

Something to [*Lex Loci*] *Celebrationis*?: Federal Marriage Benefits Following *United States v. Windsor*

by MEG PENROSE*

The critical issue the Defense of Marriage Act (“DOMA”) resolves is: who decides? Who decides whether, when, and to what extent same-sex marriages created in one American state will be recognized by other state governments, and by the federal government? That structural issue is the most important issue at stake in the controversy about interstate recognition of same-sex marriage in the United States. It is a question legal proceduralists and legal structuralists—such as conflict of laws scholars—can, should, and largely do understand and appreciate. The structural matters of respect for the constitutional allocation of government, and adherence to legitimate processes to decide important issues are at least as important—and are probably even more important to our nation’s legal system—as the very significant substantive policies concerning same-sex marriage and inter-jurisdictional recognition of same-sex marriage.¹

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1. Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT’L L.J. 143, 143–44 (2010).

Introduction: Not Who *Decides*, But Who *Is Married*?

Americans love weddings. Each year, Americans spend hundreds of millions of dollars on wedding celebrations.² Hotels. Churches. Receptions. Marriage is about more than love. Marriage is also about money. The revenue generating potential of marriage is what ultimately convinced New York State to allow same-sex couples to legally marry. For New York, the question came down to dollars and sense, not politics. New York is purportedly hundreds of millions of dollars wealthier because of this decision.³

2. PHILLY.COM reported on the massive economic benefits (and losses) that attend same-sex marriage issues, including those relating to tourism. See Jeff Gammage, *Another Reason Backers Say PA Should Legalize Gay Marriage: \$\$\$*, PHILLY.COM (July 16, 2013, 1:07 AM), http://articles.philly.com/2013-07-16/news/40592292_1_gay-marriage-limited-marriage-lee-badgett. Gammage reports that:

In New York City, officials say the first full year of legal same-sex marriage brought \$16 million in direct revenue to the city, among \$259 million in economic impact for hotels, restaurants, caterers, and wedding suppliers.

The 8,200 same-sex marriage licenses issued between July 2011 and 2012 represented more than 10 percent of 75,000 total licenses. For those gay weddings, 200,000 guests traveled to the five boroughs from outside the city, booking 235,000 hotel-room nights at an average daily rate of \$275, according to a study released by Mayor Michael Bloomberg and City Council Speaker Christine Quinn.

Other states see similar windfalls—or watch them pass, according to the Williams Institute, an arm of the UCLA Law School that studies gender-identity law and policy. It found:

In Washington state, same-sex marriage should generate \$88 million during the next three years, including \$5 million in additional tax revenue in the first year.

Texas loses out on about \$60 million a year in wedding-related revenue, due to its ban on gay marriage.

Maryland same-sex couples will spend an estimated \$63 million on weddings in the next three years.

“It’s big,” said Lee Badgett, the institute research director and a professor of economics at the University of Massachusetts, Amherst. “Many couples who want to get married, it’s a special day, so they spend lots of money. They invite friends and family, and they spend lots of money.”

3. Blake Ellis, *Gay Marriage Boosts NYCs Economy by \$259 Million in First Year*, CNN MONEY (July 24, 2012, 6:01 PM) <http://money.cnn.com/2012/07/24/pf/gay-marriage-economic-impact/index.htm>. Ellis reports that:

More than 200,000 guests flocked to New York City from other parts of the state or country to partake in the celebrations. Hotels booked nearly 236,000 nights at an average rate of \$275 per night. More than 40,000 wedding announcements were printed, and couples bought 47,445 wedding favors, the economic impact survey found.

Many same-sex couples have flocked to New York and its “gay-friendly” hotels to tie the knot. For these couples, the decision to marry likewise carries (usually beneficial) financial consequences. Same-sex jurisdictions celebrate the fact that tourism, for “destination wedding” purposes, is up.⁴ Same-sex couples celebrate the fact that they, too, can now marry. But, what happens when these same-sex couples return home to a state that does not recognize their marriage?⁵ Or, worse yet, what happens when individuals living in New York get married in New York but then move to a state where their marriage is not recognized?⁶ Is marital status portable? Is marital status dissolvable merely through travel? Who—for *federal* purposes—is legally married?

This is the new question relating to same sex marriage.⁷ Not “who decides,” but who *is* married.⁸ Not what marriage should be, but what marriage *is*—federally speaking.⁹

4. Further evidence of New York’s appreciation for this tourism boom is the July, 2013 decision of New York state Comptroller, Thomas DiNapoli. DiNapoli:

is using the power of the state’s \$160 billion pension system to urge President Barack Obama to order federal agencies and programs around the country to recognize gay marriages performed in New York.

DiNapoli’s idea is to adopt a “place of celebration” standard in federal government, meaning gay marriages that take place in New York would be recognized even in states that do not permit them. It could be a big push in DiNapoli’s effort to get major companies that do business with the state pension fund to adopt anti-discrimination measures when providing benefits for gay couples.

Michael Gormley, *NY Official Pushes Feds to Recognize Gay Marriages*, ASSOCIATED PRESS (July 19, 2013, 1:02 PM), <http://bigstory.ap.org/article/ny-official-pushes-feds-recognize-gay-marriages>.

5. It is important to note that this article makes no distinction between “migratory” and “evasive” marriages. Migratory marriages are those where the couple is domiciled in state where their marriage is legal and, thereafter, leaves the state. In contrast, “evasive” marriages are those marriages where an individual intentionally leaves their domicile to evade their home state’s laws relating to marriage. Conflicts of law provisions have routinely distinguished between migratory and evasive marriages. This author, however, believes that while the distinction between migratory and evasive marriage is relevant to state recognition issues, the distinction is not relevant to the question of federal recognition.

6. See, e.g., Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1423–24 (2012).

7. See Cozen O’Connor, P.C. v. Tobits, Civ. Action No.11–0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013). Within weeks of the Supreme Court’s 2013 ruling in *United States v. Windsor* extending federal tax benefits to the surviving spouse in a same-sex marriage, a similar action was filed by a surviving same-sex spouse in Pennsylvania seeking retirement benefits under ERISA, a federal law. Relying on *Windsor*, the federal district court found

This article attempts to give a very simple and direct answer to the question: who should be considered married for federal law purposes? The federal government and many states have historically relied on the place-of-celebration rule, or the Latin “*lex loci celebrationis*,” to determine who is married.¹⁰ Reliance on *lex loci celebrationis* ensures that married couples do not lose their marital status simply because they travel across state borders or relocate to a new home. Under *lex loci celebrationis*, if the marriage is legally valid where it was celebrated, then the marriage is legally valid everywhere else and for all purposes. This recognition continues even in states where the marriage could not have been originally performed.

The United States government has not spoken with a single voice regarding its reaction to *United States v. Windsor*. Instead, in piecemeal fashion, various federal agencies are beginning to announce who is considered married for certain federal purposes. The Office of Personnel Management quickly embraced *lex loci celebrationis*, indicating in a July 2013 advisory letter that federal benefits “[c]overage is available to a legally married same-sex spouse of a Federal employee or annuitant, regardless of his or her state of residency.” The Department of Defense followed suit in August 2013, affirming the military will embrace the place-of-celebration rule. The Department of Defense went further, though, in declaring its policy to provide same-sex couples with ten days of nonchargeable leave to enable such couples equal opportunity to reap the military’s many marital benefits. Most recently, in late August 2013, the Internal Revenue Service confirmed that it, too, will follow *lex loci celebrationis*.¹¹

in favor of the surviving spouse even though the defendant company was not located in a state recognizing same-sex marriage. *Id.* at 9–12.

8. This question may unintentionally call to mind the infamous quote of former President William Jefferson Clinton when he explained, “[i]t depends on what your definition of ‘is’ is.”

9. See *Cozen O’Connor, P.C. v. Tobits*, Civ. Action No. 11–0045, 2013 WL 3878688, at *10–12 (E.D. Pa. July 29, 2013) (considering the definition of “spouse” for federal law purposes).

10. See H.R. REP. NO. 104-664, at 8 (1996) (noting “[t]he general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.”).

11. Treasury and IRS Announce that all Legal Same-Sex Marriages Will be Recognized for Federal Tax Purposes (Aug. 29, 2013), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>. The IRS ruling explains:

One might expect, or even hope, that all federal agencies will embrace this same expansive approach. But, such pronouncement is not a direct by-product of *United States v. Windsor*. The question of who is married, for federal purposes, becomes even more complicated now that the United States Supreme Court has sanctioned, in a very narrowly drafted opinion, certain same-sex marriages for federal purposes.¹² Whether all same-sex marriages fall within *Windsor*'s grace is unclear. Currently, thirteen states and the District of Columbia recognize same-sex marriage.¹³ The Court's opinion in *United States v. Windsor* did not provide a universal definition of marriage or clarity regarding which marriages will be federally recognized. Rather, *Windsor* only held that those individuals married in a jurisdiction recognizing same-sex marriage and currently living in a state that recognizes same-sex marriage are entitled to have their marriage federally recognized.¹⁴ In this respect, *Windsor* raised far more questions than it answered.

These lingering questions retain constitutional dimensions even though federal agencies are beginning to speak. Marriage, and its attendant benefits, should not be susceptible to varying agency pronouncements. Rather, as Justice Kennedy makes clear in *Windsor*, the question of who is entitled to federal marriage benefits invokes liberty and equal protection concerns. Regardless of how federal agencies answer the question of marriage entitlement, anything less than a constitutional statement is contingent on future

The U.S. Department of the Treasury and the Internal Revenue Service (IRS) today ruled that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage.

The ruling implements federal tax aspects of the June 26 Supreme Court decision invalidating a key provision of the 1996 Defense of Marriage Act.

Under this ruling, same-sex couples will be treated as married for all federal tax purposes, including income and gift and estate taxes. The ruling applies to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit.

12. *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013).

13. California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia. Minnesota and Rhode Island are the two most recent states to legalize same-sex marriage, with both states' laws taking effect August 1, 2013.

14. *Windsor*, slip op. at 1-26.

agency pronouncements and changes in presidential administrations. The question “Who is married for federal purposes?” undoubtedly remains a viable, and urgent, constitutional question.

This article addresses the most pressing unresolved question of *Windsor*: Will the federal government use the morphing and varied state definitions of marriage to assess which couples are legally married, or will it use a singular federal criterion, such as *lex loci celebrations*, for evaluating marriage when it comes to determining federal burdens and benefits? Resort to any paradigm excepting “the place of celebration” carries serious constitutional consequences. If same-sex marriages are evaluated federally under guidelines distinct from opposite-sex marriages, an equal protection challenge looms large.¹⁵ If federal recognition of same-sex marriages depends on remaining in a state that sanctions same-sex unions, the constitutional right to travel is impaired. These looming constitutional questions can easily be resolved by relying on *lex loci celebrationis* to determine who, for federal purposes, is married.

Section I provides a brief explanation of the Court’s holding in *Windsor*. Section II discusses *lex loci celebrationis*, the tradition of recognizing a marriage if the marriage was legal where it was originally celebrated.¹⁶ Section III addresses the lingering constitutional implications following *Windsor*, including whether the Fifth Amendment’s Equal Protection Clause protects all legally wed same-sex couples, or only those living in same-sex jurisdictions; and whether the fundamental right to travel protects those legally performed even after the couple leaves that jurisdiction. The natural extension of *Windsor* requires adoption of the *lex loci celebrationis* definition of marriage for federal purposes. Because the federal government has chosen to recognize some same-sex marriages, any variation among this class of marriages will be subject to constitutional scrutiny either under equal protection or the constitutional right to travel. While *Windsor* stopped abruptly short of granting a constitutional right to same-sex marriage, Justice

15. To be clear, this article does not address those opposite-sex marriages that have been traditionally condemned by both state and federal courts, including cases involving bigamy, incest or polygamy. While some authors, and jurists, conflate these long-prohibited marriages with the same-sex question, same-sex marriages do not have the same pedigree of condemnation, legally, as bigamous, incestuous and polygamous marriages. See *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879) (unanimous opinion).

16. RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 121 (1934) (The Restatement deemed a marriage “valid everywhere” if the “requirements of the marriage law of the state where the contract of marriage” occurred were satisfied.).

Kennedy's majority opinion undoubtedly opened the door for federal recognition of *all* same-sex marriages. Americans uniquely possess two forms of citizenship—state and federal. States are constitutionally justified in defining for themselves who can be married within their borders. *Windsor* does not alter this power. Instead, *Windsor* implicates concepts of federal citizenship when it asks which couples are married for federal purposes.

Adopting the place-of-celebration rule does not force the larger, and far more controversial, substantive due process issue¹⁷ and it still provides states with the right to choose which marriages they will recognize. Using *lex loci celebrationis* enables the federal government to treat all citizens equally for federal marital purposes without implicating federalism, equal protection or constitutional right to travel concerns. Now that *Windsor* has advanced the gay marriage issue, potentially implicating some measure of federal constitutional protection for same-sex couples, perhaps there is finally something for same-sex couples to (*lex loci*) *celebrationis*.

I. The *Winds[or]* Change

The threatening conditions that caused Congress to enact DOMA fourteen years ago—to protect state and congressional authority to decide the marriage recognition question for their own sovereign jurisdictions—have not disappeared, but are instead more threatening than ever. No state had yet legalized same-sex marriage in 1996; today, five states and the District of Columbia have legalized same-sex marriage. Therefore, those six jurisdictions create same-sex marriages that are exported to other states (when same-sex couples move from one state to another). Further, in 1996, no American court had yet ruled that same-sex marriages performed in one state had to be recognized

17. Under Justice Scalia's prediction, full-fledged gay marriage is but a constitutional season or two away. See Justice Scalia's dissent in *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). Justice Scalia predicts that *Lawrence*'s "reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples." *Id.* at 601. Justice Scalia returns to the gay marriage issue a few pages later when he admonishes, "At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. . . .' Do not believe it." *Id.* at 604.

*in another. Today, over a dozen United States courts have ruled that same-sex marriages created elsewhere must be recognized by their respective state laws. Thus, as a matter of constitutional structure and procedure, DOMA is needed today more than ever before.*¹⁸

This paragraph was published in 2010.¹⁹ The author's concerns have grown more acute as 14 jurisdictions have now sanctioned same-sex marriage.²⁰ Further, state courts are increasingly accepting the need to legally recognize same-sex marriages for family law purposes.²¹ The Supreme Court's *Windsor* opinion acknowledged the need to embrace the legality of same-sex marriage where that marriage was both legal where performed and legal where the couple was domiciled.²² But, the Court did *not* address the exportation issue.²³

On June 26, 2013, the Supreme Court issued two opinions addressing same-sex marriage.²⁴ In neither case did the Court render a transformative decision granting a federal constitutional right to same-sex marriage.²⁵ Rather, in *Windsor*, the lone case where the

18. Lynn D. Wardel, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L L.J. 143, 177–78 (2010).

19. *Id.*

20. Sanders, *supra* note 3, at 1439 (“Legally, politically, and culturally, same-sex marriage has gone mainstream”).

21. See Alexander Maugeri, *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*, 30 ST. LOUIS U. PUB. L. REV. 325, 329 (2011). Maugeri writes:

[S]tate courts will decide a multiplicity of choice of law cases in which same-sex litigants seek to have a particular benefit, right, or amalgam of rights associated with their domestic partnership, civil union, or marriage granted *recognition and legal effect* by states *other than* the one that celebrated their legal relationship.

These controversies are sure to arise because of the diversity of state policies toward conferring these statuses and benefits, as well as the diversity of statutory and state constitutional rules for the recognition of foreign same-sex statuses. (emphasis in original).

22. *United States v. Windsor*, No. 12-307, slip op. at 17 (U.S. June 26, 2013).

23. *Id.* at 1–26.

24. *Windsor*, slip op. at 1; *Hollingsworth v. Perry*, No. 12-144, slip op. at 1 (U.S. June 26, 2013).

25. The Court returned *Perry* to the lower court, essentially reinstating the federal district court's opinion, based on the majority's finding that the Court lacked standing. It is noteworthy that both gay marriage cases provided lengthy discussions relating to standing and justiciability. Avoiding the merits of such controversial and heated issues is not, however, foreign to the Court. See *DeFunis v. Odegard*, 416 U.S. 312 (1974) (dismissing an educational affirmative action case on mootness grounds).

Court addressed the constitutional merits of same-sex marriage, the Court found Section 3 of the Defense of Marriage Act (“DOMA”) unconstitutional.²⁶

A. DOMA

DOMA—a federal statute passed in 1996—limited recognition of marriage to “a legal union between one man and one woman as husband and wife.”²⁷ The impetus behind DOMA was to prevent Hawaii, the first state to declare same-sex marriage a legal right, from setting a national requirement to recognize same-sex marriages as valid for benefit purposes under the Full Faith and Credit Clause.²⁸ DOMA was a directive to forego the traditional application of the place-of-celebration rule and, instead, cabin marital recognition—solely for same-sex marriages—to a new and distinct standard.

Through DOMA, Congress declared that the Constitution’s Full Faith and Credit Clause would not apply for same-sex marriages.²⁹ DOMA was remarkable in both its breadth and purpose. For the first time in our history, the federal government—not the individual states—was defining marriage and declaring which marriages could be recognized.³⁰ The only prior attempts to prevent certain marriages

26. *Windsor*, slip op. at 25.

27. 1 U.S.C. § 7 (1996).

28. See Background and Need for Legislation, Defense of Marriage Act (“DOMA”), H.R. REP. NO 104-664, at 2 (1996) (acknowledging that DOMA “is a response to a very particular development in the State of Hawaii”).

29. 28 U.S.C. § 1738 C (1996).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

30. *Id.*; 1 U.S.C. § 7 (1996).

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.

See also Mary Margaret Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 174–77 (2013) (The only prior attempts to federally define or constitutional marriage were the various attempts to outlaw interracial marriages.).

were the failed attempts to federally legislate and constitutionalize the prohibition of interracial marriage.³¹

For years, DOMA ensured that any same-sex couple seeking federal recognition of their marriage would be denied the more than 1,000 federal benefits attributed to married couples.³² When Edith Windsor challenged the IRS's refusal to consider her a surviving spouse—a decision that resulted in her being charged \$363,000 in estate taxes that were not charged to surviving spouses in opposite-sex couples—DOMA fell. As the *Windsor* decision made clear, the federal benefits attending marriage carry serious constitutional consequences.

B. *Windsor* Puts an End to DOMA

The *Windsor* majority found DOMA “unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”³³ The opinion vacillated, however, between the liberty component and the equal protection component of the Fifth Amendment by interchanging liberty (suggesting substantive due process protection) and equality verbiage.³⁴ Justice Kennedy's opinion did not clearly identify the constitutional standard of review utilized, whether it was intermediate scrutiny usually applied to gender cases³⁵ or strict scrutiny reserved for suspect classes such as race or national origin.³⁶ The opinion can be fairly criticized for its opaque review standard finding DOMA invalid, “for no legitimate purpose overcomes the purpose and effect to disparage

31. *Id.*

32. Penrose, *supra* note 29, at 169. See also, Maugeri, *supra* note 20, at 335 (observing that DOMA “specifies that the terms ‘marriage’ and ‘spouse’ in the U.S. Code only pertain to unions between a man and a woman; its effect is that the thousands of legal incidents conferred on traditional spouses are *not extended* for the purposes of *federal* law to those individuals in civil unions or same-sex marriages”).

33. *United States v. Windsor*, No. 12-307, slip op. at 25 (U.S. June 26, 2013).

34. *Id.* The Court proclaims both that Windsor's liberty and equality has been violated in three consecutive paragraphs. One wonders whether such presentation is intentionally confusing or merely careless. Constitutionally speaking, the presentation is undoubtedly lacking in precision.

35. *Craig v. Boren*, 429 U.S. 190 (1976) (the seminal sex discrimination case establishing an intermediate or “mid-tier” level of constitutional scrutiny).

36. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 218–27 (1995) (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”³⁷

This language suggests “rational basis,” the lowest standard of constitutional review and least searching level of constitutional scrutiny.³⁸ Laws evaluated under rational basis are generally found constitutional because all that is required is a legitimate governmental purpose.³⁹ In fact, under traditional rational basis review, courts generally sustain legislation, even aiding governmental entities seeking to defend a particular law.⁴⁰ If the governmental actor is unable to provide a rational basis for its legislative classification, courts using true rational basis review will proffer hypothetical reasons of its own that suffice to uphold the law.⁴¹

The other form of “rational basis” review, and the form that has been seemingly applied by the Supreme Court in previous “gay rights” cases, is “rational basis plus.” Rational basis plus upholds legislative classifications unless the Court believes the classification is based on animus or a desire to cause harm to an unpopular group.⁴² Justice Kennedy’s majority opinion in *Windsor* expanded his past writings in *Romer v. Evans* and *Lawrence v. Texas*.⁴³ Throughout the majority opinion the Court expressed concern that “[t]he avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the [individual] States.”⁴⁴

37. *Windsor*, slip op. at 25–26.

38. See, e.g., *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

39. *Id.* at 488 (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

40. *Id.* at 487 (observing that the legislature “might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses”).

41. *Id.*

42. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996).

43. *Id.* Justice Kennedy’s majority opinion in *Romer* indicates that the Colorado Amendment struck down was constitutionally deficient for at least two reasons: First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class; it lacks a rational relationship to legitimate state interests. *Id.*

44. *United States v. Windsor*, No. 12-307, slip op. at 21 (U.S. June 26, 2013).

The majority in *Windsor* further rebuked DOMA for “interfer[ing] with the equal dignity of same-sex marriages”⁴⁵ and advancing an apparent principal purpose “to impose inequality”⁴⁶ on same-sex couples without justification. Justice Kennedy’s opinion condemned the federal government’s two-tiered approach toward marriage, noting that only one version qualified for federal recognition and benefits.⁴⁷ However, whether *Windsor* followed past precedence in applying “rational basis plus” evaluation to same-sex rights is not the focus of this article. Rather, this article seeks to answer the simple question: Who is married for federal law purposes? The constitutional level of scrutiny implicated by the underlying question of whether same-sex marriage is constitutional is distinct from why the federal government must adopt the place-of-celebration rule for assessing same-sex marriage. Failure to adopt *lex loci celebrationis* will undoubtedly result in future litigation under the equal protection and constitutional right to travel doctrines. In other words, perhaps the more important obscurity of *Windsor* is its failure to clearly articulate that the decision applies to all same-sex marriages, like Edith Windsor’s, that were legal at the place of celebration.

The hallmark of the “gay rights” cases has been remarkably constrained rulings. In all three cases where the Court has extended protections to members of the gay community, Justice Kennedy has written the majority opinion.⁴⁸ In each case, the majority opinions have advanced the right as narrowly as possible, indicating that the Court is not yet ready to constitutionalize a federal right to marriage⁴⁹

45. *Id.*

46. *Id.* at 22.

47. *Id.* at 22–23.

48. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013).

49. *Lawrence*, 539 U.S. at 578. Distinguishing *Lawrence* from *Bowers v. Hardwick*, the case directly overruled by *Lawrence*, Justice Kennedy clearly outlined what the case was *not* about:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Justice O’Connor echoed Justice Kennedy’s cautious approach in her concurring opinion. *Id.* at 584–85.

as previously occurred for interracial couples in *Loving v. Virginia*.⁵⁰ Justice Scalia has been quick to criticize Justice Kennedy for his lack of clarity, if not fidelity, to constitutional review and applications of constitutional levels of scrutiny in each of these three cases.⁵¹

Rather than critique the opinion for its constitutional ambiguity,⁵² this author attempts to resolve the critical issue *Windsor* leaves unanswered. The question—what qualifies as a marriage for federal law purposes—demands attention and will likely drive future same-sex marriage cases. Litigants that participated in marriages in a state, or country, where same-sex marriage was legal will want the same federal protections that *Windsor* received. Litigants will want access to the more than 1,000 federal benefits that some same-sex couples—those like *Windsor* who married (and lives in) a jurisdiction that allows same-sex marriage—are now constitutionally entitled to receive.

While *Windsor* clearly extended federal marital benefits (and burdens)⁵³ to persons whose marriage is lawful both within the *lex loci celebrationis*⁵⁴ and the *lex loci domicilii*,⁵⁵ *Windsor* actively sidestepped the follow-up and, perhaps, more critical question of whether federal

50. 388 U.S. 1 (1967).

51. *United States v. Windsor*, No. 12-307, slip op. at 15 (U.S. June 26, 2013) (Scalia, J., dissenting) (criticizing the “rootless and shifting” nature of the majority’s justifications for its holding in *Windsor*). “The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism playing a role) . . .” *Id.* at 18. The majority opinion notes the criminal law protections, bankruptcy, taxes, health care, and ethics issues that lawfully married same-sex couples are denied under DOMA. *United States v. Windsor*, No. 12-307, slip op. at 23 (U.S. June 26, 2013).

52. *United States v. Windsor*, No. 12-307, slip op. at 7–17 (U.S. June 26, 2013) (Alito, J., dissenting). Justice Alito fairly suggests that, “[p]erhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, *Windsor* and the United States couch their arguments in equal protection terms.” But, ultimately, the Court’s majority fails to resolve this question or clearly express on what basis the decision is being rendered.

53. *United States v. Windsor*, No. 12-307, slip op. at 23–24 (U.S. June 26, 2013) (noting that “DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they, in most cases, would be honored to accept were DOMA not in force”).

54. “[T]he law of the place where a contract, esp. of marriage is made.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/lex%20loci%20celebrationis> (last visited Sept. 7, 2013). Literally meaning the law of the place of the ceremony. The Oxford Reference defines this phrase as “[t]he law of the place of celebration of marriage.” OXFORDREFERENCE.COM, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100103412> (last visited Sept. 7, 2013).

55. Literally, the place of domicile.

marital benefits (and burdens) extend to same-sex couples married, but not domiciled, in a state where same-sex marriage is lawfully recognized. These marriages were certainly legal when performed. Does leaving the marital state legally eviscerate the union? Is it possible that a couple is married in New York, no longer married while driving through New Jersey, legal again for the drive through Delaware and Maryland, but not legal when arriving home in Virginia?

This convoluted scenario demonstrates the dilemma faced by same-sex couples partaking in a “destination wedding”⁵⁶—a situation never faced by opposite-sex couples.⁵⁷ The same uncertainty regarding marital status faces individuals who reside in a same-sex marriage state but later leave to reside in a state that does not recognize same-sex marriage. While the two scenarios are factually distinguishable, the issue this article considers is federal recognition of marriage, not state recognition. Thus, the benefits at issue depend on the couple’s *federal* citizenship, not state citizenship.⁵⁸ *Windsor*’s Fifth Amendment equality language and focus on a unitary approach to marriage suggests the Supreme Court will ultimately adopt the *lex loci celebrationis* definition for federal marriage purposes.

56. Because same-sex couples are not criminally prohibited from participating in a legal marriage in any state, these marriages should be assessed under the constitutional right to travel rather than the conflicts of law principle governing evasive marriages.

57. Again, as this article does not consider bigamous, incestuous or polygamous opposite-sex marriages as valid marriages due to the unbroken chain of cases holding such marriages invalid, any attempt to equate same-sex marriages—which are increasingly receiving legal sanction at both the state and federal level—with bigamous, incestuous, or polygamous marriages ignores consistent legal precedent. See *e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879) (unanimous opinion).

58. This author strongly believes that because the issue of federal recognition runs parallel to state recognition issues, the evasive marriage exceptions under traditional conflicts of law scenarios are inapplicable. Instead, the question—at the federal level—should be whether the federal government treats its married citizens similarly for federal marriage purposes. Whether those individuals partook of migratory or evasive weddings should only come in to play if the evasive marriage is criminally proscribed, not merely morally opposed. Same-sex marriage, in contrast to polygamy and incestuous marriages, is not criminal in any state.

II. *Lex Loci Celebrationis*

*Problems arise in a federal system if one is both married and unmarried at the same time.*⁵⁹

The United States generally applies the notion of *lex loci celebrationis* to assess the legality of international marriages.⁶⁰ So, too, do many of the individual states.⁶¹ *Lex loci celebrationis* is the Latin phrase for “the place-of-celebration” rule. Under the place-of-celebration rule, marriages that were legal where originally celebrated will be recognized in another jurisdiction, even if this different jurisdiction does not permit the celebration of the marriage. This approach provides a clear delineation of who is married regardless of where they travel, work, vacation or live. If a marriage is legally valid where it was performed, *lex loci celebrationis* demands that the marriage be recognized as legally valid everywhere else.

The First Restatement on Conflicts of Laws adopted *lex loci celebrationis* as the preferred method for determining the validity of marriages, while reserving a state’s right to reject evasive marriages, or those marriages where couples went to another state to avoid their home state’s rules.⁶² As one author noted:

Also, likewise under *lex celebrationis*, a forum court could decline to recognize a marriage when one or both of the spouses temporarily traveled to another state in order to evade a domestic law that would bar their marriage. The Restatement (First) Section 132 accomplishes this by providing that “a marriage which is against the law of the domicil [sic] of either party, though the requirements of the place of the celebration have been complied with, will be invalid.”⁶³

59. See Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 36 (2005).

60. Wardle, *supra* note 2, at 166.

61. See *e.g.*, *Obergefell v. Kasich*, 1:13-CV-501 (S.D. Ohio July 22, 2013) (finding that Ohio’s traditional application of “the place of celebration” rule required Ohio to recognize a same-sex marriage that was performed on a tarmac in Maryland).

62. It is important to note, however, that evasive marriages like the one involved in *Loving v. Virginia* may be recognized where the only reason to refuse such recognition would result in a constitutional violation. See *id.*

63. Maugeri, *supra* note 20, at 350, citing RESTATEMENT (FIRST) CONFLICT OF LAWS § 132 (1934).

The Restatement provides instruction and guidance for resolving state conflicts of law. The state conflicts-of-law issue is entirely irrelevant, however, when analyzing marriage for *federal* purposes.⁶⁴ Our national citizenship ensures that we will be permitted to travel freely among the many states without impacting our *federal* rights or responsibilities.⁶⁵ For example, even if one lives in a state with no state income tax, that state's approach to state taxes does not relieve an individual from paying *federal* taxes. Further, even if a state does not endorse capital punishment, if an individual commits a *federally eligible* capital offense, that individual could be subject to the death penalty for a crime committed wholly within a state prohibiting capital punishment.

Americans are privileged to maintain two entirely separate forms of citizenship—state and federal.⁶⁶ The clearest symbols between state and federal citizenship are passports and driver's licenses. A passport declares one's national citizenship. That document, and that citizenship, is extremely difficult to change. In contrast, one's driver's license provides proof of state citizenship. Unlike national citizenship, state citizenship is extraordinarily easy to change.⁶⁷ In fact, it is possible to change one's state citizenship as often and as many times as desired.

The key to *Windsor*, and the key to *lex loci celebrationis* from a federalism perspective, is that the particular marital rights at issue are *federal* rights (those attending national citizenship), not state rights (those that flow from state citizenship). A state loses no sovereign powers over its citizens when the federal government applies federal law. This is true whether the issue is taxes, criminal law, or marriage benefits. Living in a nation of federated states implicates the dual sovereignty doctrine.⁶⁸ An offense against one sovereign may or may

64. An additional shortcoming regarding the conflicts of law issue is raised cogently by Professor Sanders, who argues for a constitutional right to marital recognition. See Sanders, *supra* note 7, at 1445–50.

65. See *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *United States v. Guest*, 383 U.S. 745, 757–58 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969).

66. See, e.g., *Crandall v. Nevada*, 73 U.S. 35, 43–45 (1867).

67. See e.g., *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (acknowledging that, for diversity purposes, state citizenship requires only national citizenship and domiciliary status in that state).

68. The dual sovereignty doctrine is usually applied in the double jeopardy context. While this author recognizes the distinction between criminal law and marital benefits, the analogy is useful. See e.g., *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

not be an offense against the other. Likewise, a benefit afforded by one sovereign need not be afforded by the other. *This* is federalism—a series of national burdens and benefits attending our national citizenship that operate independently of state legislatures and governments.⁶⁹

But, unlike the dilemma faced between equal sovereigns (or between equal states), the federal government has a unique and enduring relationship with each American citizen.⁷⁰ Thus, while there may be a valid reason for competing states to individually assess their conflicts-of-law rules to determine which state has the superior right to impose its law, there is no similar reason for the national government. Because the national government is never put in a competing position with a state, there is no reason to use the Restatement (Second) Conflicts of Law’s “most significant contacts approach” because one will always be a United States citizen wherever he or she travels *or* resides. Quite simply, the issue of who receives federal marriage benefits transcends state boundaries.

A modern and fluctuating conflicts-of-law approach that attempts to connect an individual’s federal marriage benefits to the *state* having the most significant contacts loses sight of the two distinct forms of citizenship—state and federal. A person remains an American citizen regardless of which state he or she lives in, travels to, moves to, flees from, or passes through. The strength of an individual’s federal rights does not depend on the individual’s location in a particular state. The right to receive federal Social Security benefits is as valid in Hawaii as it is in Idaho. The obligation to register for the Selective Service is as mandatory in Montana as it is in Massachusetts. In short, the nation’s laws know nothing of state borders.

Lex loci celebrationis is the most consistent approach the federal government could apply towards the recognition of same-sex

69. *C.f.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1478 (2007) (observing that “[s]ome national umpire over interstate relations is essential to ensure union. This imperative follows from the dual governmental structure of our constitutional system.”).

70. *United States v. Windsor*, No. 12-307, slip op. at 22 (U.S. June 26, 2013) (noting “Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.” These benefits are entirely distinct from state benefits relating to housing, taxes and property distribution.).

marriage.⁷¹ Any other approach will revert back to the “tiered-approach” to marriage benefits that the *Windsor* majority found constitutionally offensive.⁷² Ours is a transient nation with individuals living in many states and locations during their lifetime. To think that marriage, *for federal purposes*, evaporates at the state border is antithetical to federal citizenship. All persons should be able to trust that their marriage, if legal at inception, will remain legal throughout the life of the marriage.⁷³

Reviewing courts should adopt the *lex loci celebrationis* standard for determining the application of federal marriage benefits. *Windsor* confirms that the federal government already relies upon *lex loci celebrationis* to assess other marriages, such as common law marriages or varying age and consanguinity restrictions.⁷⁴ While scholars and legislators may strive to differentiate the specific issue in *Windsor* from the broader question of what qualifies as a federal marriage, such factual distinctions are insufficient to justify a departure from *lex loci celebrationis*. Further, unlike incestuous or bigamous marriages,⁷⁵ same-sex marriages do not contain any element of criminal conduct and are thus less likely to pose a threat to federal public policy.⁷⁶

71. *Id.* at 15 (noting that “when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt”). See also Sanders, *supra* note 7, at 1434 (noting that “[i]t is a longstanding matter of legal and social practice that ‘[o]rdinarily, marriages that are valid where they are celebrated are valid everywhere, for all purposes.’ Common law commentators, modern conflicts authorities, and courts at all levels have agreed that it is in everyone’s interests—married individuals, society, and the interstate system—for states to recognize each other’s marriages”).

72. *Windsor*, slip op. at 22–23.

73. Singer, *supra* note 57, at 13–19, 23–25. Professor Singer does an exceptional job of pointing out not only the rights, but also the obligations that attend marriage. Were same-sex marriages to avoid recognition, the partners to such marriages could simply opt out of their marriage without state sanction (i.e., divorce) simply by relocating. Withholding federal recognition would give broader marriage rights to same-sex couples while also opening up such couples to unique risks not faced by their opposite-sex colleagues.

74. *Windsor*, slip op. at 18 (observing that the marital age of consent varies among the states—the minimum age is 13 in New Hampshire—yet 16 in Vermont). *Windsor* also speaks about the oft-mocked right to marry one’s cousin, available in most states.

75. The Supreme Court’s proscription against polygamy is well established. See *Reynolds v. United States*, 98 U.S. 145, 164–66 (1879).

76. Singer, *supra* note 57, at 30. “Same sex relationships used to be criminalized, but they have not been criminalized in many states for a long time and after *Lawrence v. Texas* it is unconstitutional to do so. Other void marriages that violate fundamental public policies remain criminal, such as incestuous and bigamist marriages.”

Initially, Windsor and her spouse qualified as individuals evading domestic federal law to benefit from the laws of a more progressive international location where same-sex marriage was legal. The pair fled to Canada to marry when they realized that Thea Speyer, Windsor's eventual spouse, was terminally ill. To preserve the assets accumulated over four decades together, the pair traveled to Canada to solemnize their union in legal marriage. At the time of this trip, New York did not recognize same-sex marriages. Thus, under the First Restatement, the *Windsor* marriage was not legal. Fortunately for this couple, however, the law in New York changed. *Windsor* became an easy case only because their home state of New York eventually recognized same-sex marriages as legal. Thus, the couple's marriage was legal both at the time of marriage and in their place of domicile. But, if courts wait for further states to change its laws, pseudo-married couples (or, couples currently considered married in 14 jurisdictions) will find their federal status entirely dependent on state residency. This is nonsensical. National citizenship and the benefits such citizenship yields should not, in any way, be dependent on state borders. All Americans should equally receive the benefits of national citizenship.

Windsor's larger message, discernible even through its carefully cabined language, precludes differing tiers of marriages for federal law purposes.⁷⁷ Federal benefits should be based on federal law.⁷⁸ Thus, the federal interpretation of marriage benefits should be determined under the *lex loci celebrationis* concept. Opposite-sex marriages receive *lex loci celebrationis* treatment, regardless of whether the marriage is legal in the place of domicile. If "destination weddings" are federally recognized for opposite-sex couples that travel to Toronto, Canada, or New York City to marry, then the same federal consideration should be given to same-sex couples that make the exact same journey. Anything less would appear to be a violation, under *Windsor's* governing principles, of the Fifth Amendment's

77. *Windsor*, slip op. at 22–23 (“... DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are *unworthy of federal recognition*.” (emphasis added)).

78. *Id.* at 20 (“DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage.”).

implicit equal protection guarantee,⁷⁹ if not other constitutional provisions.⁸⁰

III. Constitutional Implications Following *Windsor*

The constitutional “right to marry” has always been murky. Although the Supreme Court has said the right is “fundamental,” it has also hedged its position by giving a wide berth to state interests, explaining that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” But the Court has not explained what makes a marriage-entry regulation “reasonable,” or how we can tell when it “significantly interfere[s] with” the ability to enter marriage. Moreover, in the small number of marriages cases they have decided, the Justices “have drawn on both due process and equal protection rationales, sometimes alternating between them, sometimes relying on both, and sometimes explicitly invoking neither,” with the result that “both the rationale for [the fundamental right to marry] and its structure have remained unclear.”⁸¹

79. *Id.* at 22 (acknowledging that DOMA’s purpose was to ignore more liberal state laws embracing same-sex unions, ensuring “those unions will be treated as second-class marriages for purposes of *federal law*”) (emphasis added).

80. Singer, *supra* note 57, at 35. Professor Singer agrees that there appears some constitutional basis for recognizing same-sex marriages that cross state borders:

In my view, there are two strong arguments for requiring recognition of same sex marriages under the Full Faith and Credit Clause. The first argument is that the Full Faith and Credit Clause must be construed in light of other constitutional norms, including those underlying the Commerce Clause, the constitutional right to travel, the Takings Clause, the First Amendment, and the fundamental right to marry. Even if none of these clauses or constitutional rights is sufficient in itself to impose a rigid place of celebration rule, the combination is arguably powerful.

My thesis differs, slightly, from Professor Singer’s as I am analyzing the more limited right of federal recognition of same-sex marriages. In contrast, Professor Singer’s exceptional article addresses state recognition of other states’ same-sex marriages. Hence, this article need not address the Full Faith and Credit Clause as the thesis is limited to why the federal government should be recognizing same-sex marriages only as they relate to federal law.

81. Sanders, *supra* note 7, at 1448.

There are at least two potential constitutional claims entitling same-sex couples to demand their valid state marriages receive federal recognition following *Windsor*. First, as Justice Kennedy suggests in *Windsor*, couples may have an equal protection claim under the Fifth Amendment.⁸² Second, couples may rely on the constitutionally recognized “right to travel,” which grants Americans the right to travel freely between states without suffering financial or other legal injury. Under both Fifth Amendment equal protection and the constitutional right to travel, same-sex marriages should receive federal recognition if they are legal at the time and in the location they are performed. *Windsor* implies such recognition, arising from national citizenship, is mandated for federal purposes.⁸³

A. Fifth Amendment Equal Protection

The Fifth Amendment contains no textual right to equal protection.⁸⁴ Rather, the Supreme Court has read an equal protection component into the Fifth Amendment where legislative classifications have been drawn that burden some groups, but not others.⁸⁵ For example, in *Davis v. Passman*, the Supreme Court noted that:

The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property,

82. *Windsor*, slip op. at 22–26.

83. It bears mentioning that the majority opinion is either craftily or carelessly written. At times, the majority speaks of “a State,” using a more generic reference to any of the fourteen jurisdictions recognizing same-sex marriage, and “the State,” which seems much more specific as to New York and its residents, within the same paragraph. *See id.* at 25. Finally, in limiting the reach of *Windsor*, or attempting to do so, Justice Kennedy concludes the majority opinion by remarking that “[t]his opinion and its holding are confined to *those* lawful marriages,” without clearly identifying which lawful marriages he includes. *See id.* at 26. Are all marriages performed within a same-sex recognition state valid? Or, are only marriages that are performed in a same-sex recognition state while simultaneously domiciled in the state valid? As discussed previously within this article, Ms. Windsor and her spouse partook of an “evasive” wedding by leaving New York to find a more receptive laws in Canada. Only because New York subsequently changed its laws does *Windsor* become a situation where the marriage was legal where performed (but not legal at the time of marriage where domiciled) and, thereafter, legal where domiciled. Such fine distinctions provide another reason to adopt the *lex loci celebrationis* approach. Otherwise, in the most literal sense, timing will become everything for legally married same-sex couples.

84. U.S. CONST. amend. V. The Fifth Amendment provides, in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

85. *See* Chester James Antieau, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362, 362–63 (1952).

without due process of law.” In numerous decisions, this Court “has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. E.g., *Hampton v. Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Buckley v. Valeo*, 424 U. S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954).”⁸⁶

The Court then explained that in all such federal equal protection cases, courts must apply the requisite level of equal protection scrutiny afforded the particular classification at issue.⁸⁷ In *Passman*, the Court applied intermediate scrutiny because the issue was about gender.⁸⁸ Following *Romer*, *Lawrence* and *Windsor*, the level of scrutiny that should be applied to same-sex marriages is unclear and uncertain. Much litigation is sure to attend this issue.

The issue for federal “equal protection,” however, is better defined. Chief Justice Warren reminded in *Bolling v. Sharpe* that:

[a]lthough the Court has not assumed to define “liberty” with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”⁸⁹

Justice Kennedy’s majority opinion in *Windsor* confirms that “[t]he liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”⁹⁰

Thus, under the Fifth Amendment, the question becomes: What “proper governmental objective” could be advanced that allows same-sex marriages to qualify for federal marital benefits according to vacillating definitions under state law? What “proper governmental

86. *Davis v. Passman*, 442 U.S. 228, 234 (1979) (citing *Vance v. Bradley*, 440 U.S. 93, 95 n.1 (1979)).

87. *Passman*, 442 U.S. at 234–35.

88. *Id.*

89. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

90. *United States v. Windsor*, No. 12-307, slip op. at 25 (U.S. June 26, 2013).

objective” applies to couples who are legally married in New York, lose their marital status upon leaving New York, and regain their marital status when traveling in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, Washington, and the District of Columbia? The absurdity of a system that defines the scope of one’s federal benefits based on one’s physical location lacks a rational basis.

Further, *Windsor* unequivocally struck down DOMA’s federal definition of marriage as being solely between one man and one woman. Now, at least for federal purposes, marriage cannot be so narrowly circumscribed. *Windsor* criticized DOMA and the federal government for singling out a class of persons for unequal treatment “by refusing to acknowledge a status the State finds to be dignified and proper.”⁹¹ That status should not change based on any future relocation of the couple.

Equally troubling is that one’s marital status no longer depends on whether one is legally married, but rather on where you are currently located or living. As mentioned above, this is akin to Social Security or veterans’ benefits accruing or terminating based on whether one is currently located in Texas or Massachusetts. A surgery at the VA Hospital may be covered in Delaware, but not in Idaho. One may qualify for federal death benefits and tax exemptions while located in Iowa, but not in New Jersey. What valid *federal* governmental objective allows the states to define the parameters of federal benefits?

Justice Kennedy recognized the shortcomings in this approach, noting:

[DOMA’s] demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution’s Fifth Amendment . . .

....

. . . DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes

91. *Id.* at 25.

and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.⁹²

Using the majority's language, no level of constitutional scrutiny would allow the federal government to subject federal marital status to fluid state definitions, particularly when those definitions and anti-recognition laws—like the definition struck down in *Windsor*—are based unequivocally on the desire “to impose inequality.”⁹³ No reasonable governmental objective can be advanced “[b]y seeking to displace [federal] protection and treating these persons as living in marriages less respected than others [because doing so violates] the Fifth Amendment.”⁹⁴

B. The Constitutional Right to Travel

A second basis for providing federal marriage benefits to all legally married same-sex couples is the constitutional “right to travel.”⁹⁵ The Constitution protects an individual's right to travel, though this right has never been clearly defined.⁹⁶ The right to travel has been deemed “a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”⁹⁷ The origins of this right, though not enumerated in the Constitution, stem directly from the Magna Carta.⁹⁸ In 1958, the

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 26.

95. *United States v. Guest*, 383 U.S. 745, 757–58 (1966) (“The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”).

96. *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (“We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”).

97. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

98. *Id.* at 125–26.

Supreme Court observed that, “[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”⁹⁹

Justice Brennan echoed this sentiment in *Shapiro v. Thompson* explaining:

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

“For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”¹⁰⁰

The recognition of one’s marriage is important while traveling from state to state. How could anyone argue that the uncertainty of one’s marital status does not impermissibly “burden or restrict” movement?¹⁰¹ Increasingly, we are becoming a migratory and transient society. We travel more than our ancestors, and exponentially more than the Founders. Many Americans move to different states during their lives and may even regularly work in more than one state. It is no longer peculiar to learn that someone lives in one state and works in a nearby state. Our society is decidedly more mobile than earlier generations.

But, does the right to travel include *federal* protection for individuals seeking marital recognition? Can the constitutional right

99. *Id.* at 126.

100. *Shapiro*, 394 U.S. at 629–30.

101. *Id.*

to travel ensure that individuals married in one state will continue to carry that marital status with them if they return home or decide to find a new home? The critical distinction that this article draws—and the line demarcated in *Windsor*—is between *federal* and state recognition of marriage. At present, Texas is permitted to deny that two women are married for state law purposes. Does that mean that Texas, or any other state, may impose its provincial laws on the federal government when the federal government assesses marriage for the purpose of allocating the over 1,000 benefits that are based on marital status? This author believes not. *Windsor* and the constitutionally recognized right to travel precludes such overreaching by states that do not recognize same-sex marriage.

If state law dictates which individuals are married for *federal* purposes, some states will wield more power than others. *Windsor* found that conscientious objectors to same-sex marriage, whether state or federal, should not be permitted to differentiate between same-sex and opposite-sex couples for federal marriage purposes because such “differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship [some states] have sought to dignify.”¹⁰² Allowing states to force their will upon the minority of states that have embraced same-sex marriage for federal law purposes violates the fundamental right to travel. Worse still, such approach convolutes the individual’s right to maintain separate state and federal citizenships. If states opposing same-sex marriage are permitted to impose their will in an extraterritorial fashion upon individuals exercising their fundamental right to travel, then the Supreme Court’s dismantlement of DOMA will be limited to a select minority of states.

This article has briefly attempted to shape the arguments in favor of adopting the *lex loci celebrationis* approach to federal marriage recognition. This doctrine preserves federalism by permitting states to retain their inherent domestic power to regulate marriages within their borders under state law. The issue is of constitutional magnitude and cannot be resolved simply by allowing the separate federal agencies to periodically and in piecemeal fashion articulate their respective approaches to discerning who is married for federal purposes. Marriage implicates over 1,000 federal benefits and burdens. It is these federal benefits and burdens that merit constitutional protection. While a constitutional right to same-sex

102. *United States v. Windsor*, No. 12-307, slip op. at 23 (U.S. June 26, 2013).

marriage is inevitable, the more immediate concern is constitutionalizing federal recognition of all legally valid same-sex marriages for federal law purposes. The tone, language and clear trajectory of *Windsor* lends itself to no other conclusion.

Conclusion: Let them Eat Cake!

The Supreme Court declared marriage a fundamental right more than forty years ago. The argument that the right to marry includes same-sex couples has been advanced in recent state and federal litigation, but the question is one that even many thoughtful supporters argue the Court should not and will not settle in the very near future. A separate right of marriage recognition, if advanced in federal litigation, would alleviate an urgent problem while allowing the political and legal debates over same-sex marriage to continue. It would recognize, in a spirit of laboratories of democracy-style federalism, that states “should intensely compete to show that [one view of marriage] is more reasonable than the other,” while simultaneously recognizing that states should not be allowed to “inflict serious harm” on couples who are already married “in order to make a purely symbolic point.”¹⁰³

As Professor Sanders articulates, the most pressing issue facing our federal government right now is not whether same-sex marriage should be constitutionally mandated, but rather whether legally valid same-sex marriage should be constitutionally *recognized* across state lines. *This* is the most urgent question for thousands of same-sex couples that are now legally married under the laws of one of the thirteen states (and District of Columbia) that has legalized same-sex marriage. These individuals took legal steps to enter marriage and should not lose that status simply by moving, or returning home, to a state that does not recognize same-sex marriage.¹⁰⁴

103. Sanders, *supra* note 7, at 1425–26.

104. See Singer, *supra* note 57, at 13–19, 23–25.

The question posed herein is quite narrow: Should the federal government recognize legal same-sex marriages, wherever performed, for purposes of federal benefits and burdens? Following *Windsor*, the answer appears to be a subdued “yes.” As Professor Sanders observes:

The right of marriage recognition would be a modest, carefully tailored solution to a pressing problem of interstate relations and human dignity. It would not force any state to create a marriage of which it disapproves, or allow any couple to evade their own state’s marriage laws.¹⁰⁵

Marriage recognition by the federal government is a small, but necessary, step in the march towards marriage equality. Federal recognition of all legally performed same-sex marriages, regardless of a couple’s domicile, ensures that all Americans receive the full—and equal—benefits of their federal citizenship. Applying *lex loci celebrationis* furthers both the liberty and equality protections identified in *Windsor*.

Further, extending *federal* marital benefits to the Texas couple traveling to New York should not be dependent on the gender of the couple. Were there to be such fluctuation in the receipt of federal benefits, another possible violation would occur under the constitutionally recognized right to travel.¹⁰⁶ Opposite-sex couples—but not same-sex couples—could partake in a “destination wedding” and still receive federal benefits.¹⁰⁷ There appears no rational basis for federally drawing the line at a state’s border.¹⁰⁸ If DOMA’s federal definition of marriage is unconstitutional for legally married citizens in New York, then so, too, must that definition be unconstitutional for American citizens living in Texas or Oklahoma.

To tread down a different path, if the receipt of federal marital benefits were to depend on one’s state residency, it would result in the very chaos and vast expenditures that Justice Kennedy sought to

105. Sanders, *supra* note 7, at 1426.

106. See *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

107. See *Windsor*, slip op. at 25 (“DOMA instructs all federal officials . . . that [one type of marriage] is less worthy than the marriages of others.”). Such language appears to be the natural predicate for equal federal treatment of all legal marriages performed in an individual state.

108. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

avoid in *Windsor*.¹⁰⁹ And, one should not forget that Richard and Mildred Loving themselves had an evasive wedding when they purposefully left Virginia to be wed in the more hospitable territory of District of Columbia.¹¹⁰ Fortunately for the Lovings, and all racial minorities, the Supreme Court issued a forceful recognition of their union when the question first came before the Court.¹¹¹ Same-sex couples must wait a bit longer for their full inclusion. But, until that moment comes, same-sex marriages should not be evaluated under traditional conflicts of law provisions governing evasive marriages. Unlike the Lovings, who were persecuted under detestable and odious anti-miscegenation laws, same-sex couples commit no crime when they travel to another state to marry.¹¹² These marriages may be repulsive to some, but they are not criminal.

Ultimately, *Windsor* is a case about federal power, federal benefits and federal law. Thus, the Supreme Court acted well within its discretion to legally determine which marriages qualify for *federal* benefits under *federal* law. And, while Justice Scalia and Alito properly criticize Justice Kennedy and the majority's untethered opinion¹¹³—is this an equal protection case or a substantive due process case?¹¹⁴—this author focuses on the more pressing and enduring concerns of marital recognition. Who *is* married in the eyes of our federal government? How will the federal government resolve the “destination wedding” question? Will the federal government give a different interpretation to the relocation question? And, how long before we have a case that will provide a definitive answer to these questions? Justice Scalia forecasts one year.¹¹⁵ For the many same-sex couples whose legal status regarding their marriage remains in flux, the wait will be intolerable. Are they married? Or, does their

109. *Windsor*, slip op. at 11.

110. *Loving v. Virginia*, 388 U.S. 1 (1967).

111. *Id.*

112. *See* *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (upholding the State of Georgia's right to withdraw an offer of employment to a lesbian because her “marriage”—something the Eleventh Circuit places in quotes to emphasize its nonrecognition—involved legal conduct, sodomy, at the time under the then-governing law of *Bowers v. Hardwick*).

113. *Windsor*, slip op. at 7–17 (Alito, J., dissenting).

114. *Id.* Justice Alito fairly suggests that, “[p]erhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, *Windsor* and the United States couch their arguments in equal protection terms.” *Id.* at 10. But, ultimately, the Court's majority fails to resolve this question or clearly define on what basis the decision is being rendered.

115. *Windsor*, slip op. at 16 (Scalia, J., dissenting).

marriage literally “come and go” depending on where they live or travel? Perhaps married in New York (where one lives), but not married in New Jersey (where one works).

We have but one federal government. And, under that one federal government, all legal marriages should be treated the same. *Windsor* provides a glimmer of hope that all legally valid marriages will be viewed the same under federal law. If this holds true, then, finally, same-sex couples will have something uniquely American to *lex loci celebrationis*: “With liberty and justice for all.”