

# Escaping the American Blot? A Comparative Look at Federalism in Australia and the United States Through the Lens of Family Law

William Buss<sup>†</sup> & Emily Buss<sup>††</sup>

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<sup>†</sup> O.K Patton Professor Emeritus, University of Iowa College of Law.

<sup>††</sup> Mark and Barbara Fried Professor of Law, University of Chicago Law School. Our thanks to William Baude, Jon Carlson, Rosalind Dixon, Ann Estin, Alison LaCroix, Todd Pettys, John Reitz, Kim Rubenstein, and David Strauss, and to participants at workshops at the Law Schools of the University of New South Wales and the University of Chicago and at the 2012 Midwest Meeting of the International Society of Family Law held at the University of Iowa College of Law for their invaluable comments on earlier drafts. Thanks also to the following students for their excellent research assistance: John Beatty, Amanda Escobar, Thomas Golson, Christopher Hinshaw, Monica Kim, Zachary Waldmeier, at the University of Iowa College of Law, and Haley Barton, Christine Bonomo, Sarah David, Nora Kahn, Joshua Mahoney, and Erim Tuc, at the University of Chicago Law School.

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## Introduction

In 2004, the Commonwealth Parliament of Australia amended its Marriage Act to codify the long-standing common law definition of “marriage” as “the union of a man and a woman to the exclusion of all others voluntarily entered into for life.” A decade earlier, the Congress of the United States had enacted the Defense of Marriage Act (DOMA), whose Section 3 provided that “in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.” There is nothing especially remarkable about two countries with a shared English common law tradition enacting similar laws close in time; however, the two countries’ distinct approaches to federalism in the area of family law make the coincidental passage of national laws on same-sex marriage striking and the federalism issues raised by the two statutes entirely distinct. Where the issue in the United States turned on the extent to which Congress could regulate in an area traditionally left to the states, the issue in Australia turned on the extent to which the Commonwealth Parliament’s constitutionally enumerated power to regulate marriage and divorce

restrained its own power, as well as that of the states, to recognize same-sex marriage.

In this Article, we trace the very distinct federalism issues that today surround the two countries' treatment of same-sex marriage back to the constitutional divergence put into place by the Australians in reaction to the United States' experience with divorce in the Nineteenth Century. We then follow the respective developments of the two countries' divorce law through to the present, and we consider the special problems encountered, and solutions developed, under the two countries' distinct family law federalism regimes. We end with a consideration of same-sex marriage, reflecting on how these different approaches to family law federalism have shaped, and continue to shape, the development of the law on this central social issue.

### I. Australia's Qualified Adoption of American Federalism

In 1890, a group of political leaders in the Australian colonies met in Melbourne to explore their possible mutual interest in creating an Australian constitution. In that conference and in the consequent constitutional conventions held in 1891 in Sydney and in 1897-98 in Adelaide, Sydney, and Melbourne,<sup>1</sup> it was clear that any constitutional system would have to be a federal system in which the colonies (Australia's future states) maintained considerable political autonomy within the framework of a national government.<sup>2</sup> A number of countries offered models for Australia to emulate, including Canada, which had a federal system with a written constitution within the unwritten British Constitution (as Australia would have). But Australia chose the United States as its primary model because the American Constitution seemed to shift less power to the national government and retain more for the states than Canada's Constitution did.<sup>3</sup> One of the Australian constitutional framers, Andrew Inglis Clark, was such an advocate for the American constitutional model that he brought to the 1891 Australasian Federal Convention a complete draft of a federal constitution that was expressly based in large part on the Constitution of the

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1. The Australian Constitution was developed and officially approved in several stages, starting with two separate "Australasian Federal Conventions." See JOHN M. WILLIAMS, *AUSTRALIAN CONSTITUTION: A DOCUMENTARY HISTORY* 134 (2005). The first convention, held in Sydney in 1891, produced a complete constitution that was never officially approved; the later convention, held in three separate locations between 1897 and 1898—Adelaide (1897), Sydney (1897), and Melbourne (1898)—built on the 1891 document. See *id.* at 31-33, 134, 411-12, 475-80, 496-98, 762-64, 794-803. After one unsuccessful referendum in 1898, followed by modifications by the colonial premiers, a second referendum was approved in 1899 by the Australian people; and, after further modifications by the British Parliament, that document (the "Australian Constitution Act") became effective on January 1, 1901 as a British Statute (as, in form, it remains) although Australia has been entirely independent since 1986. See *id.* at 1145, 1151, 1160-68.

2. See *id.* at 3.

3. See *id.* at 65, 66-67 (Clark's explanatory memo).

United States.<sup>4</sup> Complimenting the American Constitution more than the framers of the Australian Constitution, Sir Owen Dixon lamented that the Australian framers' fascination with the "incomparable" American constitutional model "damped the smouldering fires of their originality."<sup>5</sup>

In connection with marriage and divorce, however, neither Dixon's criticism of the Australian framers nor a general preference for decentralization held true. Sparked by what was perceived as the scandalous "blot" on the American Constitution, a "blot" which allowed American divorce law to vary substantially from state to state, the Australian framers rejected the American approach of leaving the regulation of the family to the states, and instead assigned power to regulate marriage and divorce to the Commonwealth Parliament. In its list of enumerated powers assigned to the Commonwealth Parliament and set out in Section 51, the Australian Constitution includes two provisions related to what, today, we call Family Law: Section 51 (xxi) covers "Marriage," and Section 51 (xxii) covers "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."<sup>6</sup> After briefly considering the broader structural context in which this divergence between the American and Australian approaches to family law were embedded, we explore the constitutional deliberations that ultimately led to this grant of federal power.

#### A. The Federalist Context of Family Law in Australia and the United States

In their basic federalist design, the United States and Australian constitutions have much in common. They each embrace a federal scheme of power sharing between nation and states, and these schemes have many similar attributes. First, under both constitutions, the national government gets only the legislative power expressly enumerated in the constitution or understood to be implied by the constitution.<sup>7</sup> Second, the states retain, as residual powers, those powers not granted to the Commonwealth Parliament or the American Congress,<sup>8</sup> and third, the states generally have concurrent power over the specified national subjects.<sup>9</sup> Fourth, if a state law is inconsistent with federal legislation in an area of concurrent power, the federal law takes precedence.<sup>10</sup> Fifth, both constitutions have been inter-

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4. *Id.* at 80-93. J. A. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 28 (1972).

5. Sir Owen Dixon, *The Law and the Constitution*, in JESTING PILATE 40, 44 (Severin Howard Zichy Woinarski ed., 1965).

6. AUSTRALIAN CONSTITUTION s 51 (xxi)-(xxii).

7. *Compare* AUSTRALIAN CONSTITUTION s 51, with U.S. CONST. art. I, § 8.

8. *Compare* AUSTRALIAN CONSTITUTION ss 107-08, with U.S. CONST. amend. X.

9. *Compare* MICHAEL COPER, ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION 165-66 (1987), with ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 390 (3d ed. 2006); see also Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo. Wash. L. Rev. 139, 145 (2001) (defining "concurrent regulatory jurisdiction").

10. *Compare* AUSTRALIAN CONSTITUTION s 109, with U.S. CONST. art. VI, cl. 2.

puted to give a power of judicial review to the courts, with final reviewing authority given to one supreme federal court authorized to interpret federal laws and to enforce the federal constitution, including the division between state and national power.<sup>11</sup> Sixth, both constitutions require that full faith and credit be given to “public Acts, Records, and judicial Proceedings” of every state,<sup>12</sup> and both include a legislative power to implement that obligation.<sup>13</sup>

These similarities are qualified by significant differences, however. On its list of legislative powers, the Australian constitution includes powers referred from the states,<sup>14</sup> creating an opportunity for state-to-federal power shifts that has no parallel in the United States Constitution. In connection with the power of judicial review, there are two important distinctions that bear on the implementation of federalism in the two countries. In the United States, the decentralization of power to the states is significantly limited by a robust Bill of Rights, which restricts state and local as well as national government power and, more particularly, by the Fourteenth Amendment, which added federal protection of basic civil rights to that of the states.<sup>15</sup> By contrast, the Australian Constitution has few individual rights protections, and those protections which it does have are often limited to restrictions on national power.<sup>16</sup> On the other hand, in Australia, state autonomy is qualified by the Australian High Court’s final decision-making power over state and local law,<sup>17</sup> whereas the United States Supreme Court has no such power.<sup>18</sup> Of course, enforcing and applying constitutional provisions depend in large measure on how the provisions are understood and interpreted, which in turn depends on the values and the culture of the country in which the interpreting body acts. Suffice it to say, with respect to American and Australian values and culture, much is shared and much is different.

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11. *Compare Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, 262, with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

12. *Compare AUSTRALIAN CONSTITUTION* s 118, with U.S. CONST. art. IV, § 1. The wording in the respective constitutions is not identical; Australia’s provision adds “laws” to those things to be recognized, and the recognition required is “throughout the Commonwealth,” whereas the required American Constitution requires that full faith and credit be given “in each state.”

13. *Compare AUSTRALIAN CONSTITUTION* s 51 (xxv), with U.S. CONST. art. IV, § 1, cl. 2.

14. *AUSTRALIAN CONSTITUTION* s 51 (xxxvii).

15. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1297-98, 1334-35 (3d ed. 2000).

16. See COPER, *supra* note 9, at 316-58; LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 567-95 (5th ed. 2008).

17. See *AUSTRALIAN CONSTITUTION* s 73; *Kable v. Dir. of Pub. Prosecutions* (1996) 189 CLR 51, 51 (limiting state regulation of state courts to keep consistent with federal courts). Inglis Clark’s biographers have suggested that the Commonwealth’s general power to review state law “in many ways . . . fills the gap left by the absence of Bill of Rights clauses such as those in the United States Constitution.” F.M. NEASEY & L.J. NEASEY, *ANDREW INGLIS CLARK* 139 (2001).

18. See DIXON, *supra* note 5, at 198-99; William Buss, *Alexander Meiklejohn, American Constitutional Law, and Australia’s Implied Freedom of Political Communication*, 34 *FED. L. REV.* 421, 432-33 (2006).

## B. Australia's Family Law Deliberations in the Shadow of American Federalism

Beginning with Clark's proposed draft constitution in 1891, each of the bills considered by the constitutional conventions included federal parliamentary power to regulate "Marriage and Divorce," and this power was not controversial until the debates at Sydney in 1897.<sup>19</sup> Within those wide-ranging deliberations, there was a broad consensus that the state of divorce law in the United States was something to be avoided.<sup>20</sup> The Australian framers were troubled by the proliferation of divergent standards among the American states and the manipulation and uncertainty of the law that ensued.<sup>21</sup>

While the framers appear to have shared their dislike of the American constitutional state of affairs concerning divorce, they took various positions in the Sydney debates on the proper role for the Commonwealth Parliament in the regulation of marriage and divorce.<sup>22</sup> Some favored Clark's original "Marriage and Divorce" language. At the other extreme were those framers who opposed assigning the Commonwealth Parliament any power over marriage and divorce. Finally, there were those who favored a proposal from the Tasmanian Assembly that would have limited the Commonwealth Parliament's power to the regulation of interstate recognition of marriage and divorce.<sup>23</sup>

The aim of those framers advocating national power over marriage and divorce was to secure uniform divorce law across the Commonwealth. "If there is one blot which stands out more than another in the American Constitution," one delegate contended, "it is that, by their Constitution, they are not able to deal with this question in a uniform way; and we all know that this has led to a condition of things socially of a most deplorable character."<sup>24</sup> To this, another delegate responded, "A scandal!"<sup>25</sup> Those opposed to a uniform national law focused on their fear that granting the Commonwealth Parliament authority over divorce would lead to a nationwide liberalization of divorce law because the two most populous and nationally powerful states, New South Wales and Victoria, had the most liberal divorce laws.<sup>26</sup> Uniformity, it was feared, would impose those lib-

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19. See Deb. of the Australasian Fed. Convention, Sydney, 22 Sept. 1897, 1077-82 [hereinafter SYDNEY CONVENTION DEBATES]; WILLIAMS, *supra* note 1, at 10, 144, 175, 223, 302, 422, 595 (describing the various stages of drafting the Australian Constitution).

20. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1077-82.

21. See *id.* at 1078-81 (Hon. R.E. O'Conner and Hon. Sir J.W. Downer).

22. See *id.* at 1077-82.

23. See *id.* (Bernhard Wise, Esq., and Hon. C.H. Grant).

24. See *id.* at 1080 (Hon. R.E. O'Conner).

25. See *id.* (Josiah Symon, Esq.).

26. See *id.* at 1077-81 (Patrick Glynn, Esq.) Patrick Glynn, on behalf of South Australia, made an impassioned speech against a national power to regulate divorce, pointing to a correlation between liberalized divorce laws and the frequency of divorces. Glynn's strongest case was New South Wales: between 1886 and 1890, there were 210 divorces while between 1891 and 1894, after divorce was rendered "exceedingly easy," there were 841 divorces. *Id.* at 1077-78.

eral laws on the states that wished to retain a restrictive approach to divorce.

The Tasmanian compromise proposal would have given the Commonwealth Parliament authority to make all states respect the marriages and divorces conferred by their sister states.<sup>27</sup> This law resembled, but did not purport to rely on, the Full Faith and Credit Clause that was already in the then-current draft of the Australian constitution.<sup>28</sup> The Tasmanian proposal was an attempt to find a middle ground. One of its supporters warned against “introducing into the constitution anything which is likely to cause a difference between the commonwealth and the states,” particularly with respect to an issue such as divorce “about which stronger differences of opinion may prevail” and which are not likely to be open to argument “because they are based on sentiment and tradition.” At the same time, this supporter noted the importance of the Commonwealth’s having sufficient authority “to prevent scandals from people having one marital status in one state and another status in another state.”<sup>29</sup> Clark, himself a Tasmanian and also the original Australian proponent of the nationalization of marriage and divorce, ultimately supported the Tasmanian compromise out of concern that a national consensus on divorce could not be achieved.<sup>30</sup>

Those arguing for uniformity of the laws in regard to marriage and divorce rejected the compromise and warned against repeating “the condition of things which has obtained in America.”<sup>31</sup> The advocates of uniformity prevailed at the convention, but the losers were correct in anticipating that the issue of divorce would continue to divide the states and that the new nation was not yet ready to reach consensus around a single law.<sup>32</sup> No significant Commonwealth law on marriage or divorce was enacted for more than fifty years.<sup>33</sup>

In sharp contrast with the treatment of marriage and divorce, the proposal to give the Commonwealth Parliament power to regulate “parental rights, and the custody and guardianship of infants” was presented to the

27. See *id.* at 1079 (Hon. Charles Grant).

28. See *supra* note 12 and accompanying text.

29. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1078-79, 1081 (Bernard Wise, Esq.) (drawing upon a memorandum written by Inglis Clark).

30. In the memorandum cited by Wise, see *supra* note 29, Clark noted that Canada had found it “impractical to legislate” a uniform national law of marriage and divorce. He stated that “it is very certain that the several colonies with liberalized divorce laws would strenuously resist change and that the colonies with conservative divorce law would similarly not yield their current position.” WILLIAMS, *supra* note 1, at 706.

31. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1080 (Hon. Richard O’Connor) (“[B]y [the American] Constitution, they are not able to deal with this question in a uniform way; and we all know that this has led to a condition of things socially of a most deplorable character”).

32. See *supra* note 29-31 and accompanying text.

33. See HENRY FINLAY, TO HAVE BUT NOT TO HOLD: A HISTORY OF ATTITUDES TO MARRIAGE AND DIVORCE IN AUSTRALIA 1858-1975, 286-361 (2005); COPER, *supra* note 9, at 199.

Australian framers for the first time in Adelaide on April 13, 1897.<sup>34</sup> In the subsequent debate on this provision in Sydney, a debate which followed the marriage and divorce debate, the argument against the parental rights provision centered on states' rights and "a decided objection . . . to any federal interference with what the people conceive to be matters most sacred in the family."<sup>35</sup> In this context, the counter argument for uniformity<sup>36</sup> did not prevail.

With respect to parental rights, the framers who favored state control stressed the unique ability of the states to be good decision makers because they were "on the spot. . . . [and t]hey [had] opportunities of inquiring into the relationship of the children and their parents, and into their condition if they [were] destitute and neglected."<sup>37</sup> The issue of special concern appears to have been the intrusion of the federal government into the relationship between parent and child,<sup>38</sup> rather than the allocation of authority between parents at issue in divorce proceedings—a distinction that roughly correlates with the modern distinction between public and private custody law.<sup>39</sup>

The leader of the 1897-98 convention and chair of the drafting committee, Edmund Barton, expressed concern about dividing authority to deal with marriage and divorce from authority "to legislate as to the children, the issue of the marriage."<sup>40</sup> Where a custody dispute arose in connection with a divorce or separation, he described the complication that would result for the judge administering "one law with respect to the issue relating to divorce," while the decree dealing with custody would "be under a totally different and varying law."<sup>41</sup> Striking a compromise between those who favored including authority over parental rights among the Commonwealth Parliament's powers and those who opposed such an authorization of power, a proposal by Barton eliminated the separate "parental rights" sub-clause and expanded the Marriage and Divorce sub-clause to give the Commonwealth power to regulate "marriage and divorce

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34. See Deb. of the Australasian Fed. Convention, Adelaide, 12 Apr. 1897, 439 (Edmund Barton, Esq.).

35. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1082 (Hon. Joseph Carruthers).

36. See *id.* at 1084 (Hon. John Downer) ("[W]hen we have given the most sacred of all relations—the relation of marriage—over to the commonwealth . . . it follows, as a matter of course, that we must [give parental rights over] to the commonwealth [so that it can] pass a uniform law").

37. See *id.* at 1084 (Hon. Charles Grant).

38. Those opposed to the parental rights provision contended that "the question of parental rights is one which opens up a very large range of questions," and warned that "[w]e may have all sorts of interference between parents and their children under [this] proposal." See *id.* at 1082 (Hon. Joseph Carruthers).

39. See THE LAW AND CHILD DEVELOPMENT xii–xiii (Emily Buss & Mavis Maclean eds., 2010) (explaining that private Family Law applies to relationships among private individuals, governing, for example, marriage and divorce, whereas public Family Law applies where the state has a more direct involvement, governing, for example the child protection system).

40. SYDNEY CONVENTION DEBATES, *supra* note 19, at 1083 (Edmund Barton, Esq.).

41. *Id.*



and, in relation thereto, parental rights and the custody and guardianship of infants.”<sup>42</sup> Even as Barton forged this compromise, he promised that “the other matters to which attention has been directed will be considered by the Drafting Committee.”<sup>43</sup> It is not clear whether the Drafting Committee ever did that.

What the Drafting Committee did do was change the substance of the provision by again dividing the agreed upon single sub-clause into two sub-clauses: one that addressed only “marriage,” and a second that introduced the technical concept of “matrimonial causes.”<sup>44</sup> For the first time in the evolving constitutional text, parental rights were linked only to divorce and matrimonial causes; they were not linked to marriage. The transcript of the convention debates records no discussion of the change in wording or the change in meaning resulting from leaving the single word “Marriage” alone in what became section 51(xxi), while making the subject of section 51(xxii) “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.”<sup>45</sup>

Thus, the framers of the Australian Constitution purported to avoid the “blot” on the American Constitution and the consequent scandal that came from leaving regulation of an important, morally laden, domestic relations issue to the several and diversely situated states. But they obviously achieved only partial uniformity. The unceremonious rejection of the Drafting Committee’s original parental rights proposal reveals how narrowly the framers viewed the problem that called for a nationally uniform solution and how grudgingly they allowed erosion of state autonomy. The Australian framers, inspired by America’s problematic experience with divorce, attempted a federalistic realignment focused narrowly on the problem of the day, rather than comprehensively working through the allocation of authority between state and nation in regulating family status.

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42. *Id.* at 1035–36, 1085 (proposing to eliminate the separate number designation of the parental rights sub-clause and to insert “and in relation thereto” after “marriage and divorce”).

43. *Id.* at 1085.

44. JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* (1901), *reprinted in* *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 611 (Legal Books 1995) [hereinafter QUICK & GARRAN]. Quick and Garran explain that the phrase “matrimonial causes” would cover those matters “subsidiary and consequential to marriage and divorce. They will naturally include judicial separation, restitution of conjugal rights, nullity of marriage, jactitation, damages against an adulterer, and probably maintenance of wives and children and marriage settlements.” *Id.* at 608.

45. In eventually approving these changes without considering their possible purpose or effect, the convention seemed implicitly to reject Josiah Symon’s argument that parent-children matters were “consequent upon marriage” and “might depend simply on marriage” and that, therefore, it might be better “to leave the subclause as it is and consider the matter further later on.” SYDNEY CONVENTION DEBATES, *supra* note 19, at 1083 (Josiah Symon, Esq.). *But see Attorney-General (Vic) v. Commonwealth (Marriage Act Case)* (1962) 107 CLR 529, 554 (vindicating Symon’s position by refusing to read section 51(xxii) as a limitation of section 51(xxi) and relying on the pervasive connections of marriage and parenting).

## II. The Development of Divorce under the Two Federalist Regimes

The stories of the development of divorce law in Australia and the United States over the course of the twentieth century are in some senses strikingly similar. Both countries inherited an English tradition of a right to travel manifested in their populations' actual mobility.<sup>46</sup> This mobility, in turn, led to interstate legal uncertainties, both about the right to travel to take advantage of another state's law, and about the obligation of another state to recognize and apply a sister state's divorce law. In 1900, in both countries, divorce was regulated by the states, and the diverging approaches taken among the states exacerbated uncertainties and related problems.<sup>47</sup> By 1980, both countries had developed a fairly uniform approach to divorce that reduced those problems considerably; this approach was no-fault divorce.<sup>48</sup>

But the difference in federalism design in the United States and Australia took the development of divorce law on different paths, paths that reveal some of the tradeoffs associated with their two approaches and that capture important shifts in their family law specific federalism designs that took place over time. In the United States, the development of its full faith and credit doctrine brought substantial stability and predictability to a state-based system of divorce regulation, even as the states diverged widely in their approaches to divorce. In Australia, stability and predictability around the issue of divorce was eventually achieved through the enactment of national laws, though these enactments introduced new problems because legal authority over various family law matters became awkwardly divided between state and nation. To some extent these problems of state-federal fragmentation have been addressed in Australia by shifting additional authority over family law to the Commonwealth Parliament through the referral power.

### A. The Twentieth Century Development of Divorce Law in the United States

The Australian framers had the American story basically right. By the mid-Nineteenth Century, divorce laws among the American states had diverged considerably on both the permissible grounds for divorce (still fault-based in all states) and on the period of in-state residency required to

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46. Jack P. Greene, *Introduction: Empire and Liberty*, in *EXCLUSIONARY EMPIRE: ENGLISH LIBERTIES OVERSEAS 1600-1900* 1, 3 (Jack P. Greene ed., 2010).

47. See FINLAY, *supra* note 33, at 288-89, 291; see generally *id.* at 102-284 (surveying the state regulation of divorce in Australia from the late 1800s to mid-1900s). See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 *WM. & MARY BILL RTS. J.* 381, 382-85, 387, 394, 419 (2007) (analyzing the evolution of divorce in the United States).

48. See Estin, *supra* note 47, at 391 n.72, 406; Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443, 1472 (1992). See BELINDA FEHLBERG & JULIET BEHRENS, *AUSTRALIAN FAMILY LAW: THE CONTEMPORARY CONTEXT* 119, 640 (2009); Richard Ingleby, *Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce*, 11 *L. & POL'Y* 1, 1, 10 (1989).

obtain a divorce.<sup>49</sup> People traveled out of state to obtain a divorce which they could not obtain in their home state, and when they returned, the validity of their divorce was sometimes challenged.<sup>50</sup> Many Americans, like the Australian constitutional framers, were scandalized by this state of affairs. By the time Australia was drafting its Constitution, a conservative American backlash inspired by a spike in the divorce rate and a growing concern about forum shopping led to the implementation of more restrictive divorce laws in many states, laws which limited access to divorce and prevented extra-territorial, “migratory divorces” from being recognized.<sup>51</sup>

At the same time as Australia granted its federal parliament authority to regulate divorce, there was a call in the United States for the enactment of uniform laws for marriage and divorce.<sup>52</sup> And year after year, through the first several decades of the Twentieth century, some member of Congress proposed a constitutional amendment that would give Congress authority to regulate marriage and divorce.<sup>53</sup> In one sense, the call for national uniformity looked identical to that of the Australian framers, based as it was on “the evils growing out of the diversity of the laws of the different States, and the different views taken by the several State courts as to proper grounds of jurisdiction in divorce cases [which] have been the subject of much discussion and much anxiety.”<sup>54</sup> However, in another sense, it was noticeably different: those opposed to liberalization drove the impetus for national uniformity in the United States on the assumption that a national law would be a more restrictive law.<sup>55</sup> This was because the first movers in the liberalization trend, including states such as Nevada, Indiana, and North and South Dakota,<sup>56</sup> were not, as in Australia, the populous states holding the majority of the United States’ population. Efforts to secure national uniformity can be understood as an attempt to unify the country’s laws around majority views in order to better resist the pressure coming from the outliers.

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49. See NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 80, 82, 117-19 (1962).

50. While migratory divorces received a great deal of attention and caused special legal problems, they represented a small percentage of the total divorces obtained. See, e.g., Ernest R. Groves, *Migratory Divorces*, 2 L. & CONTEMP. PROBS. 293, 293 (1935) (noting that those traveling out of state to seek a divorce represent a “small portion of those who seek release from marriage ties through court procedure”).

51. See Estin, *supra* note 47, at 390. In an effort to harmonize state laws around a more restrictive norm, conservatives also called for a cooperative state effort to promulgate uniform divorce laws. In 1907, the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed a uniform statute that denied recognition to any out-of-state divorce entered on grounds that would not be available in the forum state. Despite these efforts, few states signed on to the statute. *Id.* at 391.

52. See BLAKE, *supra* note 49, at 133.

53. See Edward Stein, *Past and Present Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L. Q. 611, 627, 638 (2004); see Estin, *supra* note 47, at 390.

54. Caroll Davidson Wright, Comm. of Labor, *A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867 to 1886* 11 (1897).

55. See BLAKE, *supra* note 49, at 130-31, 133.

56. See *id.* at 119, 122-23; see Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504-05 (2000).

While these efforts to nationalize the law of marriage and divorce did not succeed in the United States, they demonstrate two interrelated points that bear on our comparative analysis. First, these efforts demonstrate that there was some chafing under the United States's federalism design. That is, around the time of the Australian Constitutional founding, many Americans believed that the state-based system, at least as it applied to divorce, was a mistake. Second, in the face of this prevalent belief and the difficulty of constitutional amendment, the United States Constitution imposed a significant constraint on any attempt to move toward the national regulation of divorce.

Over the course of the next several decades, three interrelated trends overwhelmed efforts to contain the liberalization of divorce. The first trend was the increase in the actual divorce rate. The second was the expansion of grounds for divorce recognized by the states. The third trend was an increase in the interstate enforcement of other states' divorce judgments. We mention the first and second trends briefly, and then focus some attention on the third, as it bears most directly on our consideration of the United States' federalism design.

The rate of divorce in the United States increased slowly over the course of the first half of the twentieth century and then increased sharply between 1960 and 1980.<sup>57</sup> Although conventional wisdom would attribute this sharp increase to the change in the laws, there is at least as much empirical support for the opposite conclusion: that increasing divorce rates fueled divorce law reform.<sup>58</sup> While the primary direction of causation between these two trends is hotly contested, there is no dispute that the divorce rate began its sharp increase before the dramatic legal reforms occurred. To get around fault requirements, couples routinely fabricated evidence of cruelty and adultery. Bringing the law on the books in line with the reality of people's lives was in fact a central justification for

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57. While the divorce rate over the first half of the century increased from 4.1 divorces among 1000 married women in 1900 to 8.9 divorces among 1000 in 1958, there was a significant spike in divorce in the 1940s, climbing as high as 17.9 in 1000 in 1946 before falling back down. Between 1960 and 1980, the divorce rate rose steadily from 9.2 to 22.6 per 1000 married women, peaking at 22.8 per 1000 in 1979. U.S. Dep't of Health & Hum. Serv., Nat'l Ctr. For Health Stat., *Advance Report of Final Divorce Statistics*, 39 MONTHLY VITAL STATISTICS REPORT 1, 7 (1991), available at [http://www.cdc.gov/nchs/data/mvsvr/supp/mv39\\_12s2.pdf](http://www.cdc.gov/nchs/data/mvsvr/supp/mv39_12s2.pdf); U.S. Dep't of Health, Educ., & Welfare, Nat'l Ctr. for Health Stat., *100 Years of Marriage and Divorce Statistics: United States, 1867-1967*, 24 (1973), available at [http://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_024.pdf](http://www.cdc.gov/nchs/data/series/sr_21/sr21_024.pdf).

58. Compare Ira Mark Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341, 358 (1998), and Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM L Q. 1, 5 (2000), with Margaret F. Brinig and F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 339 (1998), and Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608, 620 (1998).

reform.<sup>59</sup>

Pressed by changes in society's attitudes about divorce, states began introducing grounds for divorce that lacked a basis in fault as early as the 1930s.<sup>60</sup> During this period, many states were acting as "laboratories for experimentation" with the law of divorce, while other states were learning from those experiments.<sup>61</sup> "Incompatibility" was added to New Mexico's list of grounds for divorce, and other states followed.<sup>62</sup> By 1950, nearly half the states allowed divorce when a couple had lived apart for a period of time, though those time periods could be as long as a decade.<sup>63</sup> But it was not until 1969 that the first state, California, substituted "irreconcilable differences" for its list of fault-based grounds for divorce, a step that was swiftly followed by several other states.<sup>64</sup> In the next ten years, most of the remaining states adopted some version of no-fault divorce and, by 1985, all had done so, though New York did not expand the availability of no-fault to "unilateral" divorce until 2010.<sup>65</sup>

### 1. *Full Faith and Credit*

Paralleling these developments in practice and substantive law was the Supreme Court's evolving interpretation of the Full Faith and Credit Clause.<sup>66</sup> Indeed, to a large extent, the story of interstate coordination of family law in the United States is the story of the Supreme Court's gradual development of the full faith and credit doctrine.<sup>67</sup>

As early as 1869, the Supreme Court determined that the Full Faith and Credit Clause required the District of Columbia to recognize a divorce decree validly entered in Indiana.<sup>68</sup> The Court reasoned that divorce decrees were judgments, and in earlier cases<sup>69</sup> it had made clear that states

59. See Friedman, *supra* note 56, at 1531 ("The experts kept trying to reform the official law, to make it conform to what they considered social realities. They wanted, naturally enough, to get rid of the perjury, the chicanery, and the lying.")

60. *Id.* at 1527, 1533.

61. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It 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.")

62. See Estin, *supra* note 47, at 394.

63. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 441 (2002).

64. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 176-77 (2011). During this period, the NCCUSL, which, early in the twentieth century had pushed unsuccessfully for restrictive divorce rules, drafted the Uniform Marriage and Divorce Act, embracing no-fault divorce based on a finding that a marriage was "irretrievably broken" in the eyes of one spouse.

65. *Id.* at 177-78.

66. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof").

67. Estin, *supra* note 47, at 396-406.

68. *Cheever v. Wilson*, 76 U.S. (9 Wall) 108, 123-24 (1869).

69. See, e.g., *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

were required, under constitutional and statutory full faith and credit provisions,<sup>70</sup> to give out-of-state judgments the same effect those judgments would be given in their states of issuance. “If a [divorce] judgment is conclusive in a State where it is rendered,” the Court declared in *Cheever v. Wilson*, “it is equally conclusive everywhere in the courts of the United States,” regardless of the place of marriage, the place of marital fault, or the domicile of the non-petitioning spouse.<sup>71</sup> By the end of the nineteenth century, other states widely recognized ex parte divorce decrees issued by a court in the petitioner’s state of domicile, with the exception of a few states that had especially strict divorce laws.<sup>72</sup>

But then in 1906, when the nationwide controversy over divorce in general and migratory divorce in particular was in full swing, the Supreme Court introduced a confounding qualification to its application of the Full Faith and Credit Clause in the context of divorce. The Court concluded that, where an ex parte petitioner’s domicile in the divorce-granting state was achieved through marital fault, other states had no obligation to recognize the divorce.<sup>73</sup> Thus, in *Haddock v. Haddock*, Mr. Haddock’s Connecticut divorce was found to have been validly ignored in New York, because his establishment of domicile in Connecticut was associated with his abandonment of his New York wife.<sup>74</sup> The Court did not question Connecticut’s

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70. There is a substantial body of scholarship acknowledging the uncertainty about whether and to what extent the Full Faith and Credit Clause was intended to create a self-executing obligation on the forum state to apply the law of a sister state or merely imposed an evidentiary obligation to recognize that the legal action in question had been taken in another state. See generally David P. Currie, *The Constitution and the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. CHI. L. REV. 867 (1985); David Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584 (2009); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998); Charles M. Yablon, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125 (2011).

The Supreme Court began eliminating that uncertainty in *Mills v. Duryee* when it held that the forum state was required to give the same effect to out-of-state judgments as they would be afforded in the state in which judgment was entered, emphasizing the Act of Congress implementing the Full Faith and Credit Clause. *Mills*, 11 US (7 Cranch) at 483-84 (explaining that, in the Act of 26th of May, 1790, ch. 11, “[C]ongress provided for the mode of authenticating the records and judicial proceedings of the state Courts, and then further declared that the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States as they have by the law or usage in the Courts of the state from whence the said records are or shall be taken”). This statutory interpretation was eventually incorporated into the Court’s interpretation of the constitutional language as well, affording special protection to out-of-state judgments, (or “judicial proceedings,” in the language of the Clause). See, e.g., *Chi. & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887); see generally, Whitten, *supra*, at 332-46.

71. *Cheever*, 76 U.S. (9 Wall) at 123.

72. *Estin*, *supra* note 47, at 387.

73. *Haddock v. Haddock*, 201 U.S. 562, 604-06 (1906).

74. *Id.*

authority to grant the husband's ex parte petition for divorce, as that was a matter of Connecticut state law, but it nevertheless allowed New York to refuse to recognize the decree based on its assessment of the husband's fault. Mr. Haddock was thus a divorced man in Connecticut but a married man in New York. In his dissent, Justice Holmes expressed his concern that the ruling was "likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of a lawful marriage;"<sup>75</sup> a concern shared by many critics of the *Haddock* opinion.<sup>76</sup>

So stood the constitutional law of Full Faith and Credit in the United States for the next several decades, complicated and confused by the question of marital fault. As the attitudes and laws governing divorce gradually shifted, however, the "rules and exceptions spawned by *Haddock* grew steadily more complicated,"<sup>77</sup> and the marital fault exception to the full faith and credit requirement was finally abandoned by the Court in 1942. In *Williams v. North Carolina (Williams I)*,<sup>78</sup> the Court determined that North Carolina was obligated by the Full Faith and Credit Clause to recognize Nevada's ex parte divorce decree, so long as the petitioning party had established domicile according to the law of the divorce-granting state. Thus, nearly a century later, the Supreme Court circled back to its position in *Cheever*, reading the Full Faith and Credit Clause to promote interstate clarity and consistency, without regard to interstate differences in divorce policy.

While this reading of the Full Faith and Credit Clause remains in force today, two new qualifications were introduced by the Court shortly after *Williams I* was decided. The first qualification, introduced in a subsequent stage of the litigation (*Williams II*) allows a state to avoid the enforcement obligation where it finds, based on a challenge brought by the divorce-opposing spouse, that the divorce-granting state did not have jurisdiction over the petitioner.<sup>79</sup> This is so, the Court explained, even where the divorce remains valid in the divorce-granting state because the decree is not subject there to collateral attack.<sup>80</sup> Thus, after *Williams II*, Mr. Williams, like Mr. Haddock, was divorced in one state (Nevada), but not in another (North Carolina). And this time Holmes's parade of horribles was not

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75. *Haddock*, 201 U.S. at 628 (Holmes, J., dissenting).

76. See Ernst Freund, *Unifying Tendencies in American Legislation*, 22 *YALE L.J.* 96, 108-09 (1912) (discussing how *Haddock*'s non-recognition would lead to undesirable confusion about the status of parties who are rightfully married in one State, and guilty of bigamy in another); see also *McCormick v. McCormick*, 107 P. 546, 550 (Kan. 1910) (explaining that the Kansas state legislature, for the "purpose of avoiding any possible disaster . . . caused by misapprehension of the doctrine," enacted legislation making divorce decrees in any U.S. state enforceable in Kansas).

77. Estin, *supra* note 47, at 389.

78. *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 302-04 (1942).

79. *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229-30 (1945). This qualification of the full faith and credit obligation was further limited to cases in which the non-petitioning spouse had not appeared. *Sherrer v. Sherrer*, 334 U.S. 343, 348-52 (1948).

80. *Williams II*, 325 U.S. at 233-34.

merely speculative: Mr. Williams and his new wife were convicted of bigamy in North Carolina.<sup>81</sup> Despite this troublesome consequence, there is a coherent rationale behind the *Williams II* qualification to the full faith and credit obligation. Where an individual travels to another state for the sole, “evasive,” purpose of obtaining a divorce that he could not obtain in his home state, he is in effect selecting the law of his choosing, and importing a legal status that is against the public policy of the state in which he lives. This sort of self-interested selection is particularly problematic if it conflicts with the interests of the other party, who is opposed to the divorce.

The second qualification to the full faith and credit obligation imposed on the states concerns the scope of the divorce judgment. Shortly after *Williams II*, the Supreme Court issued two decisions endorsing the concept of “divisible divorce,” under which the Full Faith and Credit Clause applied to the decree of divorce itself, but not to related orders concerning spousal support.<sup>82</sup> Divisible divorce ensured that an individual’s marital status remained clear and consistent across states, while protecting both the non-petitioning spouse’s interest in being heard and the state’s interest in resolving issues of its “dominant concern,” such as ensuring that its divorced domiciliaries not be left impoverished.<sup>83</sup> In a separate line of cases, the Supreme Court ruled that sister state child custody orders need not be enforced by a forum state as part of the sister states’ divorce decrees.<sup>84</sup> While these rulings rested in part on the distinct jurisdictional questions raised in the custody context,<sup>85</sup> full faith and credit was found, more generally, not to bar the reconsideration of custody orders which were in all states non-final orders. Because these custody orders could be revisited in the state of origin, the Court reasoned, another court could similarly revisit the order without thwarting its full faith and credit obligations.<sup>86</sup>

However justified this bifurcated approach was, it nevertheless perpetuated the problems of legal instability and uncertainty engendered by America’s state-based authority over the law of divorce. The need for interstate coordination of custody orders led to an attempt to develop uniform state laws and, ultimately, to the expansion of federal legislation implementing the Full Faith and Credit Clause to require interstate enforcement of custody orders.<sup>87</sup> Similarly, a uniform state law concerning the enforce-

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81. *Id.* at 226.

82. *Estin v. Estin*, 334 U.S. 541, 549 (1948) (“The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony”); see also *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

83. *Estin*, 334 U.S. at 547, 549.

84. See *May v. Anderson*, 345 U.S. 528, 533–34 (1953). See also *Kovacs v. Brewer*, 356 U.S. 604, 607–08 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613–15 (1947).

85. See *May*, 345 U.S. at 530–33.

86. See *Halvey*, 330 U.S. at 613–15; see also *Ford v. Ford*, 371 U.S. 187, 192 (1962).

87. The Uniform Child Custody Jurisdiction Act of 1968, which was adopted by all states in some form by 1981, was intended to ensure interstate stability for custody orders. However, continuing uncertainties caused by multiple states’ concurrent juris-



ment of child support orders was supplemented by a federal law directing states to enforce other states' child support orders;<sup>88</sup> that federal law, too, was grounded on Congress's constitutional authority to enact legislation implementing the full faith and credit obligation.<sup>89</sup> Notably, it is only in the area of family law that Congress has invoked its legislative authority under the Clause to ensure interstate coordination.<sup>90</sup>

By the last quarter of the twentieth century, nationwide support for liberalized divorce laws was manifest in their enactment and subsequent stability in all fifty states.<sup>91</sup> By leaving marriage and divorce to the states, and thus rejecting national uniformity,<sup>92</sup> the Americans did get the benefit of the state-based laboratories for experimentation. And at least with respect to divorce, which was the driving force for uniformity in Australia in 1897, the several states in the United States slowly but surely moved from widely divergent experiments to a consensus favoring no-fault divorce. Even judged by Australia's own standard, in the long run the American design produced a largely uniform law of divorce throughout the nation. But states achieved this rough uniformity with a great deal of help from both the federal courts, which enforced the states' obligation to give one another's decisions full faith and credit, and Congress, which, pursuant to the second sentence of the clause, expanded the reach of the full faith and credit obligation beyond that found to be required by the courts. And the state-to-state uniformity is still incomplete. Some state-to-state discrepancies remain in the detail of divorce law that could at least theoretic-

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diction to modify custody decrees under the Act led Congress to enact the Parental Kidnapping and Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A, which required states to give full faith and credit to the first state to enter a custody decree. Most states have subsequently adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which mimics the language of the PKPA. See *Child Custody Jurisdiction and Enforcement Act Summary*, THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS, <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Nov. 16, 2014).

88. See Laura W. Morgan, *Pre-Emption or Abdication? Courts Rule Federal Law Trumps State Law in Child Support Jurisdiction*, 24 J. AM. ACAD. MATRIMONIAL LAW. 217, 217-21 (2011).

89. See *id.*

90. In addition to the discussed enactments addressing child custody and child support, Congress has invoked its authority under the Full Faith and Credit Clause to compel interstate recognition of protective orders in the domestic violence context. 18 U.S.C. § 2265 (2014) (full faith and credit given to protection orders). Congress has also relied on the clause to compel state recognition of tribal judgments (in contrast to our statement about interstate (state-to-state) recognition), both in the child custody context and concerning non-family law matters. 25 U.S.C. § 1911 (2014) (providing for full faith and credit to tribal child custody proceedings); 25 U.S.C. § 2207 (2014) (providing for full faith and credit to tribal actions under tribal ordinances limiting descent and distribution of trust or restricted and controlled lands).

91. See Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 317 (2002); Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 CHILD. & DIVORCE 29, 34 (1994).

92. See Sylvia A. Law, *The Founders on Families*, 39 U. FLA. L. REV. 583, 586 (1987) ("Virtually nothing in the original [United States] constitutional debates directly addresses the situation of women and families").

cally encourage forum shopping and related legal instability.<sup>93</sup> A bit of America's nineteenth century "scandal" survives, albeit in a much weakened state.

#### B. The Twentieth Century Development of Divorce Law in Australia

Although the Commonwealth Parliament had the constitutional authority over marriage and divorce that the United States Congress lacked, it did not exercise that authority for several decades.<sup>94</sup> Two sorts of constraints, both anticipated in the Convention Debates, encumbered Australia's achievement of a national uniform law of divorce.

The first constraint imposed on the achievement of uniformity was political in nature. True to the prediction of those opposed to nationalizing the power over divorce, the enactment of a uniform divorce law proved to be politically controversial; indeed, it was too politically controversial to be pursued by the new Commonwealth government.<sup>95</sup> The other constraint on achieving uniformity was imposed by the framers themselves: in defining the scope of federal authority narrowly, with specific language ("marriage," "divorce," and "matrimonial causes") tied to the particular concerns of the day, the framers withheld from the Commonwealth Parliament authority over all family law issues not sufficiently related to those terms.<sup>96</sup>

In the absence of federal legislation in the first half of the twentieth century, the Australian states relied on their concurrent power to regulate divorce and progressed in much the same way as their American counterparts. Based on English law, divorce law in the Australian colonies originally provided only one ground for divorce, adultery, and required a woman seeking divorce to prove much more (repeated or aggravated acts by her husband) than a man had to prove (one incident by his wife).<sup>97</sup> At the time of the constitutional conventions in the last decade of the nineteenth century, those Australian states charged with making divorce "exceedingly easy"<sup>98</sup> had only added the fault grounds of desertion for three years, habitual drunkenness, and imprisonment (and, in the case of New South Wales, the equalization of the adultery standard for men and

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93. See *Williams v. Williams*, 61 Va. App. 170, 178-79 (Va. Ct. App. 2012) (refusing modification of a divorce decree entered in another state, and citing policy grounds against forum-shopping).

94. See ANTHONY DICKEY, *FAMILY LAW* 14 (5th ed. 2007).

95. See Henry Finlay, *Caught in a Time Warp*, *Australian Family Law: A Split Jurisdiction*, 19-20 (2000), <http://www.familylawwebguide.com.au/library/spca/docs/Caught%20in%20a%20Time%20Warp%20-%20Australian%20Family%20Law.pdf> (describing Tasmanian Senator Henry Dobson's introduction of the Matrimonial Causes Bill in the first Commonwealth Parliament, and the virulent backlash it inspired); Sir Garfield Barwick, *Some Aspects of the New Matrimonial Causes Act*, 3 Sydney L. Rev. 409, 411-12 (1961) (noting that the absence of legislation in the early days under the Constitution was anticipated by the convention debates).

96. See Augusto Zimmerman, *The Constitutionality of Same-Sex Marriage in Australia (and Other Related Issues)*, 27 BYU J. PUB. L. 465, 473-75 (2012).

97. Finlay, *supra* note 95, at 2-3.

98. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1077 (Patrick Glynn, Esq.).

women).<sup>99</sup>

Over the first several decades of the twentieth century, various states added several additional grounds, creating some of the inconsistencies and uncertainties that the framers had hoped to avoid with a national law.<sup>100</sup> But the interstate distinctions in divorce law, and the interstate conflicts they generated, were understood to be far less stark than those observed in the United States.<sup>101</sup> This lesser level of interstate conflict might account for the lack of any significant development of American-style full faith and credit doctrine as a means of addressing those conflicts.<sup>102</sup> Moreover, while there was some scholarly criticism of the Australian courts' failure to apply the full faith and credit doctrine to interstate divorce conflicts,<sup>103</sup> the significance of that omission was largely rendered moot when Parliament enacted the Matrimonial Causes Act of 1959 and the Marriage Act of 1961.

Under the Matrimonial Causes Act, the Commonwealth included all of the grounds for divorce that existed at that time, collectively, in all of the states. Nationalization was thus, at first, largely a pooling mechanism. Significant among those fourteen grounds was separation of five years or more with no reasonable likelihood of resuming cohabitation, a ground that had, before 1959, been recognized only in South Australia and Western Australia, and, as in the United States, was a clear step in the direction of no-fault divorce.<sup>104</sup> This initial legislation was enforced through the state courts, as there were no general federal courts (other than the High Court itself) at the time of its enactment.<sup>105</sup> Thus, even after the law was

99. Finlay, *supra* note 95, at 2-3.

100. *See id.* at 21.

101. *Harris v Harris* [1947] V.L.R. 44, 58. ("In Australia the substantive law and the procedure in matters of divorce differ among the States, but the differences are trifling in comparison with those which exist in the United States"); P.H. LANE, *THE AUSTRALIAN FEDERAL SYSTEM* 918 (2d ed. 1979) (highlighting the Victorian Supreme Court's conclusion in *Harris*); Zelman Cowen, *Full Faith and Credit, The Australian Experience*, 6 *RES JUDICATAE* 27, 46 (1953) ("In Australia [in contrast to the United States], although the bulk of divorce laws have been enacted by the several states, there are, at present, no diversities comparable to those existing in America").

102. *But see Harris v Harris* [1947] V.L.R. 44, 58. There, the Victoria Supreme Court seemed to apply the doctrine more strictly than the United States Supreme Court had done in *Williams II*, see *supra* note 79 and accompanying text. The decision triggered a debate on paper between the then Deans of Melbourne University Law School and Harvard Law School. Compare Zelman Cowen, *The Recognition of Foreign Judgments under a Full Faith and Credit Clause*, 2 *THE INT'L L. Q.* 21, 23-25 (1948), and Cowen, *Full Faith and Credit: The Australian Experience*, *supra* note 101, at 47-48, with Erwin Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees - A Comparative Study*, 65 *HARV. L. REV.* 193, 221-22 (1951).

103. *See* Cowen, *Full Faith and Credit: The Australian Experience*, *supra* note 101, at 27-29.

104. Finlay, *supra* note 95, at 21-22 ("The five year separation ground was the most noteworthy advance in the development of divorce").

105. *Id.* at 22-23; LESLIE ZINES, COWEN AND ZINES'S *FEDERAL JURISDICTION IN AUSTRALIA* 110-11 (3d ed. 2002); ENID CAMPBELL & H.P. LEE, *THE AUSTRALIAN JUDICIARY* 12-13 (2001). Parliament gave federal jurisdiction over these Acts to the state courts, pursuant to its power under sections 71 and 77(iii). This power was explained at the Melbourne sitting of the 1897-98 convention as a power designed to get "rid of the doubt that was raised in the United States." William G. Buss, *Andrew Inglis Clark's Draft Constitution*,

nationalized, state courts continued to oversee all divorce proceedings, potentially introducing some local diversity into the application of the federal law.

In 1975, the Commonwealth Parliament dramatically changed both the procedural and substantive law of divorce. With its establishment of the federal Family Court of Australia (FCA), Parliament shifted primary enforcement of national divorce laws from state to federal court.<sup>106</sup> At the same time as it accomplished this procedural shift, Parliament abandoned fault-based grounds for divorce altogether and adopted a no-fault federal substantive standard. Irretrievable breakdown as evidenced by a short period of separation became the national uniform standard for obtaining a divorce in Australia.<sup>107</sup> While some of the framers presciently anticipated the shift to national no-fault divorce,<sup>108</sup> this shift in the law did not occur until seventy-five years after the scandalous state of divorce in America inspired them to press for national power and six years after California became the first state in the United States to pass a nearly identical no-fault law.<sup>109</sup>

Australia and the United States transformed their divorce regimes into no-fault regimes at roughly the same time, but Australia's national legislation, true to its framers' vision, secured a national uniformity that preceded the emergence of the United States' nationwide consensus and, to this day, exceeds the level of uniformity achieved through that consensus in the United States. Moreover, by establishing the Family Court of Australia, Parliament encouraged the uniform interpretation of its national law throughout the country.<sup>110</sup> These changes in substantive and procedural

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and the Assist from Article III of the Constitution of the United States, 33 MELB. U. L. REV. 718, 734-39 (2009).

106. See CAMPBELL & LEE, *supra* note 105, at 13. . The Family Court of Australia is a Chapter III federal court created by the Commonwealth Parliament under section 71, with judicial independence provided under section 72(ii) and (iii). *Family Court of Australia Background*, FAMILY COURT OF AUSTRALIA, <http://www.familycourt.gov.au/wps/wcm/connect/FCoA/home/about/FCoA/> (last visited Feb. 10, 2015); AUSTRALIAN CONSTITUTION ss 71, 72(ii), (iii). No such court exists in the United States. While one could be created under Article III, Section 1, its jurisdiction (and thus its justification for existing) would be severely limited by the general lack of enumerated federal legislative power over family law matters. U.S. CONST. art. III, § 1.

107. See Finlay, *supra* note 95, at 24-25; *Family Law Act 1975* (Cth) ss 48-49 (Austl.).

108. For example, Charles Grant said it would be "intolerable" for spouses who cannot maintain friendly relations to "be compelled by law to make a semblance of doing so, and both lives be in effect wasted." SYDNEY CONVENTION DEBATES, *supra* note 19, at 1080 (Hon. Charles Grant); see *id.* at 1078 (Hon. Isaac Isaacs) ("These laws [complained about by Glynn] were introduced for the purpose of separating people who were not suited to each other"); see *id.* at 1081 (Hon. John Downer) ("I can understand the position of those who say there should not be divorce from any cause at all; but all that is past and gone, and we will not allow the domination of any church to interfere with these relations").

109. Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3314-51 (codified as amended at Cal. Civ. Code ss 4000-5100 (West 1983 & Supp. 1987)).

110. This uniform interpretation is potentially qualified by the continuing, though limited, jurisdiction of state court enforcement of federal family law, jurisdiction that is currently present only through the Family Court of Western Australia and subject to review by the Family Court of Australia. *International and Constitutional Settings-The*

law went a long way in establishing uniform federal family law in Australia. But, in creating greater national uniformity in the law of marriage and divorce in particular, the Commonwealth Parliament opened a divide between state and federal family law more generally.

We know from the convention debates that the framers did not intend to make all of what came to be known as “family law” a national subject.<sup>111</sup> We know, also, that while Sir Edmund Barton, as chair of the drafting committee, anticipated that further attention was required to determine how to strike the proper balance between state and national power in this area, there is no evidence in the record of any such further attention.<sup>112</sup> The regulation of family law in Australia was thus divided between the federal government for matters covered by sections 51(xxi) and (xxii) and the state governments for everything else.<sup>113</sup> When the Commonwealth enacted the Family Law Act (“FLA”) in 1975, the Act’s ambitious title belied the constitutional limits imposed on Parliament’s authority. To avoid finding that some parts of the law were unconstitutional, the High Court “read down” both (1) provisions defining “children of the marriage” to apply only to genetic and adopted children of both parties to the marriage, and (2) provisions covering property of one or both married parties to cover only those disputes in which the property claim was tied to a divorce or decree of nullity.<sup>114</sup>

After 1975, disputes concerning the common children of married couples were covered by the FLA and resolved by the Family Court of Australia, whereas disputes concerning step-children or children born to unmarried couples were covered by state law and adjudicated in state courts.<sup>115</sup> Similarly, property disputes directly tied to a couple’s marriage or divorce were adjudicated under the FLA by the Family Court of Australia, whereas other property disputes, including some disputes between a married couple as well as those involving unmarried couples and third parties, were tried under state law in state courts.<sup>116</sup> It was hard enough that different federal and state laws applied to these closely related sets of issues when a family’s entire dispute could be tried in one court or the

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*Context for Reform*, AUSTRALIAN LAW REFORM COMMISSION, <http://www.alrc.gov.au/publications/2.%20International%20and%20Constitutional%20Settings%20%E2%80%94%20The%20Context%20for%20Reform/constitutional-fra#> (last visited Dec. 3, 2014).

111. See *supra* notes 34–45 and accompanying text.

112. See SYDNEY CONVENTION DEBATES, *supra* note 19, at 1083 (Hon. Edmund Barton).

113. AUSTRALIAN CONSTITUTION, s 51 (xxi), (xxii).

114. See generally FEHLBERG & BEHRENS, *supra* note 48, at 24–27 (summarizing the High Court’s holding in *Russell v. Russell* (1976) 134 CLR 495, along with subsequent case history).

115. *Id.* at 32–33; DICKEY, *supra* note 94, at 26–27. See also COPER, *supra* note 9, at 198–99 (“No rational scheme would contain the fragmentation of jurisdiction which presently exists in Australia in relation to family law and industrial law. In the area of family law, a custody dispute between the parties to a marriage is a matter of Commonwealth law in relation to a natural child of the marriage but is likely to be a matter of State law in relation to a step-child, although both children are part of the same household.” (citing *R v Cook*; *ex parte C* (1985) 156 CLR 249)).

116. See FEHLBERG & BEHRENS, *supra* note 48, at 26–27; DICKEY, *supra* note 94, at 27.

other. Considerably worse were circumstances under which families were forced to litigate different portions of their dispute in different courts. This was the case, for example, where a family sought parenting orders for multiple children, some of whom were the genetic or adopted offspring of both members of the marital couple and some of whom were not.<sup>117</sup> It was also the case for many multi-faceted property disputes between separating couples.<sup>118</sup> It remains the case today for familial disputes that implicate both private divorce law and public child protection law, and for many parentage issues implicating adoption and assisted reproductive technologies.<sup>119</sup>

### 1. Shared Court Jurisdiction

Australia attempted to address federal-state jurisdictional fragmentation and to coordinate the application of fragmented substantive law by conferring shared jurisdiction on state and federal courts. Chapter III (Australia's equivalent of America's Article III) confers on the Commonwealth Parliament the power to give state courts federal jurisdiction to enforce federal law.<sup>120</sup> As noted, this power was employed throughout the nation during the period between the enactment of early national legislation covering marriage and divorce in 1959 and 1961 and the creation of the Family Court of Australia in 1975,<sup>121</sup> and it continues to be employed in Western Australia today.<sup>122</sup>

Australia also attempted to consolidate state and federal matters, including, but not limited to family law matters, in the federal courts. The

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117. See FEHLBERG & BEHRENS, *supra* note 48, at 33.

118. See *id.* at 26-27.

119. See *id.* at 86-98, 289-91; Fiona Kelly & Belinda Fehlberg, *Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection*, 16 INT'L J. OF L., POL'Y, FAM. 38, 40 (2002). It is worth noting that state-federal divisions are not the only source of court-to-court fragmentation. Within each of the American states, we see some version of the Australian division between private domestic relations proceedings and public abuse and neglect proceedings, as well as the problems that division creates. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm With Caution*, 40 FAM. CT. REV. 435, 435-36 (2002) (describing the unified family court movement in the United States, which seeks to bring all matters touching family law issues into one unified state court). Addressing this sort of fragmentation problem does not implicate the constitutional constraints associated with federal-state power sharing, but these examples of parallel intrastate fragmentation serve as a reminder that the problem is not simply a federalism problem.

120. AUSTRALIAN CONSTITUTION ss 71, 77 (iii). Although Congress lacks this authority to give state courts federal jurisdiction, American state courts have ample authority to decide federal issues under their state jurisdiction. See Buss, *supra* note 105, at 734-39. Australian state courts (like American state courts) also have such authority to decide federal law issues under a jurisdiction which "belongs to . . . the courts of the States," when federal jurisdiction is neither granted nor precluded. AUSTRALIAN CONSTITUTION s 77(ii) & (iii); see also ZINES, *supra* note 105, at 235-38.

121. See *supra* text accompanying note 105.

122. DICKEY, *supra* note 94, at 95-96. The FLA offers this option, on the condition that these state "family" courts are modeled after the Family Court of Australia, with informality and procedures conducive to the solution of family controversies. *Family Law Act 1975* (Cth) s 41. Western Australia is the only state that chose this approach. DICKEY, *supra* note 94, at 95-96.

most expansive version of this approach was pursued under the doctrine of cross-vesting, which the High Court ultimately found to violate the Australian Constitution.<sup>123</sup> After cross-vesting became unavailable, a federalism principle that had always been available received more attention and, perhaps, more use in family law cases.<sup>124</sup> Under accrued jurisdiction (“supplemental” or “pendent” jurisdiction in the United States), the inseparability of state and federal issues justifies federal courts in exercising jurisdiction over state law issues closely aligned with matters that provide the basis for federal jurisdiction under section 75 or 76 of the Australian Constitution. However, accrued jurisdiction includes only some of what would have been brought within federal jurisdiction under the cross-vesting legislation because it requires a relatively tight interconnection between the state and federal claims.<sup>125</sup>

## 2. *Referrals from State to Federal Authority*

There is little indication that the jurisdictional mechanisms discussed in the previous section had more than a modest effect on the ability of courts to consolidate adjudication of related family law matters. Moreover, putting state family law and federal family law in the same courts did not change the fact that there are two distinct bodies of substantive law to be adjudicated as well as differences in the laws among the various states.

To reduce fragmentation in substantive family law and related jurisdictional authority, Australia invoked its “referral power” to expand the federal Parliament’s authority to enact uniform federal law. This provision adds to other Commonwealth powers under section 51 the power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.<sup>126</sup>

To American eyes, this subsection is extraordinary.<sup>127</sup> It provides the basis

123. See *Re Wakim; ex parte McNally* (1999) 198 CLR 511 (holding that federal jurisdiction was limited to “matters” specified in sections 75 and 76 of Chapter III of the Australian Constitution); see also ZINES, *supra* note 105, at 154–55.

124. See FEHLBERG & BEHRENS, *supra* note 48, at 71 (“Given the impact of *Re Wakim* in narrowing the FCA’s jurisdiction, it was not surprising that soon after the HCA’s decision, positive views regarding the existence of the FCA’s accrued jurisdiction began to surface in first-instance FCA decisions”); see Zines, *supra* note 105, at 140, 155.

125. See ZINES, *supra* note 105, at 137–47 (explaining accrued jurisdiction); see also *id.* at 148–49 (explaining associated jurisdiction). The High Court found that this jurisdictional device gives the Family Court jurisdiction over some state law matters despite its striking down of the cross-vesting provisions. See *Re Wakim; ex parte McNally* (1999) 198 CLR 511; see also ZINES, *supra* note 105, at 145.

126. AUSTRALIAN CONSTITUTION s 51(xxxvii).

127. Cf. *New York v. United States*, 505 U.S. 144, 154 (1992) (“Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials”). *But see* U.S. CONST. art. 1, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another state”); *New York v. United States*, 505 U.S. at 163 (White, J.,

for unlimited expansion of federal power, subject to the states' agreement. Such a referral has the effect of adding the referred power to the Commonwealth Parliament's legislative power just as if the Constitution itself contained the words of the referral as a subsection of section 51.<sup>128</sup> As with other parliamentary legislative powers under section 51, a state retains concurrent power over a referred matter, but any inconsistent legislation by a referring state would be invalid to the extent of the inconsistency.<sup>129</sup>

A referral is not something done lightly. Interstate and state-federal distrust and the concern of state government officials that referrals would be used to aggrandize the Commonwealth Parliament's power at the expense of the states long constrained the use of referrals.<sup>130</sup> Expanding federal power via referral is limited by the fact that only the referring state can be subject to the resulting federal legislation, and when more than one state refers, each is bound only to so much of the resulting federal legislation as conforms to that state's referral. Complicated negotiations are therefore likely required to bring all or most of the states into agreement, and to ensure that the Commonwealth Parliament is receptive to the referral of power, as proposed by the states.<sup>131</sup> This source of power is further limited by states' potential ability to revoke their referrals.<sup>132</sup> For all these

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dissenting). See also Cheryl Saunders, *Cooperative Arrangements in Comparative Perspective*, in *THE FUTURE OF AUSTRALIAN FEDERALISM: COMPARATIVE AND INTERDISCIPLINARY PERSPECTIVES* 414, 428-29 (Gabrielle Appleby et al. eds., 2012); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 *TEXAS L. REV.* 741, 741-43 (2010).

128. For this reason, some Australian framers objected to the provision as an inappropriate circumvention of the demanding requirements for amending the Constitution. See Deb. of the Australasian Fed. Convention, Melbourne, 27 Jan. 1898, 217-18 (Dr. John Quick) [hereinafter *MELBOURNE CONVENTION DEBATES*]; *id.* at 224 (Mr. Frederick Holder); *id.* at 225 (Mr. Patrick Glynn).

129. *AUSTRALIAN CONSTITUTION* s 109.

130. See Graeme A.R. Johnson, *The Reference Power in the Australian Constitution*, 9 *Melb. U. L. Rev.* 42, 42-50 (1973); see also GEOFFREY SAWER, *AUSTRALIAN FEDERAL POLITICS AND LAW: 1901-1929* 145 (1956).

131. See Justice R.S. French, *The Referral of State Powers—Cooperative Federalism Lives*, 31 *U. W. AUSTRAL. L. REV.* 19, 28 (2003) (describing the “convoluted negotiations and game playing that went on prior to” the adoption of the Corporation Act based on the Referral Power); Rosemary Owens, *Unfinished Constitutional Business: Building a National System to Regulate Work*, 22 *AUSTRAL. J. LAB. L.* 258, 276-82 (2009) (describing the difficult process of negotiations for a national system of workplace regulation, with resistance coming from New South Wales and, at least for the time being, culminating in Western Australia's bailing out when its Labor Government was voted out of office); Ross Anderson, *Reference of Powers by the States to the Commonwealth*, 2 *U. W. AUSTRAL. ANN. REV.* 1, 3 (1951); Johnson, *supra* note 130, at 46-58.

132. State referrals are widely assumed to be revocable, although the issue is far from settled. Compare Andrew Lynch, *After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51* (xxxvii), 32 *Sydney L. Rev.* 363, 381-84 (2010), Johnson, *supra* note 130, at 69-75, and “Senex,” *Commonwealth Powers Bill—A Repletion of opinions*, 16 *AUSTRAL. L. J.* 323, 327 (1943), with French, *supra* note 131, at 33. According to Anne Twomey, the repeal of a referral on the basis of which Commonwealth legislation had been enacted would be invalid under section 109 of the Constitution; Lynch has argued to the contrary that section 109 would not apply because the state's decision to revoke legislation and the Commonwealth's referral-based legislation concern two different subjects. Compare ANNE TWOMEY, *THE CONSTITUTION OF NEW SOUTH WALES* 810 (2014), with Lynch, *supra*, at 382. See also Cheryl Saunders, *A New Direction for Intergov-*



reasons, the referral power was written off by one scholar only two decades ago as a dead letter.<sup>133</sup>

Notwithstanding the significant encumbrances associated with this mechanism as a means of expanding uniform national authority, the use of referrals has, contrary to prediction, intensified in recent years;<sup>134</sup> in family law alone, two major legislative enactments—concerning children and de facto relationships—rest upon state referrals.<sup>135</sup> The first of these extended the scope of the federal parliament's powers to include issues related to "ex-nuptial" (non-marital in U.S. terms) children.<sup>136</sup> This referral added an important missing piece to the federal government's authority to assign parental responsibility under the Family Law Act—an added authority which the Commonwealth Parliament swiftly exercised.<sup>137</sup> The second major family law referral gave the Commonwealth Parliament authority over the post-separation claims of de facto partners.<sup>138</sup> The federal legislation authorized by this second referral has brought Australia up to, but not through, the door of same-sex marriage recognition, a threshold to which we return in Part III.

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*ernmental Agreements*, 12 PUB. L. REV. 274, 282 (2001); W.A. WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 171-72 (5th ed. 1976). It seems to be conceded, however, that referrals may be for a fixed period or revocable on the basis of a specified event. See *R v Pub. Vehicles Licensing Appeal Tribunal* [1964] 113 CLR 207, 226 (Austl.); see also Lynch, *supra*, at 384 (noting that referrals are now habitually self-limiting). The fate of Commonwealth legislation enacted on the basis of a withdrawn referral or on the expiration of a self-limiting referral is still unsettled. See Lynch, *supra*, at 384-85; TWOMEY, *supra*, at 811; "Senex," *supra*, at 326; French, *supra* note 131, at 33. See also MELBOURNE CONVENTION DEBATES, *supra* 128, at 218 (Dr. John Quick) (asserting that if revocation is possible, then confusion and uncertainty would result); *id.* at 218 (Mr. Edmund Barton) (discussing when repeal by state is not available); *id.* at 219 (Mr. Josiah Symon) (discussing if referral acted on resulting legislation, then it could not be interfered with by the state); *id.* at 220 (Mr. Isaac Isaacs) (agreeing with Mr. Symon); *id.* at 223 (Mr. George Reid) (agreeing with Mr. Symon and Mr. Isaac by implication); *id.* at 225 (Mr. Patrick Glynn) (discussing how state might, by referral, deprive itself of the right of appeal).

133. Greg Craven, *Death of a Placitum: the Fall and Fall of the Reference Power*, 1 Pub. L. Rev. 285, 286 (1990).

134. See Lynch, *supra* note 132, at 363, 366, 369. See, e.g., *Corporations Act 2001* (Cth) s 4 (Austl.); *Criminal Code 1995* (Cth) s 100.2, 100.3 (Austl.); *Fair Work Act 2009* (Cth) s 30B, 30L (Austl.).

135. See FEHLBERG & BEHRENS, *supra* note 48, at 32-35; DICKEY, *supra* note 94, at 38-40; ALTOBELLI, *FAMILY LAW IN AUSTRALIA: PRINCIPLES AND PRACTICE* 54-55 (2003); Dorothy Kovacs, *A Federal Law of De Facto Property Rights: the Dream and the Reality*, 23 AUSTRAL. J. FAM. L. 104, 114 (2009); Hon. J. Gary Watts, *The De Facto Relationships Legislation*, 23 AUSTRAL. J. FAM. L. 122, 122 (2009).

136. Significantly, the terms of the referring acts from the participating states (all states other than Western Australia), are essentially the same. See, e.g., *Commonwealth Powers (Family Law-Children) Act 1986* (NSW) s 3 (Austl.).

137. *Family Law Amendment Act 1987* (Cth) (Austl.).

138. See *Commonwealth Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) No. 115 sch 1 (Austl.). Again, the referring state laws (except for Western Australia, which referred only superannuation matters) are in substantially similar terms. See, e.g., *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) ss 1, 3. See also Jenni Millbank, *The Changing Meaning of "De Facto" Relationships*, 4 (Sydney Law Sch. Research Paper No. 06/43, 2006) (noting the change in the name from "De Facto Relationships Act" to "Property (Relationships) Act").

Australia's use of its referral power to consolidate its family law can best be understood in connection with the jurisdictional developments discussed above, as, together, they tell a story of gradual, but still incomplete, evolution toward the nationalization of the country's family law. As noted, when the FLA was first enacted, claims concerning children and property that arose from the marriage were litigated in a different court than parallel and interrelated claims that were not so tied to the marriage.<sup>139</sup> A decade later, states referred authority over parenting orders concerning ex-nuptial children to the Commonwealth Parliament, which amended the FLA to include resolution of all parenting claims, without regard to the parents' marital status.<sup>140</sup> This move toward national uniformity introduced a new state-federal jurisdictional gap—this time between the claims of unmarried couples regarding property distribution on the one hand and child custody on the other; this gap was closed for the next ten years by the cross-vesting provisions.<sup>141</sup> The High Court's rejection of cross-vesting in 1999 led to the second wave of referrals, giving Parliament authority over the financial claims between unmarried couples as well.<sup>142</sup>

In a sense, Australia's evolution from state-based divorce law, to a partially nationalized divorce law, to court decisions circumscribing that nationalization, to state referrals expanding the Commonwealth Parliament's authority to nationalize, can be seen as paralleling the evolution of divorce law in the United States from state-to-state free-for-all, to Court-imposed nationwide enforcement of out-of-state orders, to the Supreme Court's development of certain qualifications of that nationwide obligation, to the congressional expansion of those national obligations. The important difference, of course, is that Australia's tale is one of the gradual nationalization of the substantive law, whereas in the United States the story is of the gradually increasing national recognition of judgments grounded on diverse state laws.<sup>143</sup> In other words, in the context of divorce, both countries developed a means of addressing the fragmentation problems generated by their distinct family law federalism regimes in a way that reinforced, rather than minimized, their distinctions.

However far from the framers' thoughts family law may have been when they adopted section 51 (xxxvii), the referral power has given Australians an ongoing opportunity to take up Sir Edmund Barton's call at the 1897 constitutional convention for further deliberation concerning the proper division of state and federal authority over family law.<sup>144</sup> And, over

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139. See *supra* notes 111-18 and accompanying text.

140. *Commonwealth Powers (Family Law) Act 1986* (SA) s 3 (Austl.); *Family Law Reform Act 1989* (Cth) No. 167 s 31 (Austl.).

141. FEHLBERG & BEHRENS, *supra* note 48, at 68.

142. *Id.* at 577-79.

143. The result in the United States might be like what would have occurred in Australia had the framers adopted the Tasmanian compromise, giving the Commonwealth Parliament the power to regulate "the status in other states of the Commonwealth of persons married or divorced in any state." See *supra* notes 23, 27-30 and accompanying text.

144. See *supra* notes 43 and accompanying text.

time, the reach of national power over family law matters has expanded beyond its original constitutional limits of marriage and divorce and related parental rights.<sup>145</sup> That being said, important portions of family law (among them the regulation of child abuse and neglect) remain in state control, and this state-federal fragmentation remains an ongoing topic of concern for family law scholars and policy makers.<sup>146</sup> While these concerns suggest that the Australian framers may not have gone far enough in their commitment to family law uniformity, Australia's current experience with same-sex marriage reveals the potential problems that even partial nationally imposed uniformity can create for family law innovation.

### III. Putting the Two Federalist Designs to a Modern Test: Same-Sex Marriage

Both countries applied and developed their family law federalism regimes to address the specific issues raised by separating couples and, in that context, both achieved considerable success in establishing a system of stable, coherent, and predictable laws. Less certain, however, is how the solutions developed in the context of divorce translate to other areas of family law. In the United States, a primary question is whether the full faith and credit obligation, which clearly applies to out-of-state judgments (through which divorces are obtained), can and should apply to other legal actions conferring family status, such as marriage; and a second, fast-developing question is whether and to what extent individual constitutional rights will nationalize family law and displace the full faith and credit solution. In Australia, a primary question is the extent to which the nationalization of conventional marriage and divorce law can and should be extended to other aspects of family law. We turn to the respective development of same-sex marriage laws in both countries in order to expand and update our comparative account of these two family law federalism regimes.

At the time of Australia's constitutional drafting, divorce was the family law issue of concern.<sup>147</sup> There was a clear movement in the law of divorce, and a range of strongly held views about whether that movement should be encouraged, accepted, or resisted. Today, the central contested issue in family law is same-sex marriage, and, in both the United States and Australia, the law is in flux. As with divorce a century ago, there is a

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145. This trend is in line with what many scholars perceive and sometimes decry as a general trend toward the centralization of Australia's federalism. See generally PAUL KILDEA, ANDREW LYNCH, & GEORGE WILLIAMS, *TOMORROW'S FEDERATION: REFORMING AUSTRALIAN GOVERNMENT* (2012); Hon. Chief Justice Paul De Jersey, *A Sketch of the Modern Australian Federation*, in *THE FUTURE OF AUSTRALIAN FEDERALISM: COMPARATIVE AND INTERDISCIPLINARY PERSPECTIVES*, *supra* note 127, at 66.

146. See, e.g., Belinda Fehlberg, *Parenting Disputes, State Child Protection Laws and an Attempt at Lateral Thinking*, 25 *AUSTRAL. J. FAM. L.* 157, 159-160 (2011); see Daryl J. Higgins and Rae Kaspiew, "Mind the Gap. . .": *Protecting children in family law cases*, 22 *AUSTR. J. OF FAM. L.* 235, 242 (2008); see also FEHLBERG & BEHRENS, *supra* note 48, at 86-89.

147. See *supra* notes 19-33 and accompanying text.

broad range of strongly held views about whether and to what extent recognition of same-sex marriage should be encouraged or resisted. And in both countries, the important role played by their distinct family law federalism regimes is a central focus of discussion.

## A. Same-Sex Marriage in the United States

### 1. *The Classical Model of State Autonomy and Experimentation*

Until recently, the development of same-sex marriage in the United States looked much like the development of divorce law that so scandalized the Australian framers 100 years ago. It is a story of considerable experimentation and variety among the fifty states, variety not only in the states' substantive laws, but also in the diverse legal paths taken to reach those substantive ends.

At the turn of the twenty-first century, several state supreme courts ruled that state laws limiting marriage to opposite-sex couples violated non-discrimination and due process provisions of their state constitutions.<sup>148</sup> Even among these rulings, there were significant differences in fact finding, doctrinal analysis, and the relief awarded.<sup>149</sup> In other states, courts ruled that same-sex couples had no right to either marriage or a

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148. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Commissioner*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

149. *Baehr*, 852 P.2d at 68 (returning case to trial court to consider the possible justifications for a same-sex exclusion; finding that there is a fundamental right to marriage which doesn't extend to same-sex marriage under due process, but that strict scrutiny applies because sex is a suspect category under Hawaii's equal protection doctrine); *Baker*, 744 A.2d at 886-87 (ruling that any difference in treatment between opposite and same-sex couples violated Vermont's constitution, as the same-sex marriage ban violated the state's Common Benefits Clause because denying same-sex couples the benefits of marriage didn't bear a reasonable and just relation to the government's purpose, but also finding that the status that conferred equal rights to same-sex couples did not need to be called "marriage"); *Lewis*, 908 A.2d at 223-24 (finding that there is a fundamental right to marriage that doesn't include same-sex marriage under New Jersey's due process clause, but that under the state equal protection analysis denying same-sex couples the benefits of marriage was unconstitutional because it bore no relationship to a legitimate government interest, but also finding that the status that conferred equal rights did not have to be called marriage); *Goodridge*, 798 N.E. 2d at 968 (finding that Massachusetts's same-sex marriage ban violated the Massachusetts constitution, because under the state equal protection and due process analyses, the ban didn't survive a rational basis test, so there was no need to determine if strict scrutiny applied); *Kerrigan*, 957 A.2d at 482 (finding that Connecticut's ban violated the Connecticut constitution and that the ban was subject to intermediate scrutiny under the state's equal protection doctrine because gay persons were part of a quasi-suspect class); *In re Marriage Cases*, 183 P.3d at 453 (finding that California's ban violated the California constitution because there is a fundamental right to marry that extends to all citizens under due process, and that sexual orientation is a suspect class and thus strict scrutiny applies under equal protection analysis); *Varnum*, 763 N.W.2d at 907 (finding that Iowa's ban violated Iowa constitution after applying an intermediate level of scrutiny based upon the finding that gay people were part of a quasi-suspect class).

marriage-like status under their state constitutions.<sup>150</sup>

In response to this judicial activity, state legislatures got involved by introducing both statutory and, in many cases, constitutional bans on same-sex marriage.<sup>151</sup> Among and in addition to these states were those that enacted legislation creating a distinct legal status for same-sex couples, entitling them to some or all of the benefits of marriage under different names.<sup>152</sup> These marriage-like provisions were favored by some as a long-term alternative to same-sex marriage and by others as a step along the way toward the full recognition of same-sex marriage as political attitudes changed.<sup>153</sup> In recent years, there has been a notable shift in democratic support in favor of same-sex marriage, and all but two<sup>154</sup> of the twelve states that have recognized same-sex marriage pursuant to state law, since 2009, have done so either through legislation or direct popular vote.<sup>155</sup>

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150. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (the ban on same-sex marriage did not violate state equal protection or due process rights); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (due process, the right to privacy, and equal protection did not create a right to marry a person of the same-sex under the Washington constitution); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (there is no fundamental right to marry under the Maryland constitution, and the state had a legitimate interest in banning same-sex marriage); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (same-sex marriage ban did not violate District's law against discrimination based on sex or sexual orientation, nor did it violate the U.S. Constitution); see also *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (the ban on same-sex marriage did not violate federal equal protection or due process rights).

151. Within twelve years of the Hawaii Supreme Court's ruling, many states, including Hawaii, had added an express ban on same-sex marriage to their laws, and a majority of these prohibitions were ultimately adopted as constitutional amendments. See Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 436 (2005).

152. See, e.g., Cal. Fam. Code § 297-297.5 (2012) ("domestic partnership"); 750 Ill. Comp. Stat. Ann. 75/15 (2011) (since displaced by Illinois Same-Sex Marriage Act) ("civil union"); N.J. Stat. Ann. Domestic Partnership Act. § 26:8a-1 (2004) ("domestic partnership"); N.J. Stat. Ann. §37:1-28 (2007) ("civil union"); Wis. Stat. Ann. §770.05 (2009) ("domestic partnership"); Del. Code Ann. Eligibility to Enter into a Civil Union. 13, § 202 (2012) ("civil union"); Nev. Rev. Stat. Ann. § 122a.100 (2010) ("domestic partnership"); Or. Rev. Stat. Ann. § 106.305 (2008) ("domestic partnership"); Wash. Rev. Code Ann. § 26.60.030 (2007); Colo. Rev. Stat. Ann. § 15-22-103 (2009) ("designated beneficiary agreements"); Colo. Rev. Stat. Ann. § 14-15-103 (2013) ("civil unions"); Haw. Rev. Stat. §572C-3 (1997) ("reciprocal beneficiary relationship"); Haw. Rev. Stat. §572B-1 (2011) ("civil unions"); R.I. Gen. Laws. Ann. § 15-3.1-1 (2011) ("civil unions"); D.C. Code § 32-702 (2012) ("domestic partnership").

153. See generally Douglas NeJaime, *Framing Inequality for Same-Sex Couples*, 60 UCLA L. Rev. Disc. 184 (2013) (discussing the difference between two views of civil unions—that civil unions represent an alternative to marriage that provided equality to same-sex couples, and that civil unions were just a step on the way towards equality); Elizabeth Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125 (2012) (same).

154. See *Garden State Equal v. Dow*, 82 A.3d 336, 368-69 (N.J. 2013) (finding that New Jersey's civil union law violated same-sex couples' equal protection rights); *Grigio v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (finding that New Mexico's ban on same-sex marriage violated the New Mexico state constitution).

155. Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, (also Washington D.C.) (by legislation), and Maine, Maryland, and Washington (by popular vote), 33 *States with Legal Gay Marriage and 17 States with Same-Sex Marriage*

Additional complexity in state laws' treatment of same-sex couples was introduced through state law and practice concerning same-sex parenting. For the most part, medical clinics providing assisted reproductive technologies were open to same-sex couples, and issues of parentage were only pressed when these couples separated, again, to different ends in different states. In at least one state, the marriage and parentage laws ran in opposite directions: in 2001, Pennsylvania prohibited same-sex marriage, while leading the way in recognizing the parental claim of a non-biologically related same-sex partner.<sup>156</sup> Moreover, much decision making about placement and family formation, particularly for children who are placed in the child welfare system due to allegations of abuse and neglect, is heavily driven by the individual best interest judgments of social workers and judges.<sup>157</sup> This allowed courts, in effect, to form same-sex couple families (through the authorization of foster care placements with or adoptions by same-sex couples) in some states even as those states refused to recognize same-sex marriages.<sup>158</sup> Conversely, intense opposition to same-sex marriage inspired some legislatures to press for restrictions on same-sex couples' access to adoption and assisted reproductive technologies, restrictions that were never contemplated before.<sup>159</sup>

From the perspective of the nineteenth century Australian framers, this tale could readily be seen as a scandalous free-for all. For the champions of the United States' fifty-state social and legal laboratories of experimentation, this tremendous proliferation of diverse approaches might be taken as a sign of federalistic health. Not only was the issue engaged by courts, legislatures, and the national public, but that engagement took states in any number of directions, based on any number of reasons that were fleshed out with some care in briefs, court opinions, testimony at legislative hearings, and popular media. Even the division of states into supporters and opponents doesn't quite capture these developments, as some states that banned same-sex marriage also instituted domestic part-

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Bans, PROCON.ORG (Nov. 13, 2014), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857>.

156. See *T.B. v. L.R.M.*, 786 A.2d 913, 920 (Pa. 2001) (“[Non-biologically related same-sex-partner of biological mother] stood in loco parentis to the child and therefore had standing to seek partial custody for purposes of visitation”).

157. See Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 714-15 (noting demand for adoptive families in the United States and the support of “mainstream child welfare organizations” for gay and lesbian adoptions).

158. See Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. Rev. 247 (2007); Polikoff, *supra* note 157, at 748-49 (describing Connecticut's decision to allow same-sex couples to adopt children while expressly limiting marriage to opposite-sex couples). That being said, there is no question that the proliferation of same-sex parenting couples added weight to the arguments in favor of giving legal recognition to the couples' relationships. See *id.* at 746-47.

159. See Polikoff, *supra* note 157, at 750 (noting that Mississippi enacted a law prohibiting same-sex couple adoptions out of concern that such adoptions might lead to a court decision mandating the recognition of same-sex marriage).

nership provisions or created the institution of civil union to give same-sex couples equal rights in all but name. The Wikipedia site on “Same-sex Marriage in the United States” captured this evolving diversity with an ever-changing map of the fifty states coded in shades of blue (recognition laws), and red (prohibition laws) and stripes (various combinations of the two).<sup>160</sup>

This fifty-state variety also produced precisely the sort of second-order problems that the Australian framers had abhorred in the context of divorce. With respect to the recognition of same-sex marriage, there has been a considerable amount of interstate confusion and inconsistency, with hazardous consequences for members of same-sex couples and their children. Where states opposed to same-sex marriage refused to recognize out-of-state same-sex marriages, they not only denied marital benefits during the life of the marriage, but also denied access to divorce should the couple choose to end the marriage.<sup>161</sup> Even more troubling, a state that did not recognize same-sex marriage could refuse to recognize a parent-child relationship, for purposes of assigning custodial rights and responsibilities, to a same-sex partner who lacked a biological relationship with the child.<sup>162</sup>

Had courts applied the lessons learned in the divorce context to resolve issues raised by the interstate diversity in same-sex marriage laws, they would have found states obligated to give full force to out-of-state marriages that were non-evasively obtained. But courts did not adopt this approach, and while some states recognized out-of-state same-sex marriages even when they did not themselves license same-sex marriages,<sup>163</sup> no court found that a state had an obligation to do so, under the Full Faith

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160. *Same-Sex Marriage in the United States*, WIKIPEDIA, [en.wikipedia.org/wiki/same-sex\\_marriage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/same-sex_marriage_in_the_United_States) (last visited Feb. 10, 2015). This map has been continually changing, and now reflects (with some added colors) federal court developments as well.

161. See Nick Tarasen, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585, 1592–94 (2011).

162. This problem played out dramatically, though in the context of a civil union and not a same-sex marriage, in *Miller-Jenkins v. Miller-Jenkins*. In that case, a Virginia court refused to recognize the same-sex partner of the biological mother of a child as a parent with custody or visitation rights, despite the fact that they had been joined in civil union in Vermont. A jurisdictional battle involving the Vermont and Virginia courts ensued and was only ultimately resolved (in favor of the non-biological partner) on the basis of a technical ruling with no precedential value. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), 637 S.E.2d 330 (Va. Ct. App. 2006), 661 S.E.2d 822 (Va. 2008), 678 S.E.2d 268 (Va. Ct. App. 2009) 12 A.3d 768 (Vt. 2010), cert. denied, 562 U.S. 1026(2010). In another case, a state refused to recognize both members of a same-sex married couple as parents, despite the fact that they had both legally adopted the child in another state. *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011); but see *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (Oklahoma statute preventing recognition of adoptions by same-sex couples violated Full Faith and Credit Clause). See generally Joseph A. Fraioli, *Having Faith in Full Faith & Credit*: *Finstuen*, *Adar* and the *Quest for Interstate Same-Sex Parental Recognition*, 98 Iowa L. Rev. 365 (2012).

163. See, e.g., *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008); *Port v. Cowan*, 44 A.3d 970 (Md. 2012).

and Credit Clause.<sup>164</sup> This meant that even couples who were legally married in one state could not be confident that the important benefits and protections associated with that status would survive the movement of either one of them out of state. The ongoing instability of these relationships may have encouraged couples to shift their attention to federal litigation where they asserted that same-sex marriage bans violated their civil rights under the United States Constitution. After considering the full faith and credit road not traveled, we will turn to federal developments that are rapidly displacing the fifty-state laboratory.

## 2. *Applying the Federalism Lessons from Divorce to Marriage*

The American solution to the problem created by interstate diversity in divorce law was to impose an obligation on all states to recognize a divorce validly obtained in any other state, without regard to the forum state's divorce policy.<sup>165</sup> This solution was achieved through the development of a constitutional obligation under the Full Faith and Credit Clause. The straightforward solution to the current issue of interstate recognition of same-sex marriages is to apply the lessons learned in the context of divorce and to impose the same constitutional obligation on forum states to recognize validly obtained same-sex marriages. To date, however, courts have found no such constitutional obligation in the context of marriage, and the bulk of scholarly opinion dismisses the appropriateness of applying the Full Faith and Credit Clause to compel out-of-state marriage recognition, reasoning that marriage is not, like divorce, obtained through a judicial proceeding, the form of out-of-state legal action that has been most clearly and strongly protected in the cases.<sup>166</sup> After a brief review of the Full Faith and Credit Clause's application to other state legal actions, we argue that the best understanding of the Clause, its purpose, and the important role it played in resolving the parallel problem in the divorce context all call for its similar application to marriage.

The Full Faith and Credit Clause requires states to give full faith and credit to out-of-state "public Acts, Records, and judicial Proceedings."<sup>167</sup> The Clause's strong protection of "judicial proceedings"<sup>168</sup> has been rou-

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164. See generally 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); ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 118 (2006). As we discuss, below, several federal courts have recently found that states are required, under the Equal Protection and Due Process Clauses of the U.S. Constitution, to recognize same-sex marriages validly celebrated in a sister state. See *infra* Part III.A.3.a.vi.

165. See *supra* text accompanying notes 66-93.

166. KOPPELMAN, *supra* note 164, at 118; Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358 (2005); Ralph U. Whitten, *Full Faith and Credit for Dummies*, 28 CREIGHTON L. REV. 465 (2005); *but see* Sanders *supra* note 164, at 96.

167. U.S. CONST. art. IV, § 1.

168. Australia, like the United States, gives binding effect to out-of-state judgments. Brian R. Opeskin, *Constitutional Dimensions of Choice of Law in Australia*, 3 Pub. L. Rev. 152, 173 n. 79 (1992).



tinely distinguished from the weak obligation imposed by the Clause on a forum state to apply the substantive law, or “public Acts,” of a sister state,<sup>169</sup> and the reasons for this distinction are straightforward. The first reason is textual, and focuses on the implementing statute, as enacted and amended around the time of the Clause’s adoption.<sup>170</sup> In both versions of the statute, “acts of the legislatures of the several states” were included in the description of methods of authentication of another state’s law, but not, as judgments (and records) were, also included in the provision requiring that they be given the same effect in “every court within the United States” as they were given in the state where they were issued.<sup>171</sup> The second justification for the distinct treatment of judgments and substantive law is functional. Requiring states to give full faith and credit to sister state judgments imposes concrete, well-defined obligations on a forum state otherwise left free to govern its residents, whereas requiring a forum state to give full faith and credit to sister states’ substantive law could impose a broad and ill-defined obligation that goes to the heart of the forum state’s sovereignty.<sup>172</sup>

The third justification goes to the underlying purpose of the Clause—to help bring the states together in one nation.<sup>173</sup> Just as finality and clar-

169. See, e.g., *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003); *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (distinguishing between “credit owed to [legislative measures and common law] and to judgments”). See also Borchers, *supra* note 166, at 358 (referring to the “two” branches of Supreme Court jurisprudence).

170. This implementing statute was originally enacted in 1790, and then amended in 1804. Cf. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 351–52 (1816) (emphasizing the relevance of, for purposes of constitutional interpretation, action taken contemporaneously with the writing of the Constitution and noting that the first Congress was composed of men who were involved in the framing of and deliberations over the Constitution).

171. Omitting the inclusion of “public Acts,” the critical language in the original statute said, “[a]nd the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.” Act of 26 May 1790, ch. XI, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2014)) (authentication of the acts and judicial proceedings of the states); Act of 27 Mar. 1804, ch. LVI, 2 Stat. 298 (supplemented Act of 26 May 1790).

172. Douglas Laycock captured the dilemma that makes a duty to adopt a sister state’s “public Acts” a very different proposition from giving a sister state’s judgment the same recognition that it would be given in the sister state itself: “To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the [Full Faith and Credit] Clause.” Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 297 (1992). Accord Nadelmann, *supra* note 70, at 73.; Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 159 (1998); Justice W.M.C. Gummow, *Full Faith and Credit in Three Federations*, 46 S.C. L. REV. 979, 986–87 (1995) (making the same point about absurdity with respect to Australia’s nearly equivalent Full Faith and Credit Clause).

173. See, e.g., *Estin v. Estin*, 334 U.S. 541, 545–46 (1948) (“The Full Faith and Credit Clause . . . substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns”); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (“The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states

ity of rights and obligations, achieved through the announcement and enforcement of judgments in individual cases, allow citizens within a state to order their affairs and develop relationships in reliance on those rights and obligations, finality and clarity of rights and obligations across state lines similarly allow a highly mobile nation of citizens to order their affairs and develop relations in reliance on rights and obligations that will not change as they cross state lines. And while predictability and clarity are needed in the application of substantive law, that predictability and clarity can generally be achieved, at least as successfully, by allowing each state to apply its own laws to those within its borders. All this being said, the Supreme Court has concluded that even public Acts are entitled to full faith and credit in some circumstances,<sup>174</sup> but increasingly the Clause has been interpreted to impose only modest limits on a state's ability to apply its own substantive law.<sup>175</sup>

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as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.”); David P. Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2d 7, 12 (1997) (“The Full Faith and Credit Clause is designed to promote interstate harmony”); Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 16 NW. U. L. REV. 827, 851 (2004); Justice Robert Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (“[The Full Faith and Credit Clause] was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states”).

174. See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 613–14 (1951) (finding that Wisconsin was required by the Full Faith and Credit Clause to recognize Illinois’ wrongful death statute as a “public Act” of a sister state). In contrast, the Australian High Court has found a total absence of any constitutional full faith and credit obligation with respect to “public Acts” under the Australian Constitution. See *Breavington v Godleman* [1988] HCA 40, ¶ 43; Brian Opeskin, *Constitutional Dimensions of Choice of Law in Australia*, 3 PUB. L. REV. 152, 173–80 (1992); Geoffrey Lindell and Sir Anthony Mason, *The Resolution of Inconsistent State and Territory Legislation*, 38 FED. L. REV. 391, 416 (2010) (discussing how Australian Constitution section 118 has a “minor” effect on common law choice of law in precluding reliance on a public policy exception).

175. The Supreme Court has developed the doctrine to allow a forum state to apply its own substantive law so long as it has a minimal legitimate connection to the individuals and circumstances addressed in the litigation. *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547–48 (1935) (holding that one who challenges, under the Full Faith and Credit Clause, the right of a forum state to enforce its own statutes “assumes the burden of showing . . . that of the conflicting interests involved, those of the foreign state are superior to those of the forum” state); *Pacific Employer Insurance Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939) (“[T]he very nature of the federal union of states . . . precludes resort to the full faith and credit clause as the means for compelling 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”); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312–13 (1982) (holding that forum state is not prevented by Full Faith and Credit or Due Process Clauses from applying its own law where it has sufficient contacts creating state interests to make the application of its law neither arbitrary nor fundamentally unfair); *Sun Oil v. Wortman*, 486 U.S. 717, 729–30 (1988) (holding that where state applies traditional choice of law rules that would have been accepted at the time when the Full Faith and Credit and Due Process Clauses were ratified, application of forum law is valid even if it fails the *Allstate* test); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003).

While the justifications for distinguishing a sister state's judgments, which states are required under the Full Faith and Credit Clause to enforce, and a sister state's substantive law, which states are generally not required to apply, are compelling, a complicating connection exists between the two: if citizens had complete freedom to travel to other states to obtain rights and obligations that they could then return home to enforce, citizens would essentially have the ability (so long as they had the means to travel) to import whatever law they wished, however contrary that law was to the public policy of their state of residence.

As we have seen in the divorce context, the Supreme Court has interpreted the full faith and credit obligation to stop short of requiring states to enforce such evasively acquired judgments.<sup>176</sup> In these proceedings, jurisdiction is tied to domicile, a relationship between state and citizen that requires a physical presence and an intent to remain.<sup>177</sup> The jurisdictional qualification of the full faith and credit obligation places some limit, if at times a fairly thin one, on citizens' ability to travel to another state for the sole purpose of importing the benefit of that state's law back to the citizen's home state.<sup>178</sup>

How much the full faith and credit obligation extends to other state actions affecting the familial status of American citizens depends largely upon how another state's legal actions are categorized. The highly protected "judicial Proceedings" include, in addition to divorce, judgments concerning custody, child support,<sup>179</sup> parentage, and adoption.<sup>180</sup> At the other extreme, the largely unprotected category of "public Acts" includes the statutes and common law that set out the substantive law of a state, such as the recognized grounds for divorce, the period of residence required for divorce, and the qualifications for marriages occurring within the state.<sup>181</sup> But the state's celebration of a marriage is neither a judicial proceeding nor, as the term is used in the Clause, a public Act<sup>182</sup> (despite

176. See III.A.1. (discussing *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 236 (1945)).

177. *Id.* at 236 ("Domicil[e], the jury was instructed, was that place where a person 'has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time'").

178. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 193 (2004).

179. Note, however, that the extent of states' obligation to enforce sister states' child custody and child support rulings was clarified through federal legislation after court decisions interpreted the constitutional obligation more narrowly. See *supra* notes 82-90 and accompanying text.

180. See also JOSEPH F. ZIMMERMAN, *INTERSTATE RELATIONS: THE NEGLECTED DIMENSION OF FEDERALISM* 64-69 (1996). There is some controversy in the adoption context. See *supra* note 162 and accompanying text. See Fraioli, *supra* note 162; Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1,8 (2009) (discussing the arguments against adoption as a "judicial proceeding" subject to the Full Faith and Credit Clause).

181. ZIMMERMAN, *supra* note 180, at 59.

182. See Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 344 (2005); Emily J. Sack, *The Retreat from DOMA: The*

scholarly argument to the contrary).<sup>183</sup> Rather, it is best placed in the category of a “Record,” the third category of legal actions listed in the Clause.<sup>184</sup>

“Records” are by far the least developed category of state legal actions addressed in full faith and credit jurisprudence.<sup>185</sup> Deeds, mortgages and wills fall into this category,<sup>186</sup> and, in the context of family law, birth, death, and marriage certificates seem to fall into this category as well.<sup>187</sup> The three reasons to distinguish judicial proceedings from public acts, discussed above, all suggest that records—at least records that document a state’s completed conferral of a familial status—have more in common with judicial Proceedings than with public Acts and therefore should be entitled to strong protection under the Full Faith and Credit Clause.

First, as a textual matter, the same original implementing statute, reinforced shortly thereafter in a clarifying amendment, included records, along with judicial proceedings but not public acts, among those matters to be given “such faith and credit . . . as they have by the law or usage in the Courts of the state from whence the said records are or shall be taken.”<sup>188</sup> By the original reasoning of the Supreme Court in *Mills v. Duryee*, this language suggests that all public office records, like judicial records, are to be given the same effect by the forum state as they would be given in the state where they were entered, rather than merely accepted by the forum state as evidence.<sup>189</sup>

Second, functional considerations support treating records like judicial proceedings, rather than like public acts under the Full Faith and Credit Clause. Requiring a forum state to recognize and give effect to sister state records, such as certificates that document the conferral of a legal status, does not conjure up the absurdity suggested by a requirement that

*Public Policy of Same-Sex Marriage and a Theory of Congressional Power under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 524 (2005).

183. See, e.g., Whitten, *supra* note 70, at 389-90.

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

185. *Id.* at 1444.

186. ZIMMERMAN, *supra* note 180, at 59.

187. Gebhardt, *supra* note 184 at 1444.

188. Act of 26 May 1790, ch. XI, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2014)) (authentication of the acts and judicial proceedings of the states); Act of 27 Mar. 1804, ch. LVI, 2 Stat. 298 (supplemented Act of 26 May 1790). While there may have been some ambiguity in the original statute about whether this language extended beyond records of judicial proceedings, this ambiguity was eliminated when the statute was amended in 1804 to include “records and exemplifications of office books kept in any public office of any state.” Nadelmann, *supra* note 70, at 61; Act of 27 Mar. 1804, ch. LVI, 2 Stat. 298. See also 13 ANNALS OF CONG. 554 (1803) (explaining that the amendment applied to records “in any public office of a state not appertaining to a court”).

189. Nadelmann, *supra* note 70, at 61-62. In response to a question raised in the House of Representatives on November 1, 1803—“whether any additional provisions are necessary to be made” to the original enforcement act of 1790—Congress enacted the Act of 27 Mar. 1804. As Professor Nadelmann explained, one of the two important things this amendment accomplished was the extension “to records and exemplifications of office books kept in any public office of any state, not appertaining to a court.” *Id.* at 61.

forum states routinely apply one another's substantive law. Just as with judgments, forum states could give effect to these specific instances of out-of-state legal action without embracing the substantive law on which they are based.<sup>190</sup>

Third is the justification tied to purpose. Just as with judgments, records that establish a legal status change the rights and obligations of individuals in a concrete and clearly defined way. Individuals rely on such express and enforceable assignments of rights and responsibilities in ordering their affairs, and the aim of the Full Faith and Credit Clause was to expand the reach of that legal stability across an entire nation. And, as with judgments, the importance of defining and stabilizing rights and obligations across state lines is particularly important where those rights and obligations apply to a relationship between two people and related children, rather than to a single individual.<sup>191</sup>

All of this suggests that a marriage certificate—the official state record of a marriage celebrated in that state—should be understood in much the same way as a divorce decree, for purposes of applying the Full Faith and Credit Clause. While a divorce decree is a record of a court judgment and a marriage certificate is a record of another official state act, both document legal acts that establish familial status, with important implications for the couple and third parties that necessarily transcend state borders. In addition, both are issued pursuant to established procedures designed to ensure the reliability of the legal information reported and the validity of the familial status obtained. If anything, the claim for out-of-state marriage recognition is stronger than for the recognition of out-of-state divorce, for in the marriage context the couple is, by definition, united in their interest in having the important family status recognized.<sup>192</sup> With divorce, in contrast, as *Williams v. North Carolina* well illustrated, the parties are often at odds about whether the status is something to be embraced or challenged.

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190. See Gebhardt, *supra* note 184, at 1442–44.

191. *Id.* at 1447–50. One other assumption made in the typical argument for excluding marriage recognition from states' full faith and credit obligation is worth countering, both to reveal a point of confusion and to note the diversity of documents within the "Records" category. Scholars who dismiss the full faith and credit argument often assume that the relevant legal document in question is the marriage "license," that is, the document authorizing the marriage, rather than the certificate, the document officially recording when a marriage has occurred. See, e.g., Borchers, *supra* note 166, at 358; KOPPELMAN, *supra* note 164, at 118. In authorizing a marriage, a license essentially declares that a couple meets the state's requirements to marry in that state; this is clearly a declaration of qualifications that cannot be transported across state lines. In contrast, marriage certificates are the official recording of the status of a marriage conferred; this intention, of course, is for that legal status to be permanent and without territorial borders. Indeed, the permanency of the status is understood to be an important aspect of what it means to be married, and the status creates not only rights, but also responsibilities that spouses cannot avoid until their status is officially altered through divorce.

192. This argument is compatible with the approach taken in *Sherrer v. Sherrer*, in which the Court refused to apply *Williams II*'s jurisdictional qualification to a state's full faith and credit obligation where the divorce-opposing spouse had participated in the divorce-granting proceeding. 334 U.S. 343, 349 (1948).

If marriage certificates received the same full faith and credit treatment as divorce decrees, every state would be free to apply its own conditions for granting such a certificate but, like a divorce decree, any marriage certificate granted pursuant to those conditions would be required to be given the same recognition in every other state. A forum state could not withhold recognition of the marriage simply because of its moral disapproval of the marriage. That is the significance of *Williams I*, in which the Supreme Court required North Carolina to recognize a divorce issued in Nevada that was granted on terms inconsistent with North Carolina's public policy.<sup>193</sup> However, as with divorce, an exception could be made to a forum state's obligation to recognize the validity of a sister state's marriage if that marriage was obtained by forum state residents in an attempt to evade the requirements of the forum state's law. That is the significance of *Williams II*.<sup>194</sup>

States have not, however, found themselves obligated by the Full Faith and Credit Clause to recognize same-sex marriages that were validly and non-evasively celebrated in another state.<sup>195</sup> Absent a constitutional requirement, states apply the common law principle of "comity." And while the rule of "lex loci celebrationis," (the law of the place of celebration) directs that a marriage valid where celebrated is to be recognized as valid everywhere,<sup>196</sup> states have qualified that obligation to recognize out-of-state marriages under a public policy exception.<sup>197</sup> Of course, it is pre-

193. *Williams I*, 317 U.S. at 303.

194. *Williams II*, 325 U.S. at 236. A parallel exception for evasive marriages has also been developed under state conflict of laws doctrine, see *infra* note 197.

195. See *supra* notes 163-64 and accompanying text.

196. See, e.g., PETER HAY ET AL., CONFLICT OF LAWS 621 (5th ed. 2010); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 548 (3d ed. 2000); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 98 (2d ed. 1987).

197. HAY, ET AL., *supra* note 196, at 621-22. Although the focus of the public policy exception is on the substantive distinctions between the marriage laws of the two states in question, the application of the rule has frequently drawn a distinction between cases where parties travel to another state temporarily for the purpose of gaining the benefit of a sister state's favorable marriage laws and cases where parties are lawfully married in one state and later choose to move to (or travel through) a state in which the marriage could not have been celebrated. Courts and legislatures routinely relieve the home state of any obligation to enforce the evasive marriages that go against the home state's public policy, but require the home state to recognize marriages that violate the same public policy if they were celebrated legally in the couples' state of residence. This is the rule set out in the Restatement (Second) of Conflict of Laws, which provides:

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.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS: STATUS § 283 (1971).

Especially notable, some courts applied this rule in states that banned interracial marriage (before such bans were found unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967)), when confronted with mixed race couples who had married lawfully in another state. Declaring that "the law of nations is a part of the law of North Carolina," a state judge in North Carolina recognized a couple's valid South Carolina marriage, despite the court's view that such marriages were "revolting to us." *State v. Ross*, 76 N.C. 242, 246-47 (1877). In contrast, southern courts consistently invalidated marriages

cisely such policy driven exceptions that the evolution of the full faith and credit obligation was designed, in the divorce context, to eliminate.<sup>198</sup>

For decades, the states' general policy of favoring marriage and the minimal differences among states' marriage laws<sup>199</sup> limited application of the public policy exception and the related development of the law. With the introduction of same-sex marriage in a number of American states, however, the scope and legitimacy of this exception moved to center stage.

### 3. *Challenges to America's Family Law Federalism Regime*

Rather than responding to the proliferation of diverse state approaches to same-sex marriage by imposing an obligation of interstate recognition, the federal government enacted legislation—the Defense of Marriage Act (DOMA)—to discourage that coordination.<sup>200</sup> This legislative resistance to states' full faith and credit obligation reflects, in our view, a failure to learn from the lessons of the past that threatens to leave United States family law in an unstable state. After considering DOMA's constitutionality under the Full Faith and Credit Clause, we will turn to the federal civil rights litigation sparked by DOMA, litigation that will likely bring stability to the law of marriage, while profoundly altering the United States' family law federalism design.

#### a. The Defense of Marriage Act

In 1996, in response to the Hawaii Supreme Court's ground-breaking opinion calling into question the legality of the state's same-sex marriage ban under the Hawaii Constitution, Congress enacted DOMA in an attempt to restrict the reach and influence of any state's recognition of same-sex marriage. As enacted, DOMA had two substantive provisions. In Section 2, the Act provided 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<sup>False</sup>

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obtained by those seeking to avoid the miscegenation ban in their home state. See, KOPPELMAN, *supra* note 164, at 30-32. Thus, application of the public policy exception has commonly, but not universally, been limited to circumstances in which the marriage is both against the state's public policy and obtained by evasion.

198. See *Williams II*, 325 U.S. at 228 (reasoning that imposing a constitutional full faith and credit obligation was required because "comity may be 'too fluid [and] ill-defined' a concept for domestic relations purposes insofar as the marital status conferred by another state is at issue").

199. See Sanders, *supra* note 164, at 110 ("[U]p until now, there has been little need to enforce" a federal full faith and credit obligation because states have been generous in applying each other's law and "recognize[] the desirability of uniform marital status"). Differences in laws concerning miscegenation were eliminated decades ago. No state allows polygamy, nor marriage between parent and child or brother and sister. For some time, the most significant distinctions among state marriage requirements concerned minimum age and marriages between first cousins. MARK STRASSER, *SAME-SEX UNIONS ACROSS THE UNITED STATES* 45-49 (2011); KOPPELMAN, *supra* note 164, at 30-32.

200. See STRASSER, *supra* note 199, at 61.

The Act further provided in Section 3 that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage," means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>201</sup>

The Act was not invoked for several years until Massachusetts became the first state to find that its constitution compelled the legalization of same-sex marriage.<sup>202</sup> Since that time, the constitutional challenges to DOMA have centered on equal protection and due process arguments, and largely ignored potential challenges based on the Full Faith and Credit Clause. The Supreme Court ultimately struck down Section 3 in *Windsor v. United States*<sup>203</sup> and *Windsor*, in turn, was relied upon by federal district courts to invalidate state non-recognition laws on equal protection and due process grounds. Before turning to these significant developments, we consider the validity of Section 2 under the Full Faith and Credit Clause, which has implications for all potentially controversial familial statuses conferred by state law.

#### i. Federalism Constraints on DOMA Section 2

Under Section 2, states are freed from any obligation to recognize same-sex marriages celebrated in other states. This means that lawfully married couples could put all their rights and obligations associated with the marriage at risk when they cross state lines, and one spouse could exploit that vulnerability to escape marital and related parental obligations. Section 2 has been subject to very little litigation under the Full Faith and Credit Clause,<sup>204</sup> and there has been no authoritative assessment of the section's constitutionality. We argue that, in keeping with the United States' family law federalism regime, Section 2 should be found unconstitutional under the Full Faith and Credit Clause.

DOMA's Section 2 is an express authorization to override any full faith and credit obligation with respect to same-sex marriages. It thus raises questions about the scope of both the constitutional obligation imposed by the Clause and Congress's power to define and modify that obligation pursuant to its implementing authority. On the first question, as noted, many scholars have argued that the constitutional full faith and credit obligation does not even apply because these protections are limited to judgments, and marriages, unlike divorces, are not given effect through judgments.<sup>205</sup> If this argument is correct, then Section 2 is unnecessary, though perhaps

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201. *Id.*

202. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

203. *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

204. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (holding that Congress had authority, under the Full Faith and Credit Clause's implementing statute, to enact Section 2).

205. See, e.g., Ralph U. Whitten, *supra* note 166, at 479-83; KOPPELMAN, *supra* note 164, at 118.



not entirely constitutional, as it sweeps in “judicial Proceedings” among the sister states’ legal actions relating to same-sex marriage that a forum state is authorized to ignore. As already noted, however, we think the language, function and purpose of the Clause, and the inclusion of “Records” as distinct from “judicial Proceedings” and “public Acts,” all counsel in favor of the Clause’s application to marriage.

Further complicating the analysis is the second sentence of the Clause, in which Congress is given the power to make laws prescribing the “manner” and “effect” of the “Acts, Records, and Proceedings” that are the subject of the Clause.<sup>206</sup> In many cases, the Court’s analysis of the full faith and credit obligation has merged the obligations imposed by the Constitution with those imposed by Congress’s implementing statute.<sup>207</sup> Perhaps Congress can diminish the scope of the Clause’s reach through its enactments as well. If Congress has this power, even “judicial Proceedings” are fair game, and all of DOMA Section 2 may be constitutional, a conclusion that threatens the stability of same-sex parent adoptions, custody orders, and divorces. There is scholarly support for both views—one being that the implementing provision gives Congress the authority to reduce as well as expand the reach of the full faith and credit obligation<sup>208</sup> and the other being that the provision is a “ratchet,” that gives Congress the authority to expand (as it did in the child support and child custody contexts), but not contract, the reach of the obligation.<sup>209</sup>

While the extent of Congress’s authority under the implementing provision is an open question, the “expansion only” reading is, in our view, the better reading. Our interpretation emphasizes the important role a strong full faith and credit obligation has played in finally settling the problems created by the American family law federalism regime. And while the broader reading of Congress’s enforcement powers is not precluded by the language or history of the Clause, other constitutional protections, including the right to travel, raise serious questions about Congress’s authority to curtail states’ full faith and credit obligations in this context. It is largely through the Court’s enforcement of strong full faith and credit obligations in the context of divorce that the United States has escaped the scandal associated with what the Australian framers saw

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206. U.S. CONST. art. IV, § 1, cl. 2.

207. STRASSER, *supra* note 199, at 70.

208. Sack, *supra* note 182, at 529 (arguing that Congress has the power to “both diminish and expand the amount of full faith and credit owed . . . until and unless the Court provides a definitive interpretation of what the Constitution requires”); Whitten, *supra* note 70, at 291 (finding “compelling” historical evidence “that Congress was intended to have broad power to create statutes like DOMA under the effects Clause”).

209. See Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485–88 (2013). See also TRIBE, *supra* note 15, at 1274, n.49; 142 Congressional Record 13359–61 (1996) (letter from Lawrence H. Tribe to Senator Edward M. Kennedy). Under Australian law, Quick and Garran have read the Australian Full Faith and Credit provision as just such a one-way ratchet. See QUICK & GARRAN, *supra* note 44, at 620, 961; Geoffrey Lindell, *Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey - North America and Australasia*, 30 SYDNEY L. REV. 29, 49 (2008).

as a "blot." That same end should be achieved through that same means for marriage.

ii. Federalism Constraints on DOMA Section 3

In a federalism regime where states are understood to control matters of family law, Congress's creation of a federal definition of marriage that excluded validly married same-sex couples is striking. It was not, however, an unconstitutional exercise of authority simply because the Constitution does not confer legislative authority over marriage among Congress's enumerated powers. It is undisputed that Congress has the authority to enact legislation that affects the family under its various enumerated powers. For example, Congress has the authority to establish legislation regulating activity that affects interstate commerce, or that involves the spending of federal money "for the general welfare."<sup>210</sup> Moreover, Congress has broad discretion to set eligibility conditions for any programs or benefits that it has the constitutional authority to enact through legislation.<sup>211</sup> Thus, Congress may set the terms of the federal programs that provide benefits to married people, assuming that those programs were created pursuant to a valid federal power. And while the Tenth Amendment has been construed to impose some additional constraints on Congress's intrusion on states' authority,<sup>212</sup> these constraints neither raise problems for Congress's enactment of DOMA's Section 3 nor apply with any special force in the area of family law. In *Gill v. Office of Personnel Management*, the First Circuit rejected arguments that challenged these conclusions.<sup>213</sup>

Although Congress's enumerated powers were generally understood to be broad enough to authorize its enactment of DOMA Section 3, the statute was also challenged, and ultimately struck down, as a violation of individuals' equal protection and due process rights under the United States Constitution. Because the Supreme Court's analysis of DOMA Section 3 in

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210. U.S. CONST. art I, § 8, cl. 1, 3.

211. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 420 (1819) ("let the end be legitimate . . . all means which are appropriate . . . which are not prohibited . . . are constitutional"); see *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditions on federal spending are legitimate if they are related to the particular spending purpose being furthered).

212. U.S. CONST. amend. X. It has been argued that DOMA violates the "anti-commandeering principle" of the Tenth Amendment, established in *New York v. United States*. *New York v. United States*, 505 U.S. at 161 ("Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (citing *Hodel v. Virginia Surface Mining & Reclamation Assn*, 452 U.S. 264, 288 (1981))). This particular line of argument seems weak, as, under DOMA, Congress does not direct the state legislature to enact legislation nor direct any state official to do anything other than abide by the limitations of the federal funding grant; that limitation on the state's discretion might have been unconstitutional under an earlier Tenth Amendment doctrine. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 843 (1976) (finding that the Tenth Amendment expressly holds that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system"). However, that case was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*. 469 U.S. 528, 547-55 (1985).

213. See generally *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D.Mass. 2010).

*Windsor* focused on these federal civil rights, we consider the emergence of these rights before discussing the Court's invalidation of Section 3 in that case.

### iii. Constitutional Rights of Liberty and Equality

When the Fourteenth Amendment added the words, "No state shall,"<sup>214</sup> to the Constitution of the United States, it made a fundamental change in American Federalism.<sup>215</sup> That addition of federal to state protection of civil rights, which has no Australian constitutional parallel,<sup>216</sup> was controversial and evolved only slowly.<sup>217</sup> The first indication of this change in the context of family law occurred early in the Twentieth Century when the Supreme Court of the United States struck down state educational restrictions that interfered with parents' ability to control the upbringing of their children.<sup>218</sup> Over the course of the Twentieth Century, the Supreme Court recognized rights of childrearing,<sup>219</sup> marriage,<sup>220</sup> procreation,<sup>221</sup> and family formation<sup>222</sup> under the Due Process and Equal

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214. U.S.CONST., Amend. XIV, §1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

215. The Congressional leaders who sponsored the Fourteenth Amendment were consciously changing *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the original Bill of Rights (Amendments 1-8) did not apply to the states because the Constitution omitted these words. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (summarizing the words of these leaders: 164-65, 181, 182, 183 (Representative John Bingham); 184-85 (Representative James Wilson); 185 (Representative Thaddeus Stevens); 186 (Senator Jacob Howard)).

216. The Australian framers rejected proposals based on the American Fourteenth Amendment at the 1898 Melbourne Convention. See, *Deb. Of the Australasian Fed. Convention, Melbourne*, 8 Feb. 1898, 664-91. The reasons for the rejection are controversial. See George Williams, *Human Rights Under the Australian Constitution*, (1999), at 25 (arguing that racism - not democracy, the common law, and responsible government - was the reason); John Williams, "Race, Citizenship and the Foundation of the Australian Constitution: Andrew Inglis Clark and the 14th Amendment," 42 *AUSTRAL. J. POL. & HIST.* 10, 18-19 (1996). Inglis Clark, the primary proponent of these rejected proposals, see, e.g., memo quoted in JOHN WILLIAMS, *THE AUSTRALIA CONSTITUTION: A DOCUMENTARY HISTORY* 708-09 (2005), later defended the American Supreme Court's narrow and much-criticized reading of the Fourteenth Amendment in the *Slaughter House Cases*, 83 US (16 Wall.) 36 (1872), because, in Clark's view, a broader reading would "radically [change] the whole theory of the relations of States and Federal Government to each other, and of both these Governments to the people," A.INGLIS CLARK, *STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW* 378 (1901).

217. See AMAR *supra* note 216 at 181-230; TRIBE, *supra* note 15, at 1297-1320, 1332-43, 1362-71.

218. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a state law prohibiting the teaching of German); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional a state law prohibiting the use of private schools). Note that rights of parental authority were among those rights that the Australian Framers identified as appropriately reserved for the states. See *supra* notes 34-45 and accompanying text.

219. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

220. *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

221. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Protection Clauses. It was not until the approach of the Twenty-First century, however, that the federal courts began recognizing the federal civil rights of same-sex couples, raising the prospect of a marked shift from state to federal control over the controversial social issue of same-sex marriage. We begin with a brief overview of the relevant equal protection and due process doctrine, and then go on to discuss the doctrine's application to same-sex marriage.

Under its due process analysis,<sup>223</sup> the Court has protected the "right to marry"<sup>224</sup> and struck down state-imposed conditions on who may marry<sup>225</sup> and on how marital couples may conduct their private affairs.<sup>226</sup> Most directly applicable to same-sex couples (though outside the context of marriage), the Court found in *Lawrence v. Texas* that a same-sex couple's due process rights include the right to engage in private sexual conduct without government interference.<sup>227</sup> While this due process doctrine has played an important role in the analysis of same-sex marriage rights, it was overshadowed by equal protection doctrine in the lead up to the Supreme Court's *Windsor* decision.

The Equal Protection Clause<sup>228</sup> has been interpreted to afford three different levels, or "tiers," of protection depending upon which classes of individuals are being treated differently under the law. At one extreme, laws that treat people differently on the basis of the highly suspect classifications of race and national origin are subject to the highest level of scrutiny, and are rarely, if ever, constitutionally permissible.<sup>229</sup> At the other extreme, laws that distinguish between groups of individuals who are enti-

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222. *Moore v. East Cleveland*, 431 U.S. 494 (1977).

223. U.S. CONST. amend. XIV, § 1. These rights are often referred to as "substantive due process" rights, as these rights impose limits on actions that the government can take that would infringe on individual liberties rather than simply requiring the government to provide a certain process before so infringing. Erwin Chemerinsky, *Substantive Due Process*, 15 *TUORO L. REV.* 1501, 1501-02 (1999).

224. *Meyer*, 262 U.S. at 399 (determining that the liberty protected by the Fourteenth Amendment includes "without doubt" "the right of the individual to . . . marry, establish a home and bring up children").

225. *Turner v. Safely*, 482 U.S. 78, 99-100 (1987) (finding that restrictions imposed on prison inmates' right to marry violated their due process rights); *Loving*, 388 U.S. at 12 (striking down interracial marriage ban on due process as well as equal protection grounds). See also *Zablocki*, 434 U.S. at 395-96 (Stewart, J., concurring) (contending that Wisconsin's law, which prevented fathers with unmet child support obligations from remarrying, should be struck down on due process, rather than equal protection grounds).

226. *Griswold*, 381 U.S. at 485-86 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred").

227. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name*, 117 *Harv. L. Rev.* 1893 (2004).

228. U.S. CONST. amend. XIV, § 1. The Court has also construed the Due Process Clause of the Fifth Amendment to contain an "Equal Protection" component that applies to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1953), and it was this provision that was interpreted in *Windsor*.

229. See *Mass Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (stating that laws burdening a suspect class are "presumptively invalid" and can be upheld "only upon an extraordinary justification").

bled to no special protection are subject to deferential rational basis review, and are generally upheld.<sup>230</sup> Within this tier, however, the Court has rejected as illegitimate laws based on “animus” or the “bare desire to harm a politically unpopular group.”<sup>231</sup> In between the most and least protected classifications are those sometimes designated as quasi-suspect. These classifications, including those based on gender and legitimacy, are entitled to intermediate scrutiny, which requires courts to ask whether the challenged classification is substantially related to an important government interest—a standard said to call for a “genuine” and “exceedingly persuasive” explanation.<sup>232</sup>

At the time that the fifty-state experimentation with same-sex marriage began, there were two Supreme Court cases that addressed the rights of gay and lesbians under the Equal Protection Clause. The first was *Baker v. Nelson*, a summary dismissal of an appeal from a Minnesota Supreme Court decision finding no equal protection violation in Minnesota’s ban on same-sex marriage.<sup>233</sup> This decision is directly on point, but old enough that it predates both the doctrine’s introduction of intermediate scrutiny and the massive change in social views and practices relating to homosexuality. *Baker* included no analysis because the Supreme Court dismissed it for “want of a substantial federal question.”<sup>234</sup>

The second case, decided the same year that DOMA was enacted, was *Romer v. Evans*, in which the Court applied the “animus” qualification of the rational basis test to a law discriminating against gays and lesbians.<sup>235</sup> Thus, as the states’ same-sex marriage experiments were getting underway, the federal equal protection doctrine was just beginning to be applied to the classification of sexual orientation. The fifty-state laboratory for the institution of same-sex marriage included within it a fifty-state *judicial* laboratory for the equal protection doctrine under state constitutions, to which other courts, state and federal, could look in developing their own equal protection doctrine.

Early in this experimentation, very little parallel development of federal constitutional law was occurring in federal court. By 2012, however, three federal courts had weighed in, with two upholding state bans<sup>236</sup> and one striking down a ban.<sup>237</sup> This third case, which began life as *Perry v. Schwarzenegger*, struck down California’s Proposition 8—the referendum

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230. See *Heller v. Doe*, 509 U.S. 312, 319 (1993) (stating that there is a “strong presumption of validity” under rational basis review).

231. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 537–38 (1973).

232. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

233. *Baker v. Nelson*, 409 U.S. 810 (1972).

234. *Id.*

235. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

236. *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1119 (D. Haw. 2012) (holding that *Baker* controlled, and, even if it did not, Hawaii’s marriage laws were rationally related to a legitimate government interest); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006) (holding that Nebraska’s laws limiting marriage to heterosexual couples was rationally related to a legitimate state interest).

237. *Perry v. Brown*, 671 F.3d 1052, 1112 (9th Cir. 2012).

that amended California's Constitution to limit marriage to opposite sex couples—after the California Supreme Court had interpreted the state constitution to require the recognition of same-sex marriages.<sup>238</sup> The Northern District of California struck down the law on both equal protection and due process grounds, finding that the law violated the same-sex couples' fundamental right to marry, and could not be justified under any level of equal protection scrutiny.<sup>239</sup> The Ninth Circuit Court of Appeals affirmed the district court's ruling, but grounded the result narrowly on its finding that animus against gays and lesbians motivated the referendum.<sup>240</sup> The Supreme Court thereafter granted certiorari, scheduling oral argument back-to-back with the argument in *Windsor*.

Granting certiorari in *Perry* opened up the prospect that the Court would end the fifty-state experiment by declaring same-sex marriage a constitutional right of all citizens throughout the nation. This prospect was a source of considerable concern, not only for opponents of same-sex marriage, but also for many supporters who feared that a nationwide decision made swiftly by the Supreme Court would undermine popular acceptance of same-sex marriage and the development of the emerging national consensus.<sup>241</sup> The Court's attempt to avoid, or at least forestall, that result is part of the federalism story that we will take up in conjunction with our discussion of the Court's analysis in *Windsor*.

#### iv. The Interrelationship between the “Push” of DOMA and the “Pull” of Individual Rights

The validity of same-sex marriage prohibitions under the Equal Protection Clause has obvious relevance to the validity of Sections 2 and 3 of DOMA. States cannot refuse to recognize marriages that are protected under the United States Constitution, nor can Congress direct states to do so. And the federal government cannot define marriage to exclude couples to whom the Constitution gives the right to marry. If the Supreme Court had wanted to resolve the issue in favor of same-sex marriage once and for all on a national level, it could have swept all of DOMA away with the same doctrinal brush that would eliminate all state diversity. Before considering the steps taken by the Court in *Perry* and *Windsor* to avoid imposing a

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238. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

239. *Id.* at 1004.

240. *Perry*, 671 F.3d at 1112.

241. Sheryl Gay Stolberg & Dalia Sussman, *Same-Sex Marriage is Seen in Poll as an Issue for the States*, N.Y. TIMES (June 6, 2013), [http://www.nytimes.com/2013/06/07/us/politics/states-should-decide-gay-marriage-poll-finds.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/07/us/politics/states-should-decide-gay-marriage-poll-finds.html?pagewanted=all&_r=0) (reporting results of a New York Times/CBS News poll showing that a solid majority of Americans oppose a broad national right to same-sex marriage and prefer the issue to be decided by the states, despite the fact that they support marriage equality for gay people); *but see* John Samples & Emily Ekins, *Public Attitudes Toward Federalism*, CATO INSTITUTE POLICY ANALYSIS, 14–16 (Sept. 23, 2014), available at [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa759\\_web.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa759_web.pdf) (reporting ambiguous and somewhat conflicting survey data about popular preferences for state and federal regulation of same-sex marriage).

federal solution, we consider how equal protection challenges to Section 3 were handled in the lower federal courts.

Most of the federal courts that considered equal protection challenges to DOMA's Section 3 prior to the Supreme Court's decision in *Windsor* found that Section 3 violated same-sex couples' equal protection rights.<sup>242</sup> In some of these decisions, the courts applied only rational basis review, and concluded that Section 3 of DOMA could not survive even that lowest level of scrutiny.<sup>243</sup> In other decisions, courts found that distinctions based on sexual orientation were entitled to heightened scrutiny.<sup>244</sup> Some of these courts nevertheless went on to conclude that DOMA failed rational basis review,<sup>245</sup> while the Second Circuit in *Windsor* suggested that heightened scrutiny might be required to invalidate the law.<sup>246</sup> Most interesting for our purposes is the significance courts found in Congress's departure from the deference it generally afforded states in determining who qualified as married under federal law. According to many of these opinions, this departure from federalist traditions rendered the purported aims of the Act suspect, under equal protection analysis.<sup>247</sup>

This idea was starkly expressed in *Massachusetts v. U.S. Department of Health and Human Services*,<sup>248</sup> in which the First Circuit struggled to find a

242. See *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012); *Mass. v. U.S. Dep't of Health and Human Services*, 682 F.3d 1, 9 (1st Cir. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 1002 (N.D. Calif. 2012); *Dragovich v. U.S. Dep't. of Treasury*, 872 F. Supp. 2d 944, 954, 964 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 347 (D. Conn. 2012) (all striking down DOMA Section 3 as an equal protection violation); but see *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *vacated in part*, 447 F.3d 673 (9th Cir. 2006) (finding that plaintiffs failed to meet their burden of showing that Section 3 of DOMA was not rationally related to any legitimate government purpose).

243. See *Dragovich*, 872 F. Supp. 2d at 963–64 (finding that section 3 of DOMA failed rational basis review, and that its enactment was motivated by anti-gay animus). The First Circuit in *Massachusetts v. Dept. of Health and Human Services* also applied rational basis review, but engaged in a somewhat unique analysis. See *infra* notes 250–55 and accompanying text.

244. See *Windsor*, 699 F.3d at 185; *Pedersen*, 881 F. Supp. 2d at 333; *Golinski*, 824 F. Supp. 2d. at 989–90.

245. See *Pedersen*, 881 F. Supp. 2d at 333 (stating that heightened scrutiny applied, but disposing of the challenge under rational basis review); *Golinski*, 824 F. Supp. 2d at 1002 (finding that Section 3 fails even rational basis test).

246. *Windsor*, 699 F.3d at 180–81 (noting that the existence of a rational basis for Section 3 of DOMA is “closely argued” and declining to address whether DOMA could withstand rational basis review, relying instead on its application of heightened scrutiny which it concludes is constitutionally required).

247. See, e.g., *Windsor*, 699 F.3d at 186 (“Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA”); *Golinski*, 824 F. Supp. 2d at 1000 (“The passage of DOMA marks a stark departure from tradition and a blatant disregard of the well-accepted concept of federalism in the area of domestic relations”); *Dragovich*, 872 F. Supp. 2d at 956–57 (“Given the federal government’s long-standing deference to state law in the area of domestic relations, the BLAG’s rationale that the provision was a cautionary measure is not plausible”).

248. 682 F.3d 1 (1st Cir. 2012).

place for American family law federalism norms within the equal protection doctrine. In the view of the court, the plaintiffs could not prevail under the rational basis standard “traditionally applied in routine matters of commercial, tax and like regulations.”<sup>249</sup> The court further concluded that the plaintiffs were not entitled to heightened scrutiny under circuit precedent, and noted, apparently as a cautionary statement, that the application of a heightened standard might have the effect, not only of overruling DOMA, but also of “overturn[ing] marriage laws in a huge majority of individual states.”<sup>250</sup> Instead, the First Circuit rested its holding on a blend of the animus line of rational basis cases, and its assertion that “in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.”<sup>251</sup> Thus, this case can be understood as applying two forms of “rational basis plus” review: one to ensure that distinctions were not based on a “bare Congressional desire to harm an unpopular group” and the second based on DOMA’s extensive intrusion “into a realm that has from the start of the nation been primarily confided to state regulation.”<sup>252</sup> While the first basis, “animus,” was well supported by doctrine, the second basis, federalism, was new. Tying this federalism focus to its less deferential rational basis approach, the First Circuit explained:

These consequences [imposed by DOMA] do not violate the Tenth Amendment or spending Clause, but Congress’s effort to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws does bear on how the justifications are assessed . . . Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.<sup>253</sup>

While this federalism theme played a much smaller role in the Second Circuit’s decision in *Windsor*,<sup>254</sup> it became a central force in the subsequent Supreme Court deliberations and decision.

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249. *Mass. v. U.S. Dep’t of Health and Human Services.*, 682 F.3d at 9 .

250. *Id.* at 10.

251. *Id.* at 9-10.

252. *Id.* at 10, 12.

253. *Id.* at 12-13.

254. One of the reasons the Second Circuit offered for its determination that it was not bound by the Supreme Court’s 1972 dismissal of *Baker* was grounded in federalism: While the U.S. Supreme Court had found that Minnesota’s *state* law prohibiting same-sex marriage did not violate the Fourteenth Amendment’s guarantee of equal protection of the law, it was a different question whether a *federal* law denying the right to equal access to marital benefits violated the Fifth Amendment’s equal protection guarantee. *Windsor*, 699 F.3d at 178 . The court reasoned that the Constitution left marriage, like most family law, to the states, and Section 3 of DOMA was an intrusion of the federal government into the state’s terrain. *Id.* at 186. The Supreme Court in *Baker* might have understandably left the states considerable discretion to determine which persons should be given the privilege and related benefits of marriage, but no such deference was owed to the federal government’s intrusion.



## v. The Supreme Court's Path through Opposing National Pressures

During oral arguments in *Windsor*, the lawyers and justices gave a great deal of attention to the states' authority to regulate marriage, but there was considerable uncertainty about how this federalism history was relevant to the Court's equal protection analysis.<sup>255</sup> The connection was drawn most expressly by Justice Kagan, in a lengthy comment from the bench:

[F]or the most part and historically, the only uniformity that the Federal Government has pursued is that it's uniformly recognized the marriages that are recognized by the State. So [DOMA reflects] a real difference in the uniformity that the Federal Government was pursuing. And it suggests that maybe something—maybe Congress had something different in mind than uniformity. False

I guess the question that this statute raises, this statute that does something that's really never been done before, is whether that sends up a pretty good red flag that. . . Congress's judgment was infected by dislike, by fear, by animus, and so forth.<sup>256</sup>

This analysis appears to be the basis of the Court's subsequent decision in *Windsor* overturning Section 3, though stated more obliquely in the opinion. After discussing, at some length, the long "history and tradition"<sup>257</sup> of leaving the definition and regulation of marriage to the states, a history supported by Supreme Court precedent, the Court took pains, as the First Circuit had in *Massachusetts v. U.S. Department of Health and Human Services*, to distinguish its Equal Protection analysis from any direct reliance on the "principles of federalism."<sup>258</sup> Whatever might be permissible under the constitutional provisions governing the balance of power between the federal government and the states, discriminations that reflect an unusual departure from historical practice "suggest careful consideration to determine whether they are obnoxious" to the constitutional guarantee of equal protection.<sup>259</sup> In *Windsor*, the history of family law federalism serves as evidence rather than mandate, but in establishing the basis for the protection of individual rights, the American family law federalism balance is afforded considerable protection.<sup>260</sup>

The Court's apparent interest in avoiding any doctrinal development not strictly necessary to resolve the constitutionality of DOMA Section 3 is reflected in its complete avoidance of the question of the proper standard

255. This uncertainty was particularly well-captured in an ongoing exchange between Solicitor General Verrilli and the Justices, regarding the question of whether DOMA Section 3 and/or hypothetical variations presented "a federalism problem." See Oral Argument at 82–85, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

256. *Id.* at 72.

257. *U.S. v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Haddock*, 201 U.S. at 575 for the proposition that "the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . and the Constitution delegated no authority to [Congress] on the subject of marriage and divorce").

258. See *id.* at 18–24.

259. *Id.* at 19.

260. See *id.* at 18–24.

of scrutiny to apply, despite the fact that every opinion concerning same-sex marriage leading up to the *Windsor* decision addressed the question, as did all the lawyers litigating the case in the Supreme Court.<sup>261</sup> The standard to be applied was widely assumed to be an important, if not a determinative, factor in resolving whether or not there was a federal constitutional right to same-sex marriage. In avoiding the central doctrinal question while lacing his majority opinion with commentary praising New York for having recognized same-sex marriage and disparaging DOMA's degrading and demeaning effect, Justice Kennedy gave litigants, courts, and legislators some powerful rhetoric to work with, without more directly advancing the doctrinal march toward a federal same-sex marriage rule.<sup>262</sup>

Federalism concerns, and particularly the value of fifty-state experimentation, were also clearly on the minds of the Supreme Court Justices in their consideration of *Perry*, though their concerns in this case pressed against the recognition of an equal protection right. During oral argument, several of the Justices returned repeatedly to the "newness" of the same-sex marriage experiment, and contrasted that experiment to the thousands of years of aggregate data on opposite-sex marriage that was purportedly reflected in a majority of the states' laws.<sup>263</sup> The concern pressed by lawyers arguing for reversal and taken up by some of the Justices, was that a recognition of an equal protection right to same-sex marriage would either stop the experimentation altogether (by finding that all states were constitutionally required to recognize same-sex marriage) or severely distort the experimentation (by more narrowly finding, as the Ninth Circuit had done, that states that afforded full rights to same-sex couples other than the title of marriage were constitutionally required to give them the title as well, but leaving states affording lesser rights free from constitutional constraints).<sup>264</sup> The risks associated with imposing a national mandate in this area of "uncharted waters" may have encouraged Justice Kennedy to focus on the "substantial question of standing" in *Perry* and wonder aloud whether Supreme Court review of the case had been improperly granted.<sup>265</sup> And in the end, that standing issue allowed the Court to avoid answering the constitutional question that threatened to shut down the state laboratories.<sup>266</sup>

In these two cases, announced on the same day, the Supreme Court found a way to resist both the national legislative pressure against and the national judicial pressure favoring same-sex marriage. In *Windsor*, the Court squeezed family law federalism into its equal protection doctrine in a way that afforded states protection to control and experiment with same-sex marriage under the guise of individual rights. In *Perry*, it relied on

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261. Brief for Petitioner at 36, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for Respondent at 17, 133 S. Ct. 2675 (2013) (No. 12-307).

262. *Windsor*, 133 S. Ct. at 2692-95.

263. See Oral Argument at 18-22, 55-57, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2010) (No. 12-144).

264. *Id.* at 18-22.

265. *Id.* at 47-48.

266. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

standing to avoid a decision addressing those rights that might have distorted that experimentation or prematurely foreclosed the experimentation altogether. In short, in these two cases, the Supreme Court made use of constitutional doctrine to protect precisely the state of affairs that the Australians had decided a century ago.

vi. Federal Court Developments after *Windsor* and *Perry*

Despite the Supreme Court's efforts to keep the evolution of the law governing same-sex marriage in the hands of the states, its decision in *Windsor* set in motion a series of federal district court rulings that addressed the federal constitutionality of state same-sex marriage bans. The vast majority of these cases struck down the bans,<sup>267</sup> and most of these cases were subsequently affirmed on appeal.<sup>268</sup> When the Sixth Circuit's reversal of the district court rulings in four states<sup>269</sup> produced a circuit split, however, the Supreme Court agreed, in January of 2015, to hear the cases. If the Supreme Court rules that state same-sex marriage bans violate citizens' constitutional rights, as it is widely expected to do by the

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267. Of the following twenty-eight federal district court rulings that have addressed the constitutionality of same-sex marriage bans since *Windsor*, twenty-six have held that these bans are unconstitutional on due process grounds, equal protections grounds, or both. *Compare* *Searcy v. Strange*, No. 1:14-cv-00208-CG-N, 2015 U.S. Dist. LEXIS 7776 (S. D. Ala. Jan. 23, 2015); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2015 U.S. Dist. LEXIS 4018 (D. S.D. Jan. 12, 2015); *Campaign for Southern Equality v. Bryant*, NO. 3:14-CV-818-CWR-LRA, 2014 U.S. Dist. LEXIS 165913 (S. D. Miss., Nov. 25, 2014); *Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 U.S. Dist. LEXIS 165898 (E.D. Ark. Nov. 25, 2014); *Rolando v. Fox*, 23 F. Supp. 3d 1227 (Dist. Mont. Nov. 19, 2014); *Condon v. Haley*, 21 F. Supp. 3d 572 (D. S.C. Nov. 12, 2014); *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 U.S. Dist. LEXIS 157802, at \*31-32 (W.D. Mo. Nov. 7, 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 158680, at \*29-32 (S.D. W. Va. Nov. 7, 2014); *Marie v. Moser*, No. 14-cv-02518-DDC/TJJ, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481, at \*12 (D. Wyo. Oct. 17, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 U.S. Dist. LEXIS 148123, at \*3 (D. Colo. Oct. 17, 2014); *Majors v. Horne*, 14 F. Supp. 3d 1313, 1315-16 (D. Ariz. Oct. 17, 2014); *Hamby v. Parnell*, No. 3:14-cv-00089-TMB, 2014 U.S. Dist. LEXIS 145876, at \*34 (D. Alaska Oct. 12, 2014); *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (W.D. N.C. Oct. 10, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281-82 (N.D. Fla. Aug. 21, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. July 21, 2014); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1164 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147 (D. Or. May 19, 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. March 21, 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 639 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 480 (E.D. Va. Feb. 13, 2014); *Bishop v. Oklahoma*, 962 F. Supp. 2d 1252, 1295-96 (N.D. Okla. Jan. 14, 2014), *and* *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah Dec. 20, 2013), *with* *Conde-Vidal v. Garcia-Padilla*, No. 14-1253 (PG) (Dist P.R. Oct. 21, 2014) *and* *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 September 3, 2014 slip op. (E.D. La. Sept. 3, 2014).

268. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

269. *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

end of the current term, it will displace state with federal law on this central contemporary issue of family law.

Thus, the Supreme Court's apparent maneuvering in *Windsor* and *Perry* may have only bought the 50-state experiment two more years, and critics might emphasize that these two years have been dominated by federal, not state, developments. While the shift to federal litigation has certainly been pronounced, it has not extinguished ongoing state developments, which have included the recognition of same-sex marriage in two states by legislation<sup>270</sup> and in two states by court decisions interpreting state constitutional provisions.<sup>271</sup>

Moreover, the federal district court decisions themselves have a local dimension that might be seen to temper the shift from state to national control. Beginning in Utah, the federal district courts have interpreted and applied federal constitutional law one state at a time—indeed, sometimes in units smaller than the entire state—through judges whose professional and political lives are often deeply rooted in these communities.<sup>272</sup> And working alongside these federal district judges were a number of state court judges, who have also in all but one case concluded that their own states' same-sex marriage bans violated the U.S. Constitution.<sup>273</sup>

In reaching their decisions, the federal district courts introduced local variations, reflecting an ongoing laboratory of analysis. These state-level variations in federal analysis were further differentiated by the range of state government responses to the federal rulings. In many states, the trial court's ruling prompted an abandonment of the state's support of the ban by some or all state government officials.<sup>274</sup> Moreover, the federal decisions swiftly led in some states (those whose rulings were not immediately stayed) to marriages—marriages that dramatically demonstrated the num-

270. Hawaii Marriage Equality Act of 2013, Haw Rev. Stat. Sec. 572; Illinois Religious Freedom and Marriage Fairness Act (2013), 750 Ill. Comp. State 5/201.

271. *Garden State Equality v. Dow*, 434 N.J. Super. 163 – 82 A.3d 336 (2013); *Greigo v. Oliver* 2014-NMSC-003 – 316 P.3d 865 (2013).

272. See Emily Buss, *Federal Court Federalism*, in draft. On file with the authors.

273. *Compare Wright v. Arkansas*, 2014 Ark. 25, No. CR-12-706; *In Re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010); *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421 (438th Dist. Ct., Bexar County, Tex. April 22, 2014); *Brinkman v. Long*, No. 13-CV-32572 (Colo. D. Ct. July 9, 2014); *Pareto v. Ruvin*, No. 2014-001661-CA-01 (Fla. 11th Cir. Ct. July 25, 2014); *Huntsman v. Heavilin*, No. 2014-CA-305-K (Fla. 16th Cir. Ct. July 17, 2014); *In re Costanza and Brewer*, No. 13-01049-CA (La. Ct. App. 2013); and *State of Missouri v. Florida*, 2014 WL 5654040 (Mo. Cir. Ct. 2014) with *Borman v. Pyles-Borman*, No. 2014CV36 (Tenn. Cir. Ct. Aug. 5, 2014).

274. In Pennsylvania and Oregon, state officials chose not to appeal. John Bacon & Richard Wolf, *Pa. Governor Won't Appeal Ruling Legalizing Gay Marriage*, USA TODAY (May 21, 2014), <http://www.usatoday.com/story/news/nation/2014/05/20/pennsylvania-gay-marriage-ruling/9323521/>. In Virginia, the Attorney General refused to defend the ban on appeal, but other government officials pursued the appeal. See Richard Wolf, *Virginia Won't Defend Its Same-Sex Marriage Ban*, USA TODAY (Jan. 23, 2014), <http://www.usatoday.com/story/news/politics/2014/01/23/virginia-ag-gay-marriage/4791715/>. In several states, court clerks, with responsibilities for issuing marriage licenses, took diverse positions in the federal litigation. See John Adams et al., *Across the USA: Reaction to Same-Sex Marriage Decision*, USA TODAY (Oct. 10, 2014), <http://www.usatoday.com/story/news/nation/2014/10/06/same-sex-marriages-states/16803631/>.

ber of citizens whose lives had been constrained by their states' same-sex marriage bans. Most strikingly, in Utah, in the two weeks between the district court decision striking down the state's ban on same-sex marriage and the Supreme Court's imposition of a stay of the district court's order, more than 1,000 same-sex marriages were performed in that state alone.<sup>275</sup> And when, in October, 2014, the Supreme Court denied certiorari and lifted the stays imposed in cases from three Circuit Courts, the news coverage was full of images of couples who immediately wed.<sup>276</sup>

A number of federal courts have also relied on *Windsor* to conclude that states are constitutionally required to recognize marriages validly performed in other states.<sup>277</sup> These decisions are based, like the decisions striking down states' own same-sex marriage bans, on interpretations of the Due Process Clause, the Equal Protection Clause, or both.<sup>278</sup> Notably absent from these opinions is any consideration of the Full Faith and Credit Clause or of DOMA Section 2, which exempts states from an obligation to give full faith and credit to same-sex marriages celebrated in other states. Of course, if the Due Process and Equal Protection Clauses of the United States Constitution require states to recognize these validly entered out-of-state marriages, as these district courts have concluded, then no act of Congress can authorize states to avoid that obligation. As we await the Supreme Court's decision in the Sixth Circuit cases, the constitutional validity of DOMA Section 2 remains an open question. And even if the right to same-sex marriage will ultimately be framed in federal constitutional terms—as appears likely—the authority of Congress to curtail the interstate stability of a family's status in other contexts remains an important question for the United States' federalism regime.

## B. Same-Sex Marriage in Australia

As in the United States, the constitutional law on same-sex marriage in Australia changed dramatically in 2013. Prior to the High Court's decision in *Commonwealth of Australia v. Australian Capital Territory (ACT)*,<sup>279</sup> the state of the law was in great doubt. Although both state and federal law were moving forward toward recognizing and protecting the interests of same-sex couples in Australia, same-sex marriage was largely avoided.<sup>280</sup> As noted, the most important question in the United States, answered nega-

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275. Josh Gerstein, *Obama Administration to Recognize Utah Same-Sex Marriages*, POLITICO (Jan. 10, 2014), <http://www.politico.com/story/2014/01/same-sex-marriages-utah-102022.html>.

276. See Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. Times, (October 6, 2014).

277. See, e.g., *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1164 (S.D. Ind. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013).

278. See, e.g., *Obergefell*, 962 F. Supp. 2d at 973 (“[H]ere, the constitutional due process right at issue is not the right to marry, but, instead, the right not to be deprived of one’s already-existing legal marriage and its attendant benefits and protections”).

279. *Commonwealth v. Australian Capital Territory* (2013) 250 CLR 411.

280. See discussion *infra* Part III.B.1.

tively by the Supreme Court in 2013, was whether Congress has legislative power to deny all marriage-based federal benefits to same-sex couples validly married under state law.<sup>281</sup> In Australia, two important questions were answered by the High Court. The first, answered in the affirmative, was whether the Commonwealth Parliament had legislative power to recognize and regulate same-sex marriages.<sup>282</sup> The second, answered in the negative, was whether states could recognize and regulate same-sex marriage if the federal Parliament chose not to do so.<sup>283</sup>

Those two important High Court decisions have left open many constitutional questions—legal and political—relating to federalism. The ultimate political question remaining is whether the Commonwealth Parliament will exercise its power to recognize same-sex marriages (and, if it does so, when and under what terms). In addition, there remain difficult questions of the scope of the state’s power to regulate same-sex couples and their families, questions that go to both the continuing validity of state laws currently on the books and to the states’ ability to enact new laws that might move them closer to the recognition of a status legally equivalent to marriage. Before setting out the High Court’s decision in *Commonwealth v. ACT* and the federalism issues that remain, we describe the state and federal developments in the recognition of same-sex couples that preceded that decision.

### 1. *The Developing Recognition of Same-Sex Relationships from State Laboratories of Experimentation to Federal Law*

Over the past two decades, the law in Australia has been inching forward in an expanded recognition of families headed by same-sex couples. We break these developments into two categories in order to better plot the respective contributions made by the states and the federal government and the interaction among them. The first category of legal development is the movement toward recognition of same-sex relationships and equal treatment of those relationships without calling them “marriage.” The developments in this first category can be traced in a fairly straight line from state law, to state referral under section 51(xxxvii), to federal law, although some state variation remains. The second category is movement toward the recognition of parent-child relationships between both members of same-sex couples and their children. The developments in this second category reflect a complicated combination of state and federal law addressing access to fertility services and adoption, the assignment of parentage, and the allocation of parental responsibility.

#### a. Regulation of the Couple’s Relationship

The recognition of same-sex relationships began in the states and grew out of a state-based movement for the recognition of non-marital, opposite-

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281. See discussion *supra* Part III.A.3.v.

282. *Commonwealth v ACT* (2013) 250 CLR at 454, ¶ 9.

283. See *id.* at 468, ¶ 59.

sex couples.<sup>284</sup> In response to trends in cohabitation outside of marriage, the Australian states developed a range of legal schemes recognizing “de facto” relationships.<sup>285</sup> These schemes of regulation were the work of the states because they regulated relationships outside the scope of the federal Parliament’s marriage authority. They took their point of departure from the felt need to provide certain benefits and protections (previously available only to married couples) to unmarried couples. Over time, these state de facto regimes came to include same-sex couples as well.<sup>286</sup> While the recognition of same-sex relationships grew out of state laws designed to recognize non-marital, opposite-sex relationships, the non-marital focus for same-sex couples was likely reinforced by uncertainties surrounding states’ constitutional authority to regulate marriage, an uncertainty complicated by the federal Parliament’s amendment of the Marriage Act in 2004 to expressly limit marriage to “the union of a man and a woman to the exclusion of all others voluntarily entered into for life.”<sup>287</sup>

Over the course of this evolution, these laws governing de facto relationships were often borrowed and modified by other states—the starting point of this regulatory pattern being generally placed in New South Wales.<sup>288</sup> Notwithstanding the influence of state-to-state interaction, the various state laws were not uniform<sup>289</sup> and had limited reciprocal recognition.<sup>290</sup> The lack of uniformity among state laws and between state and federal laws coupled with increasing pressure for national legislation protecting unmarried couples led to consideration and, eventually, invocation of the Commonwealth’s referral power under section 51(xxxvii). At roughly the same time Parliament made clear that its definition of marriage did not include same-sex couples, states began to refer their power over de facto relationships (by definition, not “marriage” under xxi), to the Commonwealth Parliament under section 51 (xxxvii).<sup>291</sup> Adding to the pressure for a national law was the Human Rights and Equal Opportunity Commission’s “national inquiry into discrimination against people in same-sex relationships,” which concluded that there was widespread dispa-

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284. See BELINDA FEHLBERG & JULIET BEHRENS, *AUSTRALIAN FAMILY LAW, THE CONTEMPORARY CONTEXT* 136–38 (2008).

285. See, e.g., *De Facto Relationships Act 1984* (NSW); *Property Law (Amendment Act) 1987* (Vic).

286. See, e.g., *Property (Relationships) Act 1984* (NSW); *Statute Law Amendment (Relationships) Act 2001* (Vic) (amending state de facto relationship laws to include same-sex couples)

287. *Marriage Act 1961* (Cth) ss 5(1), 88(B)(4). This definition was understood to reinforce a common understanding of what the term “marriage” meant under Australian law. See Geoffrey Lindell, *supra* note 210, at 42. See also *Hyde v. Hyde and Woodmansee* [1886] 1 L.R.P. & D. 130, 133 (Eng.). This definition also repeated the language already set out in the Family Law Act’s statement of principles, found in section 43(a), and in the Marriage Act’s list of directions that are required to be provided to civil marriage celebrants. *Family Law Act 1975* (Cth) s 43(1)(a); *Marriage Act 1961* (Cth) s 46(1).

288. Kovacs, *supra* note 135, at 108.

289. See Adiva Sifris & Paula Gerber, *Same-Sex Marriage in Australia: A Battleground for Equality*, 25 *AUSTL. J. FAM. L.* 96, 100 (2011); Kovacs, *supra* note 135, at 108.

290. See *id.*, at 100.

291. See *supra* note 138 and accompanying text.

rate treatment of same-sex couples in a wide range of family law matters.<sup>292</sup>

Spurred by these developments, the Commonwealth Parliament enacted two pieces of legislation affecting the rights of same-sex couples in 2008: The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, and the Same-Sex Relationships (Equal Treatment in Commonwealth Law -General Law Reform) Act 2008.<sup>293</sup> The Family Law Amendment was enacted pursuant to the power received from five states under subsection 51 (xxxvii).<sup>294</sup> With the exception of Western Australia, which has the unique ability to coordinate state and federal law in its state family courts,<sup>295</sup> the nation now has uniform law governing the dissolution of same-sex relationships. As with divorce, the uniform national law, and the emerging consensus that supported the law, grew out of state-based experimentation.<sup>296</sup> However, whereas in the context of divorce the Commonwealth Parliament had the constitutional authority all along and only needed to wait for a political consensus to act, here, in the context of de facto relationship recognition, both the consensus and the constitutional authority to act on that consensus, emerged from the states.

The 2008 Amendments made substantial changes to the federal Family Law Act, affording rights set out in the Act to couples in “de facto relationships.”<sup>297</sup> To determine whether a couple is in a de facto relationship, the law looks to a number of factors,<sup>298</sup> no one of which is controlling.<sup>299</sup>

292. See generally *Same-Sex: Same Entitlements*, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, 54-117 (2007), available at [https://www.humanrights.gov.au/sites/default/files/content/human\\_rights/samesex/report/pdf/SSSE\\_Report.pdf](https://www.humanrights.gov.au/sites/default/files/content/human_rights/samesex/report/pdf/SSSE_Report.pdf).

293. See Lee Galloway, *The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill—A Guide to Practice and Policy*, 22 AUSTL. J. FAM. L. 93 (2008).

294. Four states referred that power, *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld), and a fifth, South Australia, in the language of the constitution “afterwards adopt[ed] the law.” *Commonwealth Powers (De Facto Relationships) Act 2009* (SA). Western Australia adopted a de facto relationships act, but following its general pattern of withholding referrals and proceeding through its Family Court, it referred only with respect to superannuation entitlements. *Commonwealth Powers (De Facto Relationship) Act 2006* (WA). See also Kovacs, *supra* note 135, at 114.

295. See *supra* notes 121-22 and accompanying text.

296. See Scott Stephenson, *Federalism and Rights Deliberation*, 38 MELB. U. L. REV. (forthcoming) 82-111 (arguing that deliberation at the state level contributes to decision-making at the national level).

297. Unlike the nationally adopted term “de facto relationship,” state laws now generally use the term, “domestic relationship.” See Kovacs, *supra* note 135, at 104, 212.

298. The factors are the duration of the relationship (at least two years, subject to a hardship exception); the nature and extent of common residence; the existence of a sexual relationship; financial support and dependence; ownership, use and acquisition of property; degree of mutual commitment to a shared life; care and support of children; and reputation and public aspects. *Family Law Act 1975* (Cth) s 4AA(2). See, e.g., Juliet Behrens, *‘De Facto Relationship?’ Some Early Case Law under the Family Law Act*, 24 AUSTL. J. FAM. LAW. 350, 351-52 (2010); Watts, *supra* note 135, at 123-24; Kovacs, *supra* note 135, at 114-15. Moreover, to be in a de facto relationship, the parties must live a sufficient period of the required two years in a participating jurisdiction, that is, a state that has made a qualifying referral under section 51(xxxvii) or a federal territory



The federal law has not entirely displaced state law in dealing with same-sex domestic relationships.<sup>300</sup> State registration<sup>301</sup> may influence the determination of whether a couple satisfies the de facto relationship test.<sup>302</sup> At least to this extent, the affected same-sex couples have to deal with both lack of uniformity across state lines<sup>303</sup> and lack of uniformity between state and federal laws.<sup>304</sup>

While significant advancement in the recognition of same-sex partnerships was achieved through the De Facto Relationships Amendment, the status of a de facto couple falls short of marriage in two respects, one operational and one symbolic. Operationally, the existence of a de facto relationship is based on a conclusion that some unspecified number of unranked identified criteria are met, rather than on whether the couple declares they are in a de facto relationship. No expression of commitment or state endorsement, or even registration, is required.<sup>305</sup> Indeed, it is possible for a person to be in a de facto relationship without knowing it or even contrary to the intention of one or both members of the couple not to have made any commitment.<sup>306</sup> Moreover, the provisions of the Family Law Act governing de facto relationships become operable (just as they do for married couples) only when the relationship breaks down.<sup>307</sup>

Symbolically, “de facto” relationships are, by their terms, not “marriages.” To the extent that the same-sex marriage controversy is about the

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which is covered by reason of the Commonwealth’s plenary power to legislate for territories under section 122; Western Australia does not satisfy this requirement because its referral is limited to superannuation. *Id.*

299. See *Family Law Act 1975* (Cth) s 4AA(3) (providing that “no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether persons have a de facto relationship”); *Family Law Act 1975* (Cth) s 4AA(4) (providing that in determining whether a de facto relationship exists, a court is entitled “to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case”).

300. See Kovacs, *supra* note 135, at 119; Watts, *supra* note 135, at 122, 125.

301. Four states have registration schemes. *Relationships Register Act 2010* (NSW) s 5; *Civil Partnerships Act 2011* (Qld) s 6; *Relationships Act 2003* (Tas) s 11; *Relationships Act 2008* (Vic) s 6.

302. Compare Watts, *supra* note 135, at 124 (suggesting that registration is “not determinative . . . [b]ut one factor, perhaps a powerful one”), with Kovacs, *supra* note 135, at 120 (concluding that registration “overcomes the need to prove” the two year period spent in the cohabitation and the parties’ connection with a participating state).

303. See Sifris & Gerber, *supra* note 293, at 100 (discussing how registration schemes are “not uniform” and there is “limited reciprocal recognition”).

304. See Watts, *supra* note 135, at 125 (noting the difficulty of a couple’s ability to exercise an opt-in choice under section 86A because the difference between existing state laws and the new federal law was often substantial and thus not equally favorable to both parties); Behrens, *supra* note 295, at 357–58 (suggesting a situation where, because of doubt about the federal law’s applicability and the Family Court of Australia’s accrued jurisdiction, state court and state law might be preferred).

305. Indeed, ceremonies have been discouraged by the federal government as looking too much like marriage. See Sifris & Gerber, *supra* note 293, at 103.

306. A person can be determined to be in more than one “de facto relationship” or even simultaneously in a “de facto relationship” and a marriage. See Behrens, *supra* note 302, at 357; Kovacs, *supra* note 135, at 107; Watts, *supra* note 135, at 124.

307. See generally Behrens, *supra* note 302, at 354.

access of same-sex couples to the specially recognized status of “marriage,” de facto relationship recognition is a lower status substitute.<sup>308</sup> Some individual Australian states have moved legal recognition closer to marriage by providing for the registration of “civil partnerships,” but until November 2013, no state or territory had succeeded in testing the extent of its authority to recognize same-sex couples as married under state or territory law.<sup>309</sup>

#### b. Regulation of the Parenting Relationship

A second category of legal developments concerning same-sex couples is the growing recognition of parental claims, including claims of same-sex partners who are not biologically related to their children. The story of increasing equalization of treatment between children of same-sex and opposite-sex couples is different from the story of equalization between same-sex and opposite-sex couples themselves. Before the advent of concern about non-married couples and same-sex marriage, state and federal law had detached children’s entitlement to the protections afforded by the Family Law Act from their connection to a marital family.<sup>310</sup> This inclusion of “ex-nuptial” children within the Act, which was determined to exceed Parliament’s (xxi) and (xxii) powers, was authorized by referrals from the states and enacted pursuant to subsection (xxxvii).<sup>311</sup>

Despite these significant gains in making ex-nuptial children part of a family, a significant challenge remained for same-sex couples with children, as a result of the way the law assigned parentage. Under the Family Law Act, parents were defined as the children’s genetic parents (the male and female gamete contributors) or the adoptive parents who, pursuant to state adoption law, had legally displaced the genetic parents. Restrictions on same-sex couples’ access to assisted reproductive technologies and adoption were both controlled by state law, and the lack of recognition of their partners as parents had curtailed same-sex couples’ access to the legal regime designed to safeguard children’s welfare and to recognize and protect the relationships between children and those caring for them.<sup>312</sup>

At the same time as it amended the Family Law Act to extend its financial provisions to de facto couples, Parliament extended its definition of “parent” in the Family Law Act to include certain categories of non-biologically related same-sex partners.<sup>313</sup> The amendments also added language

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308. See Sifris & Gerber, *supra* note 293, at 104.

309. See Watts, *supra* note 135, at 138.

310. See *supra* notes 136-137 and accompanying text.

311. *Family Law Amendment Act 1987* (Cth); see Part II.B.

312. See Jenni Millbank, *Recognition of Lesbian and Gay Families in Australian Law—Part Two: Children*, 34 *FED. L. REV.* 1 (2006) (documenting state-imposed limitations imposed upon same-sex couples’ access to adoption and assisted reproductive technologies (ART)).

313. *Family Law Act 1975* (Cth) s 60H (“parent” includes the consenting female de facto partner of a woman who conceived through ART); *Family Law Act 1975* (Cth) s60HA (“parent” includes an individual whose de facto partner has adopted a child with the individual’s consent).

clarifying the non-parentage of those who contribute gametes as donors without intent to become parents and of those who have served as surrogates.<sup>314</sup>

These provisions, like the amendments focused on the de facto relationship, go far in equalizing the legal status of members of a same-sex headed household. But, as with that relationship itself, the legal treatment of parent-child relationships between children and the same-sex couples who care for them is not identical to the legal treatment of the relationships between children and either (1) non-genetically related but married heterosexual parents, or (2) genetically related heterosexual parents, whether married or not. To a significant extent, same-sex parental rights under the Family Law Act are still dependent on state law and policy that control homosexual individuals' access to both assistive reproductive technology procedures and adoption.<sup>315</sup> And a non-genetic, same-sex partner is not recognized under the terms of the Act as a parent unless that individual partner qualifies as the de facto partner of a legally recognized parent by biology or adoption.<sup>316</sup> The failure to meet the conditions required to establish a de facto relationship could prevent a non-genetically related individual from being recognized as a parent, even if that individual is actively playing that role within the family.<sup>317</sup>

In this sense, the current parentage rules reintroduce a parallel to the nuptial/ex-nuptial distinction for children in same-sex headed households and manifest the ongoing effect of the limits the Australian constitutional framers placed on the scope of the Commonwealth's authority over parental rights. Providing for a registration mechanism that has the effect of establishing a de facto relationship could address the operational problem

314. See *Family Law Act 1975* (Cth) s 60H.

315. At the time of writing, same-sex couples have the right to be considered for adoption in the following states and territories: Australian Capital Territory, New South Wales, Tasmania, and Western Australia. *Adoption Act 1993* (ACT) s 14; *Adoption Act 2000* (NSW) s 23; *Adoption Act 1988* (Tas) s 20; *Adoption Act 1994* (WA) s 38. However, this right has not been recognized in the following states and territories: Northern Territory, Queensland, South Australia, and Victoria. *Adoption of Children Act 1994* (NT) s 15; *Adoption Act 2009* (Qld) s 92; *Adoption Act 1998* (SA) s 12(3); *Adoption Act 1984* (Vic) s 11. Victoria would, however, in some limited circumstances, permit a same-sex partner to adopt a child of his or her partner, as a second parent. *Id.* at ss 11(6)-(7). In every jurisdiction besides South Australia, same-sex female couples have access to assisted reproductive technology (ART) and give the non-birthing female partner (referred to as "co-mother") parental rights to the child. *Parentage Act 2004* (ACT) s 8; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 2003* (NT) s 5DA; *Status of Children Act 1978* (Qld) s 19B; *Status of Children Act 1974* (Tas) S 10C(1A); *Status of Children Act 1974* (Vic) s 13; *Artificial Conception Act 1985* (WA) S 6A. State surrogacy laws are complex, confusing, and inconsistent. See Jenni Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious Regulation of '25 Brick Walls*, 35 MELB. U. L. REV. 165, 180 (2011); see generally Jenni Millbank, *Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy*, 27 AUSTL. J. FAM. L. 135 (2013).

316. *Family Law Act 1975* (Cth) s 60HA.

317. One of the relevant factors in determining whether a de facto relationship exists is whether the partners are involved together in caring for and supporting children, but another factor is the duration of the relationship. See *Family Law Act 1975* (Cth) s 4AA(2).

with the current law. But just as for two adults in a same-sex relationship, the status of marriage is believed to confer some important symbolic value on the children of that marriage, a value that cannot be preserved under any other term.<sup>318</sup>

### c. The Special Question of Marriage

Under the Australian constitutional design, the operational issues can continue to be worked out “American style” among the states. But the symbolic issue, whether same-sex couples can be “married,” is tightly tied to the meaning of the term as set out in the Marriage Act and in section 51(xxi) of the Constitution. For most of its history under its Constitution, the legal meaning of “marriage” was assumed to be the traditional common law definition of the term. As this assumption began to be challenged throughout the world, the Commonwealth Parliament took action to secure the traditional meaning by expressly incorporating the common law definition of marriage into the Marriage Act and by expressly forbidding the recognition of same-sex marriages validly celebrated in other countries.

It is hard to deny the commonality of DOMA and the Marriage Act Amendment, which both defined marriage along traditional lines and qualified the *lex loci celebrationis* obligation for same-sex marriages. However, there are fundamental distinctions in the consequences for individuals denied the “marriage” status in the two countries—one distinction being a product of the two countries’ difference in federalism regimes, and the other simply going to the substantive effect of the two Acts. Reflecting the two countries’ federalism divergence, DOMA denied validly married same-sex couples the benefits of marriage associated with federal laws, leaving the heart of marriage rights and obligations in the hands of the states.<sup>319</sup> Australia’s Marriage Act Amendment, in contrast, controlled federal access to marriage in Australia, and no state or territory law existed to offer a marriage alternative. On the substance of the two Acts, however, the Marriage Act took considerably less from same-sex couples than did DOMA; DOMA denied same-sex couples *all* the material benefits that United States federal law confers on married individuals, whereas Australia’s Parliament withheld the special status of “marriage,” but conferred, in separate legislation,<sup>320</sup> many of the material federal benefits of marriage to same-sex couples.

While most of the state developments in the regulation of same-sex relationships stopped short of conferring “marriage” on same-sex couples, a number of state legislatures attempted to provide for comparable institutions under another name, and some even proposed bills providing for

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318. See Sifris & Gerber, *supra* note 293, at 101–03 (“While there are no credible arguments for excluding same-sex couples from the institution of marriage, there is a cogent argument that same-sex couples should be allowed to marry in order to remove the negative impact that the ineligibility of parents to marry has on children”).

319. See *supra* notes 202, 211–214 and accompanying text.

320. *Same-Sex Relationships (Equal Treatment in Commonwealth Law—General Law Reform) Act 2008* (Cth).

same-sex marriage.<sup>321</sup> Leading the way with this experimentation was the Australian Capital Territory (ACT), which first attempted to enact a Civil Union Act in 2006 and 2008. But the national government, which has plenary authority over the ACT, disallowed the 2006 marriage bill and threatened disallowance, forcing withdrawal, of the 2008 bill.<sup>322</sup> The Labor Government explained that it rejected the ACT's attempts to "mimic" marriage because such civil union laws were inconsistent with the Federal Marriage Act's exclusion of same-sex marriage.<sup>323</sup> Then in November 2013, the ACT went further and enacted a law that largely copied the Commonwealth Marriage Act except in its specification of who could marry.<sup>324</sup> A number of couples were married under this law, and the constitutionality of the law and the validity of those marriages were promptly challenged by the Commonwealth.<sup>325</sup> It was through this challenge, that the High Court addressed the scope of the Commonwealth's Marriage power.<sup>326</sup>

## 2. Commonwealth v. ACT

On December 12, 2013, the law on same-sex marriage in Australia was catapulted into a new era. In *The Commonwealth v. Australian Capital Territory (ACT)*, the High Court struck down the ACT's Marriage Equality (Same Sex) Act 2013, finding that the law exceeded the ACT's legislative authority.<sup>327</sup> As stated by the High Court, the central legal issue in the case was whether the challenged ACT Act authorizing same-sex marriages in the Capital Territory was inconsistent with the Federal *Marriage Act* (1961), and the Court concluded that it was.<sup>328</sup> In reaching this conclusion, the Court reasoned that it first had to determine whether same-sex marriage

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321. See FEHLBERG & BEHRENS, *supra* note 48, at 4.4.4. (discussing state laws providing for marriage-like registration and recognition under other names); George Williams & Sangeetha Pillai, *The High Court, the Constitution and Family Law* (Paper presented at "The High Court and Family Law," 16th National Family Law Conference, Sydney, 9 October 2014, manuscript on file with authors) at 15-16 (discussing same-sex marriage bills considered in various state parliaments).

322. See generally Margaret Brock & Dan Meagher, *The Legal Recognition of Same-Sex unions in Australia: A Constitutional Analysis*, 22 PUB. L. REV. 266 (2011). Because the Commonwealth Government has plenary authority over territories, including the ACT, there was no question that its disallowance of this civil union measure was constitutional.

323. Patrick Goodenough, *Australian Gov't Shuts Down Bid for Same-Sex Unions*, CNS NEWS (July 7, 2008), <http://cnsnews.com/news/article/australian-govt-shuts-down-bid-same-sex-unions>.

324. *Marriage Equality (Same-sex) Act 2013* (ACT).

325. Lisa Cox, *Same-Sex Marriage Law High Court Challenge Confirmed*, the *Sydney Morning Herald* (Oct. 10, 2013), <http://www.smh.com.au/federal-politics/political-news/samesex-marriage-law-high-court-challenge-confirmed-20131010-2vaqe.html>.

326. In an interesting (if imperfect) federalist mirror image, the scope of Australia's national power was tested through a territory's exercise of power, just as the scope of the American states' power over marriage played a central role in resolving a federal challenge to Congress's power to enact DOMA.

327. *Commonwealth v Australian Capital Territory* (2013)250 CLR 411.

328. *Commonwealth v Australian Capital Territory*, (2013) 250 CLR 411, at 453 ¶ 4. The High Court did not reach the question of whether the ACT Act was also inconsistent with the Federal Family Law Act (1975) which was also raised in the litigation. *Id.* ¶ 5.

came within the meaning of “marriage” in section 51(xxi) of the Constitution, because, if that constitutional provision did not give the Federal Parliament the authority to recognize same-sex marriage, the ACT Act authorizing same-sex marriage in its territory would “probably”<sup>329</sup> be consistent with the federal law defining federal marriage as exclusively between one man and one woman.<sup>330</sup>

The Court noted that the three litigants in the case before the Court<sup>331</sup> had all submitted that “marriage” in section 51(xxi) included same-sex marriage, and the Court concluded “[t]hat submission is right and should be accepted.”<sup>332</sup> Plainly, deciding the scope of the constitutional word, “marriage,” was not a simple matter of looking it up in a dictionary. Over the years, strong arguments had been made to restrict Parliament’s power over “marriage” to the common law meaning of the term established long before the Australian constitutional convention, just as there had been arguments for a broader interpretation.<sup>333</sup> The High Court had a choice; its judgment, reached swiftly<sup>334</sup> and unanimously,<sup>335</sup> had the great value of

329. See *infra* note 360 and accompanying text.

330. *Commonwealth v Australian Capital Territory*, (2013) 250 CLR 411, 454 ¶ 9.

331. The three parties were the Commonwealth, ACT, and the amicus curiae, Australian Marriage Equality Inc. See *id.* at 452, ¶ 2.

332. *Id.* The High Court went on to acknowledge, however, that the Court, and not the parties “by agreement or concession,” must determine the meaning of the Constitution. *Id.* ¶¶ 8, 9. In critical analysis of the Court’s decision, academic writers argued that the Court relied too much on the litigants’ concession and should not have reached the constitutional issue without a “contradictor” arguing that “marriage” within the meaning of section 51(xxi) did not include same-sex marriage. Patrick Parkinson & Nicholas Aroney, *The Territory of Marriage: Constitutional law, marriage law and family policy in the ACT Same Sex Marriage Case*, 28 AUSTL. J. FAM. L. 160, 162 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2435016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435016) (citing pp. 25–26); see generally Anne Twomey, *Same-Sex Marriage and Constitutional Interpretation*, AUSTL. L. J. 613, 613 (2014).

333. See Brock & Meagher, *supra* note 326; Lindell, *supra* note 210; Geoffrey Lindell, *State Legislative Power to Enact Same-Sex Marriage Legislation, and the Effect of the Marriage Act 1961 (Cth) as amended by the Marriage Amendment Act 2004 (Cth)*, 9 CONST. L. & POL’Y REV. 25 (2006); George Williams, *Can Tasmania Legislate for Same-Sex Marriage?*, 31 TASMANIA L. REV., 117 (2012); George Williams, *Advice Regarding the Proposed Same-Sex Marriage Act*, 9 CONST. L. & POL’Y REV. 21 (2006); Luke Taylor, *Getting Over It? The Future of Same Sex Marriage in Australia*, 27 AUSTL. J. FAM. L. 26 (2013).

In their article, Brock and Meagher worked through a number of alternative possibilities, including a number of arguments supporting or opposing the conclusion that the High Court eventually reached. Brock and Meagher assumed, as did most others dealing with the same-sex marriage issue before it was decided, that a High Court decision would come as a result of the Commonwealth Parliament’s enacting legislation recognizing same-sex marriage followed by a challenge on the ground that the Commonwealth had exceeded its section 51(xxi) powers. Brock & Meagher, *supra* note 326, at 270–72. That the case did not arise in that way deprived the High Court of a consideration that Brock and Meagher argued would lend support to the Court’s decision: deference to the “democratically elected representatives of the Australian people.” *Id.* at 272. Cf. Lindell, *supra* note 210, at 29 (quoting Cass Sunstein).

334. According to Professor Twomey, “the case was rushed both in hearing and judgment.” Twomey, *supra* note 336, at 613. The High Court’s decision in the case came just a month after the law went into effect, and days after marriage ceremonies were performed under the law. Adam Withnall, *Australia: Gay marriage law reversed by high court less than a week after first weddings*, *The Independent* (Dec. 12, 2013), <http://www>

opening the way for a policy decision in the Commonwealth Parliament to recognize same-sex marriage if and when a national consensus supported such a policy.<sup>336</sup>

The High Court began the explanation of its judgment by pointing out that the constitutional provisions giving authority to the Commonwealth Parliament over marriage and divorce were a direct result of a fundamental decision about federalism and the allocation of legislative power between state and the national governments and was inspired by their concern with the American divorce experience. The Court explained that sections 51(xxii) and (xxiii) “were included in the Constitution to avoid what the framers saw as a great defect in the United States Constitution,” which left these family law subjects to potentially diverse and inconsistent state regulation.<sup>337</sup> The Australian framers chose, instead, to give these powers to the Commonwealth Parliament in order “to provide uniform laws governing marriage and divorce.”<sup>338</sup>

The Court rejected the utility of adopting any “single all-embracing theory of constitutional interpretation,”<sup>339</sup> and dismissed any suggestion that it should be guided by constructions predicated on theories of “originalism” or “original intent” because such interpretive methods “serve only to obscure much more than they illuminate.”<sup>340</sup> Instead, the Court said, section 51(xxii) should be construed “as using the word ‘marriage’ in the sense of a ‘topic of juristic classification.’”<sup>341</sup> Although disclaiming a “precise definition,” the Court maintained that the description provided by Justice Windeyer in the *Marriage Act Case* was sufficient “for the purposes of this case.”<sup>342</sup> In that case, Justice Windeyer maintained that the relevant “topic of juristic classification” is “laws of a kind ‘generally considered, for comparative law and private international law, as being the subjects of a country’s marriage law.’”<sup>343</sup> More generally, the Court cited precedent from outside the family law context to declare that the “[p]ower to make laws as to any class of rights involves a power to alter those rights, to define those rights, to limit those rights, to extend those rights, and to extend the

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[independent.co.uk/news/world/australasia/australia-gay-marriage-law-reversed-less-than-a-week-after-first-weddings-8999422.html](http://independent.co.uk/news/world/australasia/australia-gay-marriage-law-reversed-less-than-a-week-after-first-weddings-8999422.html).

The High Court’s decision in the case came just a month after the law went into effect, and days after marriage ceremonies were performed under the law.

335. Justice Gageler did not participate in the High Court’s decision because, as Solicitor General before his appointment to the High Court, he had given legal advice to the Commonwealth government. See Parkinson & Aroney, *supra* note 336, at 181, n.86.

336. Along with their criticism of the Court’s decision, Parkinson and Aroney conceded this value. See Parkinson & Aroney, *supra* note 336, at 188. (noting that the High Court had made clear which legislative body had authority to determine whether or not same-sex marriages should be recognized, and also that it was not the Court’s role to make the determination).

337. *Commonwealth v Australian Capital Territory*, (2013) 250 CLR 411, 453, ¶ 7.

338. *Id.*

339. *Id.* at 455 ¶ 14.

340. *Id.*

341. *Id.* See Twomey, *supra* note 336, at 615 (commenting on other uses of this term).

342. *Commonwealth v Australian Capital Territory*, (2013) 250 CLR 411, 459 ¶ 22.

343. *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529, 578.

class of those who may enjoy those rights.”<sup>344</sup>

In rejecting the common law definition of marriage, commonly quoted as “the voluntary union for life of one man and one woman, to the exclusion of all others,”<sup>345</sup> the Court stressed that, even between the forming of the English common law version and the time of the making of the Australian Constitution in 1900, the concept of marriage had undergone significant change. The Court pointed out that, by the time of federation, marriage could be dissolved by judicial decree. Thus, it had become “a voluntary union *entered into* for life. It was no longer a union *for* life.”<sup>346</sup> The concept of “marriage” in the constitution, the High Court concluded, is best understood as an evolving social institution, whose evolution the Commonwealth Parliament is given authority to influence.<sup>347</sup>

Having concluded that “marriage” in s 51(xxi) of the Australian Constitution included same-sex marriage, the Court went on to conclude that the amendment to the Marriage Act in 2004, specifying that “marriage” was between one man and one woman, was meant to be an exhaustive use of that term.<sup>348</sup> Thus, the federal statute occupied the entire field of “marriage,” including what the Commonwealth Parliament deliberately chose to exclude from the field of legally valid marriages. Once it was established that the Commonwealth’s constitutional power to regulate “marriage” included “same-sex marriage,” the ACT’s argument that “same-sex marriage” and “marriage” were two different things, in effect occupying two different “fields,” was no longer possible.<sup>349</sup>

The Australian High Court’s decision in *Commonwealth v. ACT*, and the United States Supreme Court’s decision in *Windsor*, each reinforced their countries’ alternative visions of family law federalism that was first captured in 1900. In *Windsor*, the Supreme Court sought to preserve the state laboratory theory, and prevented Congress from enlarging its role in defining marriage. In the *ACT* case, on the other hand, the Australian High

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344. *Commonwealth v Australian Capital Territory*, (2013) 250 CLR at 459, n. 68. The Court also drew upon the analogy between the terms “trademarks” and “marriage” in arguing that the meaning of things named in the Constitution were not fixed according to the state of the law in 1900. See *id.* at 459 ¶ 21 (quoting from *Grain Pool of Western Australia v The Commonwealth*, (1908) 6 CLR 469, 494.

345. *Hyde v. Hyde and Woodmansee* [1886] 1 L.R.P. & D. 130, 133 (Eng.). This case and this language are commonly quoted when the common law definition of marriage is invoked.

346. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 411, 456, ¶ 17.

347. *Id.* at 457, ¶ 18 (quoting Justice Windeyer in the *Marriage Act Case*).

348. *Id.* at 468 ¶ 57.

349. However, it is arguable that a state or territorial law regulating “same-sex marriage” might be found to be outside of the federally occupied field if the details of the law and its rights and responsibilities were sufficiently different. The High Court put some emphasis on the fact that the ACT Act stressed marriage *equality*, and on the Act’s nearly verbatim copy of the terms in the federal Marriage Act. *Commonwealth v Australian Capital Territory* (2013) 250 CLR 411, 468-69, ¶¶ 59-61. In their critical analysis of the Court’s opinion, Parkinson and Aroney suggested that the ACT weakened its position when it did not follow Professor George Williams’s advice to write a different-looking statute with provisions not entirely mirroring the federal statute. See Parkinson & Aroney, *supra* note 329, at 173-74; see also Williams & Pillai, *supra* note 325.



Court recognized Parliament's authority to impose uniformity on the nation's definition of marriage. But each of these decisions reflects important differences in the state of the law since 1900, differences which alter the operation of the two countries' family law federalism. In *Windsor*, the growing importance of federal civil rights in addressing family law questions is evident, even as the Court emphasized the traditional deference the federal government has shown the states in defining marriage. And *Commonwealth v. ACT* makes clear that Commonwealth legislation can act as an obstacle to state-level innovation as well as an engine of progress.

### 3. *What is Left of the State Laboratories after the ACT Case?*

The obvious political question after the High Court's decision is if and, more likely, when and through what process of decision-making, the Federal Parliament will vote to bring same-sex marriages within the authorization of the federal Marriage Act. The trend of popular opinion in Australia,<sup>350</sup> as elsewhere in the "western" world,<sup>351</sup> would seem to suggest that this will happen, perhaps even fairly soon. So far, however, neither one of the major political parties in Australia has embraced same-sex marriage.<sup>352</sup> Therefore, in the immediate future, national legislation favoring same-sex marriage would seem to depend on one or both of those parties approving a "conscience vote," under which individual members of Parliament are permitted to vote their personal views independent of their party's position.<sup>353</sup>

In the meantime, the important question for Australian family law federalism is whether, and to what extent, states can continue to experiment with their regulation of same-sex couples and their families, an experiment that began over two decades ago with their development of legal protections for unmarried couples.<sup>354</sup> The same-sex marriage case left little or no room for state experimentation in the name of "same-sex marriage."<sup>355</sup> Under a broad reading of Parliament's authority over marriage under section 51(xxi), plus its incidental power under section 51(xxxix),<sup>356</sup> the Mar-

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350. The report of polling data for Australia for the period from 2004 (the year the Marriage Act was amended to limit "marriage" to opposite sex couples) to the present shows a dramatic increase in support for same-sex marriage from 38% to 72%. *Public Opinion: Nationally*, AUSTRALIAN MARRIAGE EQUALITY.ORG, <http://www.australianmarriageequality.org/who-supports-equality/a-majority-of-australians-support-marriage-equality/> (last visited Feb. 11, 2015).

351. Of special significance was the legalization of same-sex marriage in New Zealand, a country with a comparably strong British common law background and a close geographic and cultural connection to Australia. See *Marriage (Definition of Marriage) Amendment Act 2013* (N.Z.), <http://www.legislation.govt.nz/act/public/2013/0020/latest/096be8ed80a81b0d.pdf>

352. See Brock & Meagher, *supra* note 326, at 369.

353. See *id.* at 369, n.31 (discussing how calls for such a vote have been made, but not yet implemented).

354. See discussion *supra* Part III.B.1.

355. *But see* note 346.

356. In *Commonwealth v Australian Capital Territory*, the High Court indirectly left open a wide preemptive field when it said the *Marriage Equality (Same Sex) 2013* (ACT Act) would "probably" operate concurrently with the federal *Marriage Act*. *Common-*

riage Act might even be understood to preclude as inconsistent a broad range of state legislation regulating same-sex relationships. Under such a broad reading of Parliament's marriage-plus-incidental power, Commonwealth legislation might be interpreted as occupying a field wide enough to cover all manner and form of same-sex relationships (or, for that matter, opposite sex non-marital relationships), including "unions," "partnerships," "domestic" entities, "de facto" couples, administrative registration of same-sex and other non-married couples. Perhaps some or all of these state laws might be found to have some impact on Parliament's ability to shape the meaning and limits of federal marriage.<sup>357</sup>

The strength of the argument for inconsistency would seem to depend on both the wording of the federal marriage law and the operable terms of the challenged, and arguably inconsistent, state or territory law. It seems unlikely, therefore, that de facto and closely-related domestic partnership regulations would be found to be inconsistent, as their terminology and, more important, their reach, are quite significantly distinct from the reach of "marriage" under the federal Act.<sup>358</sup> The argument against the implication of inconsistency seems particularly strong when, as is now true, there are extensive federal laws protecting same-sex relationships. As we have seen, legislation based on the Commonwealth's referral power and state parliament referrals has led to sweeping revision of the Federal Family Law Act to bring about something approaching equivalent treatment of married couples and unmarried (including same-sex) couples.<sup>359</sup> Moreover, independent of that referral-based legislation, the federal government has enacted legislation under its own national powers for the express purpose of eliminating discriminatory treatment of same-sex couples.<sup>360</sup> This legislation was not based on the Commonwealth Parliament's marriage, incidental, or referred powers, but rather on its power to create and shape the federal programs that were designed and implemented in a discriminatory fashion.<sup>361</sup>

What is least clear, after the High Court's decision, is the extent to which states can recognize marriage-like institutions for same-sex relationships. Can a state allow a "celebration" or "solemnization" of a same-sex union that mirrors a marriage ceremony? Can a state provide for a "civil union," that expressly copies some or all aspects of marriage? The ACT's

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*wealth v Australian Capital Territory*, (2013) 250 CLR 411, 454 (emphasis added), if same-sex marriage was outside "marriage" in section 51(21). This comment suggested a possible, albeit not a probable, pre-emptive legislative power extending beyond the marriage power itself.

357. See Brock & Meagher, *supra* note 326, at 274-77; Lindell, *supra* note 210, at 44.

358. See *supra* Part III.B.1.a.

359. *Id.*

360. *Same-Sex Relationships (Equal Treatment in Commonwealth Law-General Law Reform) Act 2008* (Cth).

361. See Brock & Meagher, *supra* note 326, at 277 (mentioning federal power sources related to social security, taxation, defense, and immigration, among other legal benefits). The nature of the sources of national legislative power parallels Congress's source of legislative power to enact the now invalid section 3 of DOMA. See discussion *supra* Part III.A.3.ii.

experience suggests that the authority for states and territories to take these steps is uncertain.<sup>362</sup> In 2006 the Governor-General disallowed<sup>363</sup> the Act which provided for “civil unions” between two persons before a “civil union celebrant” and one other witness, and included a preamble providing that this Act would allow two people to “enter into a legally recognized relationship that is to be treated under territory law in the same way as a marriage.”<sup>364</sup> That disallowed Act was replaced by the Civil Partnership Bill 2006, which, to reduce the marriage equivalency concerns, substituted “partnership” for “union” and “civil partnership notary” for a marriage celebrant.<sup>365</sup> The ACT’s status as a territory and the national Government’s plenary authority over ACT legislation, clearly limit the direct application of this ACT experience to a constitutional analysis of the state’s authority, but the focus of concern on the marriage-like status and operation of the ACT’s laws suggests the grounds that could support a finding of “inconsistency” between state marriage-equivalency laws and the Federal Marriage Act.<sup>366</sup>

Scholars Margaret Brock and Dan Meagher have considered the inconsistency issue in some detail.<sup>367</sup> They have hypothesized an amended Federal Marriage Act that expressly precludes any same-sex union “that is the functional equivalent of marriage” and have considered the application of such an act to a state statute like the disallowed ACT civil union bill. They reasoned that, if the commonwealth statute “were considered to be within the incidental range of the marriage power, the state legislation . . . would likely be invalidated by section 109 of the Constitution” because it “would clearly ‘impair . . . the operation of a law of the Commonwealth Parliament.’”<sup>368</sup> It is far from clear that the High Court would take such an

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362. In their detailed and comprehensive analysis, Brock and Meagher drew significantly upon the sequence of same-sex couple bills advanced and laws adopted by the government of the Australian Capital Territory (prior to the rise and fall of the ACT Marriage Equality Act in 2013). Brock and Meagher considered objections and actions actually taken in opposition to these various ACT laws, all more modest in protecting same-sex couples than the ACT Act that was struck down by the High Court. See Brock & Meagher, *supra* note 326, at 27–77.

363. A disallowance is analogous to a presidential veto. See AUSTRALIAN CONSTITUTION §§ 58–60.

364. Brock & Meagher, *supra* note 326, at 275.

365. *Id.* at 275–76. According to ACT Attorney-General Simon Corbell, the more compromised bill was also threatened with disallowance because of its provisions for creation rather than recognition and registration of a relationship and for “ceremonial confirmation” of a couple’s partnership. *Id.* at 276.

366. *Id.* at 276–77 (acknowledging that the examples provided by the ACT must be qualified because of the federal government’s section 122 plenary power to disallow a territory law without any showing of the inconsistency required to invalidate a state law under section 109, but noting that the examples nevertheless were well designed to show the potential arguments for state law invalidity under section 109).

367. *Id.* at 274–77.

368. *Id.* at 275 (quoting the test stated in *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); see *Dickson v The Queen* (2010) 241 CLR 491, 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)). A consideration of whether state recognition of same-sex marriage-like relationships would impair the operation of the national marriage law would likely raise some of the same issues addressed under

expansive view of the marriage power. As with the United States, it remains to be seen how much work still can and will (or perhaps even must) be done in the state laboratories, before a new national consensus emerges.

## Conclusion

In drafting its Constitution, Australia borrowed heavily from the American federalism model. It chose to depart from that model, however, in assigning power over marriage, divorce, and some related parental matters to its national Parliament. This topic-specific deviation from the American model was designed to address a particular problem facing both countries—the regulation of divorce within and across states. This problem was pressed particularly sharply because both countries' citizens could and did move freely from one state to another, and the stakes of such moves when divorce was involved—ongoing obligations to first spouses, the validity of subsequent marriages, and the legitimacy of children from those marriages—were high. While the distinctions in their family law federalism regimes took the two countries on somewhat different paths through their twentieth century development of the law of divorce, both countries began with experimentation in the states, and, at roughly the same time, shifted to a stable national consensus.

In the United States, the states' exclusive power to regulate divorce led to valuable experimentation and cross-border learning but also created interstate instability that concerned Americans as well as Australians. Once the American federal courts imposed a strong full faith and credit obligation on states to recognize one another's divorce judgments, however, this instability was resolved. Subsequently, this stable interstate diversity was displaced by considerable national uniformity around a scheme of no-fault divorce, albeit a uniformity achieved state-by-state rather than through national law.

In Australia, the lack of political consensus prevented the Commonwealth Parliament from enacting national legislation for over half a century, and in the interim, Australian states exercised their concurrent power to regulate divorce. This produced a similar period of state-level experimentation, with similar benefits and costs to that experienced in the United States. When a national consensus in favor of no-fault divorce ultimately emerged, however, Australia's Parliament exercised its constitutional authority to enact a national uniform law. Relying on state referral power, moreover, the Commonwealth Parliament was able to build upon state experimentation to expand the scope of national uniformity in the law of divorce and related matters.

In the context of divorce, the timing of legal and social change in both countries was such that, despite their federalism differences, they each had the benefit of a period of state-level experimentation followed by the bene-

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American constitutional law, when courts are called on to assess whether there is a sufficient justification for discrimination in denying marriage to same-sex couples.

fit of a nationally uniform approach. That being said, the paths open for future changes in the law of divorce are clearly different under the two family law federalism regimes, as American states could again engage in radical experimentation whereas Australian state-level experimentation would be significantly inhibited by preemptive federal law. But this difference is likely to have no practical effect in the foreseeable future, as there are no dramatic shifts in social norms pressing for changes in divorce law on the horizon.

The chronology of legal and social developments is playing out differently, however, in Australia's consideration of same-sex marriage, and this distinction, more starkly demonstrates the potential trade-offs between the American and Australian approaches to family law federalism. As with divorce, the United States has engaged in radical state-level experimentation with same-sex marriage, creating an increasing number of states where same-sex couples can live and marry and fostering a new, emerging, national consensus concerning such marriages. In Australia, by contrast, Parliament's enactment of the Marriage Amendment Act in 2004, which codified the consensus of that time, has served as a significant roadblock to any continuing state-level experimentation. If, and likely when, Australia recognizes same-sex marriage, that recognition will come through national legislation, with all the benefits of national uniformity. But those benefits will have come at some cost—both in the loss of the benefits of state-level experimentation that did not occur and in the denial of marriage for some period to all same-sex couples in Australia, including those living in, or prepared to move to, states ready to celebrate their marriages prior to the enactment of a federal law. And, of course, the fact that such a future enactment is likely, does not mean that it is guaranteed. The lost opportunity for state-level experimentation might well inhibit the emergence of a national political consensus.

Up until 2013, the evolution of the law regulating same-sex marriage in the United States repeated that of the early twentieth century regulation of divorce, with all the same benefits and costs. This repetition even extended to the courts' failure under the Full Faith and Credit Clause to recognize same-sex marriages validly (and non-evasively) celebrated in other states, repeating the failure in the early divorce litigation. But with *Windsor* and subsequent developments in lower federal courts, an emerging shift toward a national uniform law of same-sex marriage is apparent. In all likelihood, this shift will end in the Supreme Court's recognition of a constitutional right to same-sex marriage, possibly even before this Article is in print. If the Supreme Court surprises most prognosticators and rules that same-sex couples do not have an equal protection or due process right to marry, then the state-level experimentation will continue and the need for a stable rule of interstate recognition will increase. If, however, the Court finds the right to same-sex marriage protected by the Constitution, the United States will have created a substantial new area of national family law.

The approach to the achievement of national uniformity in the United States, albeit through the judicial process, predicts an Australian-like, preemptive shift away from state-level control. Australia's experience with same-sex marriage suggests that this shift will come at some cost. While even a federal, individual-rights-based recognition of same-sex marriage in the United States can be understood, in large part, to have grown out of the initial, robust state-level experimentation for and against same-sex marriage, the emergence of federal rights of liberty and equality that would compel recognition of same-sex marriage in the United States would likely foretell a broader shift to a national, court-articulated rights-based family law, as judicial precedents are applied in new contexts. Such a shift to national control, the Australian experience suggests, could place some constraint on valuable state-level experimentation in future areas of changing societal norms.

We are in no better position than the Australian framers were to predict what that new shift in norms might be. Perhaps changes in assisted reproductive technologies and in the use of surrogates will produce radically new conceptions of parentage that will destabilize parent-child-relationships when families move across state lines. Perhaps, even, a multiplication of those recognized as legal parents of a child could alter attitudes about polygamy that now seem well beyond the range of broad societal norms. Whatever that next, barely imaginable, shift in social norms might be, Australia's experience with same-sex marriage suggests that the development of national uniform laws, however valuable for uniformity and stability, and however justified and broadly supported at the time, may constrain the sort of dramatic state-level experimentation that scandalized the framers of the Australian Constitution, but that has served both countries well.