage of the federal system envisioned by the Founders is that it leads to competition and innovation in the development of the law.[34] By keeping most legislative power out of

28. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (book review).

29. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988).

30. *Id.* at 7.

31. McConnell, *supra* note 28, at 1503.

32. A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985).

33. Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), *in* 1 THE FOUNDERS' CONSTITUTION 142 (Philip B. Kurland & Ralph Lerner eds., 1987), *cited in* Merritt, *supra* note 29, at 8 n.35.

34. This is not to suggest that same-sex marriage is necessarily a meritorious

the hands of the national government, "state and local governmental units will have greater opportunity and incentive to pioneer useful changes."[35] Experiments with new social policy—vouchers, school choice, more or less restrictive gun laws—can be conducted on the state level without the entire nation bearing the risk of failure. Justice Brandeis observed in *New State Ice Co. v. Liebmann* that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[36] Justice O'Connor has recognized the value of state innovation in the development of women's rights: "This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years."[37] In a variety of other areas—"[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination"—innovation was initiated in state legislatures.[38] By reserving power to the states, we encourage legal innovation by minimizing the risk of experimentation.

A third benefit of this decentralization—one that the Founders held particularly dear, but which may seem to some less relevant today—is the protection from tyranny. Madison theorized this effect in Federalist No. 51: "[A] double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[39] Hamilton concurred: "It may safely be received as an axiom in our political system, that the state governments will in all possible contingencies, afford complete security against invasions of the public liberty by the national authority."[40] Under this framework, the states stood as "suspicious and jealous guardians of the rights of the citizens, against incroachments from the Federal government."[41] As the Court has recognized in *Atascadero State Hospital v. Scanlon*, "the

innovation. *See infra* note 57 and accompanying text.

35. McConnell, *supra* note 28, at 1498.

36. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

37. FERC v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part).

38. Merritt, *supra* note 29, at 9.

39. THE FEDERALIST NO. 51, *supra* note 15, at 254 (James Madison).

40. THE FEDERALIST NO. 28, *supra* note 15, at 131 (Alexander Hamilton).

41. THE FEDERALIST NO. 26, *supra* note 15, at 123 (Alexander Hamilton).

'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'"[42] At least one scholar has argued that this rationale for dual sovereignty is even more vital today than it was in the eighteenth century: "The federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of its citizens. . . . Given these realities, state governments provide an institutional check on potential abuses of federal power."[43] Certainly there is danger in concentrating too much power in the hands of a monolithic national government.

Dual sovereignty, therefore, remains the vital backbone of the American republic despite the increasing interconnectedness of the states and the century-long trend of enlarging the federal government's powers through expansive readings of the enumerated powers. In recent times, conservatives have championed states' rights, especially in the context of moral issues such as abortion, yet have suddenly reversed course and favored a national solution to the issue of same-sex marriage in the form of the Musgrave Amendment. In the next section, I argue that the fundamental rationales for federalism favor leaving the question to state legislatures to decide.

## III. THE MUSGRAVE AMENDMENT

The Supreme Court has recognized that under the Constitution the regulation of marriage is generally reserved to the states.[44] This power arises directly from Madison's notion that control of "internal" matters is the purview of local governments.[45] As Coxe noted in his extensive discussion of the powers of state governments under the

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42. 473 U.S. 234, 242 (1985) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

43. Merritt, *supra* note 29, at 4-5.

44. In ruling that Congress did not have power under the Constitution to enact the Gun-Free School Zones Act of 1990, the Court wrote:

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage divorce, and child custody), for example.

United States v. Lopez, 514 U.S. 549, 564 (1995) (citation omitted). This is not to suggest, of course, that amending the Constitution so as to allow a federal role in the regulation of marriage would be unconstitutional. It is clear, however, that such authority has traditionally been reserved to the states.

45. *See* THE FEDERALIST NO. 45, *supra* note 15, at 227 (James Madison).

proposed Constitution, the authority to "regulate descents and marriages" was an authority to be exercised by state legislatures.[46] The Musgrave Amendment would effectively remove from the states the power to define marriage. The language of the amendment makes clear that it would not only protect states from the undemocratic imposition of same-sex marriages through judicial fiat—a worthy goal—but would also prevent legislatures from amending their own constitutions to allow same-sex marriage or even civil unions: "Neither this Constitution, *nor the constitution of any State*, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."[47] This would be an unjustified violation of core federalist beliefs. As I will show, the three rationales for a federalist system—increasing democratic choice, encouraging innovation in the law, and protecting liberties—each support the position that marriage law should continue to lie solely in the discretion of the states and therefore that the Musgrave amendment should be rejected.

Preserving the rights of states to define marriage as they see fit supports the key federalist objective of fostering local democratic decision-making and citizen involvement in government. Anne C. Dailey has comprehensively set out the case for the connection between state marriage law and democratic choice. She argues that it is only through local control of marriage that communities can infuse the law with their own moral vision:

> States enjoy exclusive authority over family law . . . because of the fundamental role of localism in the federal design. The theory of localism presented here rests on the view that the law of domestic relations necessarily promotes a shared moral vision of the good family life. . . . Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce, and the standards governing foster care and adoption. In answering such questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.[48]

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46. Coxe, *supra* note 19, at 95.

47. S.J. Res. 30, 108th Cong. § 2 (2004) (emphasis added). It appears under the language of the amendment proposal that a state could not amend its own constitution to mandate same-sex marriages because no part of its constitution would be allowed to mandate such marriages. Perhaps a slight change in the language of the proposal such that it only applied to provisions in place at the time of ratification would eliminate this concern.

48. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995).

Allowing states to define and regulate marriage enables the law to more closely conform to citizens' moral preferences. So long as states are capable of separately regulating marriage (i.e., there is no collective action problem), it is optimal from the perspective of maximizing individual preferences to exclude the national government from the law of marriage. The issue of same-sex marriage in particular is "a battle between two competing moral visions."[49] The view of those opposed to same-sex marriage says that "sex can be morally worthy precisely and only because of its place in procreation. . . . From this perspective, the movement for same-sex marriage is a misguided attempt to deny fundamental moral distinctions."[50] According to the second view, the "bringing together of persons has intrinsic worth whether or not it leads to childbearing or child-rearing."[51] Therefore, denying marriage to same-sex couples "is immoral, because it reflects arbitrary and irrational discrimination."[52] These distinctions in moral preferences manifest themselves in the popular debate around the marriage amendment, with those opposed to same-sex marriage referring to "the most fundamental institution of civilization" and those in favor charging foes with "writing discrimination into our Constitution."[53] Such a polarization of moral outlooks regarding homosexual unions and homosexuality in general further strengthens the argument for the continuance of state control over the definition of marriage. The optimal way to accommodate the moral intuitions of the greatest number of Americans is to vest state legislatures, not the federal Constitution, with authority to define marriage and determine the validity of same-sex unions.

The additional boon of this approach is that citizens' mobility engenders even greater preferential accommodation. The diversity of "state laws on the family provides some degree of choice for families who care to relocate and offers at least some opportunity for exit to families who feel themselves oppressed."[54] If Vermont legalizes same-sex marriage and Alabama does not, homosexuals and Christian fundamentalists alike have the possibility of living in a place that

49. Andrew Koppelman, *Same-sex Marriage, Choice of Law, and Public Policy*, 76 TEX L. REV. 921, 926 (1998).

50. *Id.* at 926-27.

51. *Id.* at 927.

52. *Id.*

53. Edwin Chen, *Bush Urges Same-Sex Marriage Ban*, L.A. TIMES, Feb. 25, 2004, at A1.

54. Dailey, *supra* note 48, at 1878.

conforms closely to their divergent moral outlooks. A state "cannot seal its borders against persons so distressed by its outrageous example of 'moral depravity' that they will give up whatever advantages they enjoy there (a good job, a high level of public goods, etc.) and move."[55] If, however, the Constitution addresses the issue—either through an amendment banning such marriages or an activist court expanding the equal protection clause to boundless lengths—one of these groups will have nowhere in the United States to turn for moral respite. This is an unnecessarily harsh result in a country founded on the federalist principle of decentralized law-making.

The second rationale for federalism—innovation through interjurisdictional competition—also supports leaving the definition of marriage to the states, because local elected representatives are better able to evaluate the societal effects of legalization than is the federal Congress. In the debate surrounding same-sex marriage, a wide variety of social consequences of legalization have been predicted. Critics posit that it will impose high fiscal costs[56] and will lead to marriage "gradually dying away, replaced by cohabitation, family dissolution, and child-rearing by the welfare state;"[57] advocates contend that it will reverse the trend towards a "culture of contingency" and bring stability to society.[58] The existence of such uncertainty regarding the effects of legalization favors allowing states to serve as Justice Brandeis's social laboratories. If states are free to delineate the limits of their marriage law, new conceptions of families will be subject to concrete evaluations instead of the conjecture that

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55. William Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 777.

56. *E.g.*, Mary Ann Glendon, *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14.

> [T]he American people should have the opportunity to deliberate the economic and social costs of this radical social experiment. Astonishingly, in the media coverage of this issue, next to nothing has been said about what this new special preference would cost the rest of society in terms of taxes and insurance premiums.
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> The Canadian government, which is considering same-sex marriage legislation, has just realized that retroactive social-security survivor benefits alone would cost its taxpayers hundreds of millions of dollars. There is a real problem of distributive justice here. How can one justify treating same-sex households like married couples when such benefits are denied to all the people in our society who are caring for elderly or disabled relatives whom they cannot claim as family members for tax or insurance purposes? Shouldn't citizens have a chance to vote on whether they want to give homosexual unions, most of which are childless, the same benefits that society gives to married couples, most of whom have raised or are raising children?

*Id.*

57. John O'Sullivan, *The Bells Are Ringing . . .*, NAT'L REV., Mar. 8, 2004, at 18.

58. David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15.

currently characterizes the debate. The consequences of same-sex marriage will be scrutinized and assessed within the jurisdictions that legalize it. While some critics see same-sex marriage as so morally abhorrent that even legalization in limited jurisdictions is unacceptable, the same could have been said of interracial marriage at a different point in history.[59] Experimentation at the state level proved that fears of calamitous consequences of interracial marriages were unfounded.[60] Conversely, states have not decided to replicate the isolated experiments with polygamy and incestuous marriages that have occurred at various times.[61] Clearly, then, federalism's processes of competitive innovation have enabled citizens to answer difficult moral questions in the past and the same will likely hold true for same-sex marriage.

Moreover, the asserted consequences of banning or legalizing same-sex marriage fit neatly into contemporary models of interjurisdictional competition. While most such models focus on economic competition by examining rival state fiscal policies, there is no reason to believe that this analysis will not apply equally well to issues of public morality. If competition is defined as "rivalrous behavior in which each government attempts to win some scarce beneficial resource or to avoid a particular cost," then state governments' desire to retain citizens and their tax dollars provides ample incentive to craft popular social policies.[62] Ronald C. Fisher

59. Throughout much of American history, interracial marriage was thought both morally repugnant and biologically dangerous. *See, e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 219 (2003) (stating that Virginia's antimiscegenation laws were enacted to prevent "abominable mixture and spurious issue").

60. Randall Kennedy notes that the repeal movement began slowly—sixty-four years elapsed between Ohio's repeal of its antimiscegenation law in 1887 and the next state's in 1951—but quickly gained momentum after that. By 1967, only sixteen states had such laws on the books. *Id.* at 258-59. It is true that federal court decisions in the mid-twentieth century also helped to eliminate the last vestiges of antimiscegenation laws, but, as Kennedy explains, there was little resistance to the decisions—a result that would be difficult to imagine had no state ever legalized interracial marriage and demonstrated the fallaciousness of the nineteenth century beliefs about its consequences. *See id.* at 278-79.

61. Polygamy was widespread in Utah in the nineteenth century. A series of federal laws enacted through the 1860s, beginning with the 1862 Morrill Anti-Bigamy Act, were ineffective in suppressing it due to lax enforcement. Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1322-23 (1998). Incestuous marriages of certain degrees, such as between cousins, are permissible in some states but against the public policy of other states. *See* Anita Y. Woudenberg, Note, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 VAL. U. L. REV. 1509, 1527 n. 112 (2004).

62. Daphne A. Kenyon & John Kincaid, *Introduction* to COMPETITION AMONG STATES

has identified the primary means by which governments are induced to act competitively: "(1) governments act to prevent the exit of individuals, firms, or tax base, (2) public officials seek to retain elected office, and (3) governments acquire information about other jurisdictions' actions."[63] If the consequences of legalization that opponents of same-sex marriage fear—breakdown in traditional morality, increasing sexualization of society, destruction of marriage as a revered institution, etc.—become a reality, elected officials will be induced, either by the exit of individuals to jurisdictions that have not legalized it or by public outcry, to reconsider and amend their policy choices. Similarly, if same-sex marriage does in fact bring greater stability to society and represses the "culture of contingency," the same competitive processes will induce non-legalizing states to expand their definitions of marriage.[64] In short, there is no reason to believe that states cannot behave as competitive market actors in creating innovative social policies or retaining venerable traditions. This conclusion strongly disfavors the enforcement of a uniform marriage policy on every state by the federal government.

Finally, and less intuitively, the adoption of the Musgrave Amendment would subtly erode states' ability to serve as a barrier against national tyranny. The danger lies in the imposition of moral homogeneity upon the states by the federal government. As Dailey notes, "federalism serves to defuse governmental tyranny over the moral autonomy . . . by preserving some measure of regulatory diversity at the state level. State authority destroys the national government's power to mold the moral identity of developing citizens in its own monolithic image."[65] While there is no need to embrace the libertarian abstraction that government should never create "moral" law, it is not too rash to argue that the *federal* government should not. Justice Harlan convincingly described this danger of a national moral law in his discussion of book-banning:

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AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 1 (Daphne A. Kenyon and John Kincaid, eds., 1991) [hereinafter COMPETITION AMONG STATES AND LOCAL GOVERNMENTS].

63. Ronald C. Fisher, *Interjurisdictional Competition: A Summary Perspective and Agenda for Research, in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS, *supra* note 62, at 261, 262.

64. *See, e.g.*, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage,* 68 S. CAL. L. REV. 745, 747 (1995) (suggesting that the first states to legalize same-sex marriage will experience a significant boost in tourism income from gay couples flocking to the state, which illustrates that even issues of public morality are subject to the competitive processes of federalism).

65. Dailey, *supra* note 48, at 1879.

> The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book.[66]

To adopt the Musgrave Amendment would be to take a small step towards an unnecessary and dangerous national moral uniformity. The "essence of political freedom" is "the right of choice."[67] Diffusion of law-making power ensures that one moral order will not be forced upon the entire nation.

The Musgrave Amendment, then, fails to comport with any of the fundamental rationales of the federalist system that reserves only limited powers to the national government. It would unjustifiably lessen citizens' utility by preventing states that prefer same-sex marriage from shaping their own moral practices, it would stifle innovation in family law by discouraging isolated experiments in new forms of marriage, and it would lead us perilously farther from localized moral decision-making by needlessly surrendering power to the federal government. In the context of the federalist model, the most convincing argument in favor of the amendment is that states are actually incapable of exercising authority over marriage law due to the United States Constitution's Full Faith and Credit Clause. I address this issue, which lies at the heart of the debate over the amendment, in the following section.

## IV. THE FULL FAITH AND CREDIT PROBLEM

### *A. The Public Policy Exception*

Proponents of the Musgrave Amendment claim that the legalization of same-sex marriage in one state, either through legislation or judicial fiat, will be forced upon all states through the Full Faith and Credit Clause.[68] Gay couples from Texas, the argument goes, will

66. Roth v. United States, 354 U.S. 476, 506 (1957) (Harlan, J., concurring in part and dissenting in part).

67. Howard, *supra* note 32, at 795.

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

wed in Massachusetts, and then return home and demand that Texas recognize their marriage.[69] If this scenario were to transpire, there would be some justification for a constitutional amendment to quiet the chaos that would arise from myriad conflict-of-law dilemmas.[70] Fortunately, Full Faith and Credit Clause jurisprudence almost uniformly supports the proposition that states will not be obligated to recognize the marriage status of same-sex couples who marry in other states.[71]

The language of the Full Faith and Credit Clause "is so sweeping as to make inevitable the existence of some exceptions to its literal command."[72] Such exceptions have been identified in a variety of contexts, one of which is "where the mandate of full faith and credit . . . give[s] way before the paramount interests of an individual state."[73] This principle has frequently been termed the "public policy exception" to the clause. The Supreme Court has outlined three broad approaches to determining what constitutes a valid exception—the "obnoxious" test, the "balancing" test, and the "sufficient contacts" test.[74] All three support the notion that states will not be required to recognize out-of-state same-sex marriages, particularly the sufficient contacts test, which has predominated in recent years.

In *Electric Light Co. v. Clapper*,[75] the Court explained that under the "obnoxious" test a state could decline to recognize another state's laws if it could demonstrate that they were repugnant to its own public policy. In his concurring opinion, Justice Stone went as far as

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69. In a speech on February 24, 2004, President Bush justified an amendment defining marriage as a union between a man and a woman by warning that states could be forced to recognize same-sex marriages from other states. *See* Chen, *supra* note 53.

70. In defining the sphere of congressional authority, Noah Webster wrote that

> [t]here are some regulations in which all the states are equally concerned—there are others, which in their operation, are limited to one state. The first belongs to Congress—the last to the respective legislatures. No one state has a right to supreme control, in any affair in which the other states have an interest, nor should Congress interfere in any affair which respects one state only. This is the general line of division . . . between the powers of Congress and the rights of the individual states.

Webster, *supra* note 21, at 45. By this conceptualization of congressional power, the dispositive issue is whether one state's definition of marriage will infringe upon the rights of other states to define marriage.

71. My analysis of the public policy exception is indebted to John P. Feldmeier, *Federalism and Full Faith and Credit: Must States Recognize Out-of-State Same-Sex Marriages?*, 25 PUBLIUS: J. FEDERALISM 107 (1995).

72. Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 178 (1949).

73. Feldmeier, *supra* note 71, at 112.

74. *Id.* at 113-14.

75. 286 U.S. 145 (1932).

to say that the Full Faith and Credit Clause "should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law."[76] Under this approach, the state-shopping same-sex couple scenario appears unlikely. A Texas statute that defined marriage in the traditional manner would preclude the Texas courts from recognizing a same-sex Massachusetts marriage.

The "balancing" test, as set out by the Court in *Alaska Packers Ass'n v. Industrial Accident Commission*,[77] is somewhat less conclusive in the context of same-sex marriage than is the "obnoxious test," but still strongly favors state autonomy in determining which classes of marriages to recognize. Justice Stone described the way in which the balancing approach limited the Full Faith and Credit Clause:

> [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.[78]

Here the judiciary assumes somewhat of an "arbitral function" in performing the choice-of-law calculus.[79] Although this test seems relatively straightforward, its application—the methodology for determining how much weight to assign each state's interest—obviously presents ambiguities. Still, the recognition of marriages seems to lean overwhelmingly towards the interest of the forum state, which likely provides various legal and tax benefits to married couples and which bears considerable responsibility for the moral climate of its territory. The foreign state in which the same-sex couple was married, conversely, has very little interest in the marriage once the partners have changed domicile. Although the Court has held that some legal relationships are so complex as to require substantial

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76. *Id.* at 164-65. The circumstances presented were the death of a Vermont citizen working for a Vermont company in New Hampshire and the question of whether a Vermont worker's compensation law applied. *Id.* at 151. The court ruled that it did largely because there was "no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire." *Id.* at 161.

77. 294 U.S. 532 (1935).

78. *Id.* at 547.

79. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 254 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978).

deference to the law of the state in which they were created,[80] such as that of a stockholder and a corporation,[81] it has not included marriage, a comparatively simple relationship, in this specially protected class.

More recently, the Court's adoption of the "sufficient contacts" test for Full Faith and Credit Clause problems in *Carroll v. Lanza* has favored expanded state autonomy.[82] Under this approach, "[i]f [the] parties to the action have sufficient contacts with the forum state, the forum state is seemingly welcome to disregard foreign law and apply its own."[83] In ruling that Arkansas was not compelled to apply a Missouri workers' compensation law to a Missouri employee injured on the job in Arkansas, the court severely curtailed the effect of the full faith and credit clause:

> Arkansas can adopt Missouri's policy if she likes. Or . . . she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury.[84]

In giving the states such wide latitude to disregard foreign forums' laws, the Court may have completely deflated the Full Faith and Credit Clause.[85] This narrow interpretation of the clause should calm fears of a flood of same-sex marriages spilling into traditionalist states from legalizing jurisdictions like Massachusetts. If the only measure is whether the parties to the action have sufficiently close contacts

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80. *Id.* at 255.

81. Converse v. Hamilton, 224 U.S. 243 (1912).

82. 349 U.S. 408 (1955).

83. Feldmeier, *supra* note 71, at 113.

84. *Carroll*, 349 U.S. at 413-14.

85. However, this narrow interpretation may be more in line with the Founders' intentions: "[I]t appears from the original draft of the clause, proposed to the Continental Congress in 1777, that the primary purpose of the clause was to facilitate debt collection for creditors." Feldmeier, *supra* note 71, at 110. Indeed, Madison's notes from the convention suggest that bankruptcies and collection of debts were foremost on the Founders' minds:

> Mr. Wilson and Dr. Johnson supposed the meaning to be that Judgments in one State should be the ground of actions in other States, and that acts of the Legislatures should be included, for the sake of Acts of insolvency &c.
>
> Mr. Pinckney moved to commit article XVI, with the following proposition, "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."

*Madison's Notes* (Aug. 29, 1787), *in* 2 1787: DRAFTING THE U.S. CONSTITUTION 1368 (Wilbourn E. Benton, ed., 1986).

with the forum state, then certainly a same-sex couple domiciled in the state would be subject to its laws.[86] Thus, the "sufficient contacts" test, like the "obnoxious" test and the "balancing" test, demonstrates that the Full Faith and Credit Problem identified as a primary rationale for the Musgrave Amendment is highly overstated and unlikely to come to fruition as certain states legalize same-sex marriage.

This conclusion is buttressed by a litany of judicial decisions on interstate recognition of marriages, which have generally held that public policies of the forum state that are highly antagonistic to a particular class of marriages will void them within the state's borders.[87] In *Metropolitan Life Insurance Co. v. Chase*,[88] the Third Circuit held that New Jersey was not compelled to recognize a District of Columbia common law marriage between two New Jersey residents because common law marriages were not valid in New Jersey and the couple secured their "marriage" in the District only through a brief visit. The court ruled that when the forum state

> has a strong public policy against the type of marriage which the parties have gone to another state to contract, [and the] policy is evidenced by a statute declaring such marriages to be void, the former state as the one most interested in the status and welfare of the parties will ordinarily look to its own law to determine the validity of the alleged marriage.[89]

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86. *See* Feldmeier, *supra* note 71, at 113. One can imagine hypothetical situations in which a same-sex couple does not have close contacts with the forum state. For instance, what if a couple driving through the state is involved in a car accident and one partner demands spousal hospital visitation rights? Still, the sufficient contacts test should assuage the primary concern about a states rights' approach to same-sex marriage: the possibility of couples temporarily moving to other states in order to get married and then returning to their home state.

87. 52 AM. JUR. 2D *Marriage* § 62 (2003).

> A state has the power to determine who may assume or occupy the matrimonial relationship within its borders, and, in this regard, a state legislature is competent to declare what marriages will be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who temporarily left the state of domicil for the purpose of avoiding its statute. Such effect as may be given by one state to the marriage laws of another state is merely because of comity, or because public policy and justice demand the recognition of such laws, and no state is bound by comity to give effect in its courts to laws which are repugnant to its own laws and policy. Thus, a marriage contract will be interpreted according to the law of the state of its making, so long as to do so will not violate the public policy of the forum state.

*Id.*

88. 294 F.2d 500 (3d Cir. 1961).

89. *Id.* at 503-04.

Other jurisdictions have also found that clearly expressed state policies forbidding certain classes of marriages qualify for the public policy exception.[90] In *Brinson v. Brinson*,[91] the Supreme Court of Louisiana declared that while principles of comity generally governed its recognition of foreign common law marriages, it was not bound to recognize a bigamous marriage consummated in bad faith since it violated the state's public policy and good morals.[92] In *Beddow v. Beddow*,[93] the Court of Appeals of Kentucky declared that because "the marriage of an idiot or a lunatic violates the fundamental public policy of this State," a foreign marriage to a man previously declared insane was void even though in the foreign state it was merely voidable.[94] The plainly discernable trend is that when states have clear public policies voiding a particular class of marriages, the Full Faith and Credit Clause does not control.

Particularly relevant to whether policies against same-sex marriage will fall under the public policy exception are cases involving interstate recognition of interracial marriage before the abolition of antimiscegenation laws and interstate recognition of polygamous and incestuous marriages. Although there were notable exceptions—in particular North Carolina[95]—most states with antimiscegenation laws refused to recognize out-of-state interracial marriages.[96] Even some progressive states that legalized interracial marriage nonetheless voided marriages by persons seeking solely to avoid their home state's laws.[97] Contrary to the allegations of Musgrave Amendment proponents, the record clearly shows that interstate recognition of interracial marriages was historically not mandated by the Full Faith and Credit Clause. The same is true of marriages that most people today continue to find objectionable. Forum states have often refused to recognize incestuous marriages permitted in other states (such as

90. *See* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 10 (1997) ("[S]tates have never been constitutionally prevented from withholding recognition from foreign marriages where those marriages violated their own strong public policies").

91. 96 So. 2d 653 (La. 1957).

92. *Id.* at 659.

93. 257 S.W.2d 45 (Ky. 1952).

94. *Id.* at 47-48.

95. *See* State v. Ross, 76 N.C. 242 (1877) (holding that although interracial marriage was "immoral," in the name of interstate comity, interracial marriage from other states should be recognized).

96. *See, e.g.*, State v. Bell, 66 Tenn. 9 (1872); Kinney v. Commonwealth, 71 Va. 858 (1878). For a brief summary of the cases, see KENNEDY, *supra* note 59, at 232-35.

97. KENNEDY, *supra* note 59, at 232.

marriages between aunts and nephews or first cousins) where they find they violate a clear public policy.[98] In such cases, the forum state typically must have a statute declaring the marriage void; a simple prohibition will not suffice.[99] Nonetheless, these examples indicate that in the area of marital relations the Full Faith and Credit Clause has not been read expansively and, even without a constitutional amendment, it is unlikely that states will be forced to recognize same-sex marriages.

The most direct way for states to inoculate themselves from same-sex marriages in other jurisdictions is to pass statutes that explicitly declare same-sex marriages void. Only a handful of states have such statutes, but many more have statutes that define marriage as a union of a man and a woman.[100] These pronouncements of public policy indicate the type of state interest necessary to satisfy all three of the Full Faith and Credit Clause tests.[101] For those states without such statutes, the state legislative process affords a simple way to address the matter that does not approach the complexities of amending the United States Constitution. Further problems could arise if states have existing statutes that compel recognition of all out-of state marriages,[102] but this too could also be addressed via modifications of existing laws. Finally, as I will argue in Section V, if an activist judiciary insists on reading the Full Faith and Credit Clause so expansively as to mandate interstate recognition, a limited amendment that constitutionalizes the public policy exception as it relates to same sex marriages, rather than the Musgrave Amendment's blanket prohibition on same-sex marriages, may be justified.

### *B. The Defense of Marriage Act*

The citizens of a state would have another line of defense if faced with a state judiciary intent on reading the Full Faith and Credit Clause inaccurately in order to compel national recognition of same-sex marriages. In response to the Supreme Court of Hawaii's landmark ruling that a ban on same-sex marriages violated the equal

98. 52 AM. JUR. 2D *Marriage* § 72 (2003).

99. *Id. See, e.g.*, Mazzolini v. Mazzolini, 155 N.E.2d 206, 209 (Ohio 1958) (holding that "a marriage between persons of a class that the statute simply says shall not marry is not void, in the absence of a declaration in the statute that such marriage is void").

100. Feldmeier, *supra* note 71, at 117.

101. *Id.*

102. *Id.* at 121.

protection component of the state constitution,[103] Congress passed the Defense of Marriage Act (DOMA),[104] which dictated that

> no State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.[105]

The Act also included a clause that defined marriage as a union of a man and a woman for the purposes of federal laws and regulations.[106] Even ignoring the Full Faith and Credit Clause jurisprudence, which appears to make the DOMA largely redundant,[107] and therefore assuming that states might be forced to recognize same-sex marriage from other states, DOMA conclusively stalls any such effort at interstate recognition.

Since the law's passage in 1996, however, there has been considerable debate over its constitutionality. Congress's power to enact it stemmed from the Effects Clause, which succeeds the Full Faith and Credit Clause: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[108] Kurt H. Nadelmann has argued that this provision was intended to allow congressional intervention in cases where states' interests clashed.[109] Edward Corwin, illustrating the meaning of the Effects Clause, contended that Congress could "describe a certain type of divorce and say that it shall

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103. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The court ruled that Hawaii's incorporation of the proposed Equal Protection Amendment into its own constitution afforded gender a "strict scrutiny" standard as opposed to the Supreme Court's "intermediate scrutiny" standard. It further found that denying same-sex couples marriage licenses constituted discrimination on the basis of gender. It remanded the cases with instructions that the government had to demonstrate a compelling state interest in banning same-sex marriages sufficient to overcome the presumption of unconstitutionality. *Id.* at 67-68.

104. Defense of Marriage Act, 104 Pub. L. No. 199, 110 Stat. 2419 (1996) (codified at 1 USC § 7; 1 USC Ch. 1; 28 USC § 1738C, and 28 USC Ch. 115 (2000)).

105. *Id.* § 2.

106. *Id.* § 3.

107. One scholar, in a critique of DOMA, argues that the recent trend in full faith and credit jurisprudence has been away from the public policy exception, and thus, that DOMA marks a distinct shift back towards it. Therefore, in addition to the "contacts" questions addressed later in this Comment, there may be other reasons to believe that DOMA does not merely codify the public policy exception. *See, e.g.*, Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J. L. & PUB. POL'Y 203, 215 (1997).

108. U.S. CONST. art. IV, § 1.

109. Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 80 (1957).

be granted recognition throughout the Union, and that no other kind shall."[110] One scholar, in an exhaustive review of the original understanding of the clause, has definitively asserted that that the Founders intended that Congress be empowered with enacting laws exactly like DOMA.[111] He has concluded that "the second sentence gives Congress the power to provide for the 'substantive' effect that state statutes shall have in other states—i.e., to provide a set of nationwide conflict-of-laws rules to govern the obligations of the states to enforce the statutes."[112] Critics of DOMA argue that reading the Effects Clause so as to enable Congress to "nullify" laws instead of merely giving them "effect" is an overly expansive interpretation that is contrary to the Founders' intentions.[113] In light of two hundred years of jurisprudence on the Full Faith and Credit Clause, however, it would be highly incongruous if states themselves could determine public policy exceptions to recognition of foreign laws, while Congress, which was imbued with a specifically enumerated power to regulate the manner in which foreign laws were to be given "effect," could not.[114]

The chief attack on DOMA has charged that it overrules the reigning "sufficient contacts" interpretation of the Full Faith and Credit Clause by allowing states to disregard any same-sex marriage, regardless of whether the couple has substantial contacts with the forum state, and that this exceeds the "minimum contacts" due process limitations outlined by the court in the line of cases from *International Shoe Co. v. Washington*[115] to *Asahi Metal Industry Co. v. Superior Court.*[116] Critics contend that "[e]ven if Congress has plenary authority to define the scope of full faith and credit, it cannot

110. CORWIN, *supra* note 79, at 255.

111. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act,* 32 CREIGHTON L. REV. 255, 391 (1998).

112. *Id.* at 264.

113. *See* Kelly, *supra* note 107, at 209.

114. A possible objection to this could be that since the Founders believed that familial law was reserved to the states, enabling states to determine public policy exceptions for marriage but denying that power to the federal government corresponds with the underlying rationales for federalism. The issue of recognition of foreign marriages, however, is not familial law per se, but rather a matter of interstate relations. Allowing states to determine public policy exceptions without any role for the federal government could lead to collective action problems in the same way that leaving states to regulate interstate commerce would. Clearly interstate relations are a matter of federal concern. *See supra* note 70.

115. 326 U.S. 310 (1945).

116. 480 U.S. 102 (1987). *See, e.g.*, Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority,* 97 COLUM. L. REV. 1435, 1447-49 (1997).

exercise that authority in ways that violate the due process rights of individuals."[117] Thus, even assuming Congress has power under the Effects Clause to mandate how states will receive foreign substantive law, it is constrained by due process not to arbitrarily apply the law of a forum that had nothing to do with the events giving rise to particular litigation.[118] To apply the marriage law of a state without sufficient contacts with the parties, the argument proceeds, would "offend 'traditional notions of fair play and substantial justice.'"[119] Because a public policy exception to the Full Faith and Credit Clause already exists, the only possible operative effect of DOMA would be to authorize states to disregard marriages in those situations in which they do *not* have sufficient contacts with the parties. This, critics argue, violates due process.

The problem with this critique is that it renders the Full Faith and Credit Clause nugatory. Such an expansive reading of "sufficient contacts" implies that the only situations in which states would be compelled to recognize foreign laws would be when due process concerns mandated it. This conclusion would effectively make the entire clause superfluous because all limitations on states would derive solely from due process requirements.[120] The full faith and credit mandate would entail no burdens on state action other than those already imposed by the *International Shoe* cases. The Effects Clause would be nullified as well since there would be no way for Congress to restrict the substantive laws that states must recognize—either the states could themselves refuse to recognize a law without any congressional authorization whatsoever or the states would have to recognize a law despite congressional approval of an exception. Under this approach, therefore, the Full Faith and Credit Clause and the Effects Clause would be completely subsumed in due process and cease to have any tangible impact.

The critique's flaw lies in its equation of the contacts required for choice-of-law jurisprudence with the contacts required for due process. In *Phillips Petroleum Co. v. Shutts*,[121] the Court ruled that

117. Koppelman, *supra* note 90, at 14.

118. *See id.* at 13.

119. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

120. Koppelman notes that "[t]he Court has held that full faith and credit does not impose any limitation on a state's choice-of-law distinct from the limitation of fundamental fairness imposed by the Fourteenth Amendment's requirement of due process." Koppelman, *supra* note 90, at 10-11.

121. 472 U.S. 797 (1985).

Kansas had personal jurisdiction over a plaintiff class but did not have sufficient contacts to apply its own state law.[122] In a previous case, *Allstate Ins. Co. v. Hague*,[123] Justice Stevens argued in a concurring opinion that a state could have a sufficient interest in a case to overrule a full faith and credit challenge, yet not have adequate contacts with one of the litigants to overcome due process.[124] Thus, the contacts necessary for full faith and credit and due process are not the same. Moreover, it is not so much that the two clauses require different *degrees* of contacts, but rather that they demand completely different *qualities* of contacts. The Full Faith and Credit Clause requires that the contacts evidence a state interest in the litigation, while the Due Process Clause aims to ensure basic fairness to the litigants. In any given case, the litigants could have adequate contacts for one and not the other.[125] Therefore, DOMA's operative effect is that it absolves states from recognizing foreign same-sex marriages in those cases in which the parties do not have satisfactory contacts for

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122. *Id.* at 821-23 (Stevens, J., concurring).

> Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair. . . .
>
> . . . .
>
> We therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members in this case, and reverse its judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate.

*Id.*

123. 449 U.S. 302 (1981).

124. Justice Stevens wrote:

> It may be assumed that a choice-of-law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to either litigant. I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction.
>
> The forum State's interest in the efficient operation of its judicial system is clearly not sufficient, however, to justify the application of a rule of law that is fundamentally unfair to one of the litigants. Arguably, a litigant could demonstrate such unfairness in a variety of ways. Concern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied.

*Id.* at 326-27. Justice Stevens thus indicates that the minimum contacts requirements for due process and full faith and credit are distinguished by type, rather than degree.

125. Concededly, in most cases the contacts required will probably be the same.

the purposes of the Full Faith and Credit Clause, but *do* have contacts sufficient for the due process "minimum contacts" standard of fair play. This analysis returns meaning to both the Full Faith and Credit Clause and the Effects Clause, and confirms the constitutionality of DOMA.[126]

Nonetheless, the Court has hinted at a trend towards equating the contacts required under the Full Faith and Credit and Due Process Clauses. In a footnote to the plurality opinion in *Allstate*, the Court stated that its analysis under both clauses was similar.[127] This gesture by the Court leaves DOMA in peril of a constitutional challenge. As argued below, due to this possibility it may be wise to codify the choice-of-law component of DOMA in a constitutional amendment.

Perhaps the worst fear of proponents of DOMA should be a rational basis challenge along the lines of *Romer* and *Goodridge*. The standard the Court employed in *Romer* does not reach the intermediate scrutiny that gender classifications command, but rather could best be characterized as "rational basis plus." The majority argued that a Colorado amendment prohibiting homosexuals from claiming minority status for the purpose of antidiscrimination laws did not "further a proper legislative end," but rather aimed "to make [homosexuals] unequal to everyone else."[128] Such arbitrary discrimination was inherently unconstitutional even though homosexuals as a group are not subject to special scrutiny. This requirement of a "legitimate" state purpose, coupled with the *Goodridge* court's finding that Massachusetts had no rational basis to ban same-sex marriages, could lay the groundwork for a constitutional attack on DOMA. For this reason, a constitutional amendment with significantly different language than the Musgrave Amendment may be warranted. What follows is an alternative amendment that, if enacted, would ensure that future debate about same-sex marriages takes place against a backdrop of federalism and state choice.

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126. This analysis is supported by a House Report that accompanied DOMA, which said that the law should not be read to violate any "constitutional compulsion." H.R. Rep. No. 104-664, at 30 (1996), *cited in* Ruskay-Kidd, *supra* note 116, at 1449. Furthermore, DOMA also acts as a shield against activist judiciaries that might rule that marriage recognition no longer falls within the public policy exception.

127. "This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause. In each instance, the Court has examined the relevant contacts and resulting interests of the State whose law was applied." 449 U.S. at 308 n.10.

128. Romer v. Evans, 517 U.S. 620, 635 (1996).

## V. A DIFFERENT PROPOSAL

A marriage amendment to the Constitution should accomplish two goals. First, it should preclude courts from ruling that the federal Constitution or state constitutions mandate the legalization of same-sex marriage. Second, it should codify the choice-of-law provision of DOMA so that it is beyond question that states will not be compelled to recognize foreign same-sex marriages.

A current amendment proposal addresses the first issue. Senator Orrin Hatch of Utah has introduced a more narrowly tailored marriage amendment that would allow states to determine the question of same-sex marriage themselves: "Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in this Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman."[129] This proposal appears to be more of a political compromise than a genuine recognition of federalist principles, as even Senator Hatch has stated that he favors the Musgrave Amendment.[130] Nonetheless, the language of the amendment is generally the prescription for overriding an activist judiciary while preserving federalist principles. State constitutions should however be included in the amendment's mandate.[131] After all, the primary means of sidestepping democratic choice on same-sex marriage has been by advocating radically different interpretations of *state* constitutions, as in *Goodridge* and *Baehr v. Lewin*.

In addition, the amendment should also address the choice-of-law issues. After all, it is easy to imagine an incensed judiciary turning to the Full Faith and Credit Clause to implement its social agenda. Therefore, despite the fact that the current full faith and credit jurisprudence plainly demonstrates that same-sex marriages should fall under the public policy exception, the choice-of-law clause of DOMA should be codified in the amendment. The central question would be what degree of contacts—substantial, minimum, or none—should be required to exempt states from having to recognize foreign same-sex marriages. Reasonable people could disagree about this, but

129. Editorial, *A Battle, Joined*, NAT'L REV., Mar. 22, 2004, at 15.

130. Carl Hulse, *Senate Hears Testimony on a Gay Marriage Amendment*, N.Y. TIMES, Mar. 4, 2004, at A26.

131. The drafters of the proposal may have been attempting to do this in the first sentence, but the inapplicability of current state constitutions to the issue should be made clear in the second sentence just as is done regarding the inapplicability of the federal Constitution.

that should not inhibit some version of a choice-of-law provision from being adopted.

There are a number of possible objections to this approach. First, some may worry that the inclusion of state constitutions would prevent states from ever legalizing same-sex marriage. This concern could be remedied through language that indicates that the amendment only applies to state constitutions at the time of ratification of the amendment. Thus, states could subsequently amend their constitutions to permit same-sex marriage. It may also be objected that the federal government has no business legislating interpretations of state constitutions. Two considerations counsel against this view. First, it is not unprecedented for the federal Constitution to interfere with the interpretation of state law—for example, the Fourteenth Amendment's equal protection provision. In practice, this proposed amendment would be less intrusive than the Fourteenth Amendment because it would dictate only how state constitutions at the time of ratification should be interpreted, whereas the Fourteenth Amendment creates inviolable constraints on state law. Second, this proposal is less intrusive than the Musgrave Amendment. It is the best compromise between restraining judicial activism and preserving the rights of states to write their own marriage law.

Another potential objection is that the definitional clause of the DOMA, in which marriage is defined in the traditional sense for the purposes of the federal government, is not incorporated into the amendment. The reason for this is simple: It is unnecessary to incorporate pre-existing law into the United States Constitution because its inclusion would prevent Congress and the regulatory agencies from recognizing same-sex marriages without having any additional impact on the judiciary. If future generations' attitudes about marriage change, there is no reason to force them to repeal an amendment in order to authorize federal recognition of same-sex couples. So long as there exists a federal law—DOMA—with a definitional provision, and the judiciary is checked by the amendment, there is no risk that democratic choice on this issue will be threatened.

In sum, Amendment XXVIII to the Constitution should read:

> Civil marriage shall be defined in each state by the legislature or the citizens thereof. No provision of this Constitution nor any provision of any state constitution in existence at the time of the ratification of this article shall be construed to require that marriage or its benefits be extended to any union other than that of

> a man and a woman. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State or a right or claim arising from such relationship.

Same-sex marriage is a difficult moral issue that arouses passion from both its supporters and opponents. This is all the more reason why we should avoid a quick solution that violates our founding principles and instead encourage states to endure the painful process of democratic deliberation.

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