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Harmonizing Love Across Borders: A Juridical Inquiry into the Recognition of Foreign Same - Sex Marriages in India

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Abstract: ***India is place which is exhaustive with culture, political judgements, religious belief and many more but still there is a strong sustenance as well as starvation on the grounds of same sex marriage. Along with it promotes antidiscrimination safeguards same - sex partnerships under the framework of orientation and opposes the use of marriage equality as a means of eroding the current non - discriminatory laws on sexual orientation. Where some jurisdiction believes to welcome same sex relationship where some jurisdiction believes as a prescribe punishment for homosexual relationship across their border. Stated the voidness of an international uniform approach, there is a massive possibility for conflict and legal contradiction. Imagine a situation where a couple from Belgium, which has legalised homosexual relations, and later travel to country such like Pakistan or India, which believes homosexual relation as a curse? The paper will amplify upon legal issue which involve in recognition of same - sex marriage celebrated outside India. The paper majorly focuses on the legal aspect and their induvial right of homosexual individual.***

Keywords: India, same-sex marriage, legal issues, discrimination, homosexual rights

1. Introduction

Imagine that Georgia and Jenny marry and reside in Iowa, a place where same sex marriage is considered to be legal. Where Iowa is amongst the six states where same sex marriage is legal with the district of Columbia. Where across world nearly 2 or 3 percentage of people are same sex marriage, and imagine that Georgia and janny pull up states and moved to Indiana for any personal purpose. Where Indiana law purports to declare their marriage as “void” because it involves two people of same sex. Where Indiana comes in that rest of the states which do not promote same sex marriage, and have adopted statues or constitutional amendments banning same sex marriage (mini - DOMAs). The majority of mini DOMAs not only forbid the acceptance of same sex marriage but their constitution and statutory language would consider them void even to perfectly valid same sex couple who migrates from states such marriage is legal. Moreover, if they di not purport to actually void marriage, these countries who do not recognize laws transfer the legally same sex couple to complete legal strangers, with no custody rights and incident of marriage as long as they continue to stay in mini - DOMA state. For that instance, the couple have been divorced against their will or will promote to do so for jobs, education, family, and many more other reasons.

The main question is “WHAT HAPPENS TO PEOPLE IN LEGALLY RECOGNIZE SAME - SEX RELATIONSHIP” when they move across boarder. The majority of legal experts who consider this issue would argue that Jenny and Georgia have a conflict of laws issue because they subscribe to the localism theory of family law, which holds that each state has the authority to define marriage within its borders. According to me, there is a constitutional problem that needs a constitutional solution because of people like Gregoria and Jenny. To be clear, those who support their "right to marry" are already married. Lem is concerning their rights.

This paper is going to discuss when an individual marries in her domicile place and later moves across another state that becomes her new domicile and should have significant liberty interest under the fourteenth amendment’s. The supreme court declares marriage as a constitutional and fundamental right long ago, now the major conflicts and disputes come across in the matter of same sex couple, in recent state and federal cases, the claim that same - sex couples have the right to marry has been made, considerate supporters contend that the Court shouldn't and won't answer this subject anytime soon.

The acknowledgment of marital rights would be a modest, thoughtfully designed response to an urgent issue pertaining to human dignity and interstate relations. It would not permit a couple to circumvent the marriage laws of their home state, nor would it compel any state to sanction a marriage that it finds objectionable. It would merely forbid governments from denying people the opportunity to remain in their current marriages by establishing a biassed exception to the widely accepted law of marriage recognition. The right would erode the long - standing and eminently sensible rule of interstate marriage recognition, which safeguards married individuals (as well as their assets, debts, and children), as well as the requirements of a national economy and the sensible operation of a highly mobile society. Moreover, it would validate the principle, well established in constitutional law.

Where the paper is divided into five parts. Part I, explains modern family life is no longer viewed through the lenses of localism and rigid government regulation. Instead, they are accepted by society and the law, in general, as issues of personal autonomy, private ordering, and individual rights. That makes legislation that permit a state to declare an

existing marriage null and void or to refuse to recognise it extremely unusual.

Where part II, describes where the principle arises when states refuse to follow this principle, particularly in the case of migratory same - sex marriage, many states have enacted law, such as mini - DOMAs that explicitly refuse to recognize same sex marriage. Where the conflict doctrine lacks the appropriate rule for recognizing migratory marriage.

Part III, consider how marriage creation differs from marriage recognition and how denying to license a marriage differ from nullifying one.

Part IV, where is discuss the four principles of constitution of right of marriage recognition, where it talks about i) protection of reasonable expectations ii) Marital and family privacy iii) respect for settled legal and social practices iv) expectation of proper procedure where it explained an intermediate level of scrutiny, which is appropriate for evaluating a right of marriage recognition. Part V talks about elucidate, in terms of federalism, a right to marriage recognition achieves a fair balance. It would uphold the idea that acknowledging a sister state's lawful marriage is a condition of being a part of a federal system of equal state sovereigns, allowing each state to choose whether to permit same - sex marriage for its own domiciliary.

Shifting paradigms – the evolution of marriage and family laws from state control to individual liberty

The following paper will talk about the view on marriage and family which have evolved over time, where during early 1800's, the supreme court believes that state has complete right over family and marriage law, but with the flow of time where marriage and family seems more through the Lense of personal choice, individual freedom and rights. Now before delving into matter regarding marriage recognition, it is crucial to understand the existing constitutional protection for marriage, family and intimate relationship. Which includes recognizing the matter of personal freedom, additionally to grasp how state currently regulate marriage. It is crucial to examine these laws meticulously.

Constitution Protection for Marriage, Family and Intimate Relationship.

The protection of family privacy and autonomy under the process clause from the case such as *Lochner - era case Meyer v. Nebraska and pierce v society of sisters*[1] where which underscores the right of parents to control the education of their children. The court interpreted the fourteenth Amendment broadly, stating to guaranteed liberty, including the rights to marry and raise children. [2]

The rulings in Griswold v. Connecticut and Loving v. Virginia[3] represented a departure from traditional state authority over marital matters, emphasizing individual freedom and privacy. These cases recognized evolving social norms and redefined marriage as a private institution not subject to extensive state intervention[4]. In contrast to earlier times when marriage was closely associated with Christian morals, the mid - twentieth century viewed it as a domain of personal autonomy, consent, and privacy. Reviewing its Due Process Clause jurisprudence once more, the Court affirmed that the Constitution provides protection for matters concerning marriage, procreation, contraception, family relationships, and education. [5] These areas involve deeply personal choices and decisions that impact an individual's dignity and autonomy throughout their life. The Constitution restricts states from imposing specific terms on marriage or family based solely on the preferences or moral beliefs of the majority, stating that matters defining personhood should not be subject to state compulsion. In 2003, the Court extended these principles to gay and lesbian relationships in Lawrence v. Texas, [6] where it struck down sodomy laws. The decision emphasized individual liberty and rejected state attempts to define the meaning of intimate relationships, stating that such definitions should only be established if they protect individuals from harm or abuse of power[7]. The contemporary jurisprudence of the court doesn't give view on marriage family and intimate relationship as a separate issues, instead, it safeguards the fundamental privacy and personal decision involved in all these areas, demanding justification for government interference. This interpretation due process doctrine shapes the argument as presented in this paper. [8]

State Regulation Marriage

During the time where the supreme court was trying to emphasize on the individual freedom within marriage, family dynamics and intimate relationship, state gradually relinquished their control over regulating marriage. [9] This shift marked a significant change in the state's role concerning families. [10] Moreover, looking forward with traditional method where the state regulation of existing marriage aimed to uphold the important role of family by ensuring a strong family structure, promoting the welfare if citizens through legal responsibilities, and guaranteeing proper care for children. [11]Instead, marriage law in the United Nation reflects the value of autonomy rather than conformity. [12] Lawmakers view marriage as a predominately private and lightly regulated institution. State involvement is minimal and typically only occurs in case of abuse or neglect, as well as in decision regarding property division, child support and custody arrangement during divorce.

Marriage and intersection of legal Jurisdictions

The main issues which come along is about traditional way of thinking and modern way of thinking about marriage conflicts where traditional legal way recognize marriage across different states while modern legal way suggest good faith, even if that state doesn't allow such marriage itself, it lack

[1] 68 U.S. 510 (1925)
[2] Prince v. Massachusetts, 321 U.S. 158, 166 (1994)
[3] 388 U.S. 1 (1967)
[4] Mary Ann Glendon, Marriage and the State: The Withering Away of Marriage, 62 Va. L. Rev. 663, 668 (1976).
[5] Cott, supra note 39, at 19
[6] 539 U.S. 558 (2003).
[7] Lawrence, 539 U.S. at 567.
[8] See infra Part
[9] Glendon, supra note 31, a
[10] See Carl E. Schneider & Margaret F. Brinig, An Invitation to Family Law 180-184(3(1 ed. 2007
[11] Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Ca lif. L. Rev. 1169, 1242-45 (197
[12] Brian H. Bix, Choice of Law and Marriage: A Proposal, 36 Fam. L.Q. 255, 267 (2002

enforcement mechanism. Despite promoting fairness and corporation amongst the state for same sex marriage the conflict rule can easily be overridden by new laws or amendments as seen with the rise of mini - DOMAs. Where the mini - DOMA restrict same sex marriage.

Place of Celeberation Rules

According to principal of legal and social perspective marriage is been a valid contract which is celebrated everywhere, this states that once marriage is legally solemnised in one location, it should be considered valid in another jurisdiction. Where the principal referred to "place of celebration" [13]suggest that law governing gives validity of marriage on based on where it was originally conducted, usually where couple lives. [14] The paper talks about weddings in which a couple temporarily departs their home state to marry someone else in order to get around marriage laws in their own state are not covered by the customary norm about where a marriage is performed. They solely concentrate on non - evasive marriages, which are unions consummated in the couple's native state or in a state with comparable marital laws. Evasive marriages, in which a couple leaves their home state to marry someone they don't agree with, are considered acts of civil disobedience. They cannot, however, expect their home state to recognise their marriage as they are bound by the rules of their home state. In contrast, a couple that lives and marries in Massachusetts and later relocates to Indiana has already established their marriage and has a legitimate expectation that it would be upheld in Indiana. While acknowledging that once a marriage is created, it creates significant legal and private rights that must be taken into account alongside the state's interests in its marriage regulations, the proposed constitutional provision also seeks to maintain states' powers to regulate marriage for their inhabitants. [15]

In American law, marriage is recognized as an important celebration, by ensuring that marriage is governed by a single legislation, this rule helps to avoid uncertainty between states over whether a couple is married or not. For those who depend on their marital status for their entire existence, and who require immediate knowledge of their legal status, this constancy is essential. It avoids awkward circumstances in which a couple may be legally married in one state but not in another, which could cause issues with the validity of their children and their marital responsibilities. Consider a scenario in which someone may simply move to a state with different marriage laws and avoid their commitments under the terms of their marriage. This might result in circumstances where someone could inherit property from their marriage, get remarried, or even become a bigamist in their new state without facing repercussions. The norm has been in place for a very long time and is accepted as standard procedure in all civilised countries. It guarantees that the couple's marital rights go with them, offering stability and preventing the potential legal mayhem that could result from differing state laws regarding marriage.

Bishop underlined how crucial it is for both people and society at large to have clear guidelines on the locations where marriages are accepted. There would be complete chaos in the absence of such regulations. For instance, when someone moved between states, they would not be able to confirm if they were married legally or not. This unpredictability could result in several issues and mayhem. [16]

Validating Marriages Through the Due Process Clause

The paper already covered how same - sex marriages are prohibited by law and how this affects the stability of families that already exist. Additionally, it has come to notice that, there is no easy or quick fix for the problem of same - sex marriages relocating across state lines when relying solely on legal precepts regarding conflicts between states.

We can see the harm that laws that fail to recognise these marriages cause when we look beyond what each state desires and see the distinction between establishing a marriage and recognising it. States ought to have to demonstrate that there is a compelling reason why they should not be recognised.

Due Process Principles Supporting a Right of Marriage Recognition

Reasonable expectation and reliance

To simplify, some argue that marriage could be seen as a type of property interest, similar to how the law protects things like welfare benefits or certain job positions. They point out that the Supreme Court has protected property interests under procedural due process, meaning that the government can't take them away without fair procedures. [17]

However, the problem with applying this argument to marriage is that the courts haven't extended this level of protection to property interests that cross state lines. [18] For example, if something is legal in one state but illegal in another, the Constitution doesn't step in to protect it. Instead of viewing marriage purely as property, it might be better to see it as a fundamental liberty interest. [19] This means that protections under the Due Process Clause of the Constitution, which safeguard personal freedoms and relationships, should apply to marriages as well. One argument suggests that same - sex couples might not reasonably expect the same treatment for their marriages as heterosexual couples. This argument points out that many states still prohibit same - sex marriage, so it's not surprising if same - sex couples aren't shocked by anti - recognition laws. [20]

[13] Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921, 922 (1998).
[14] Madewell v. United States, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).
[15] See infra Section iv.C
[16] Id.
[17] In re Estate of Lenherr, 314 A.2d 255, 258 (Pa. 1974); see also Margaret F. Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855, 856 (1988) ("[T]he law of domestic relations—like the law governing many other consensual relationships—has always protected the 'reliance interest,' that is, the parties' change of posi tion in reliance on the joint enterprise."
[18] Michael H. Gottesman, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 Geo. L.J. 1, 12-13 (1991).
[19] Borchers, supra note 75, at 354
[20] Scoles et al., supra note 11, at 56 o88

However, defining "reasonable expectations" legally can be tricky and subjective. Larry Kramer, for example, notes that statements about reasonable expectations often reflect what a court believes the parties should expect.

Still, there are valid reasons why same - sex couples who followed the law of their home state shouldn't be excluded from expecting their marriages to be recognized elsewhere. The majority of married couples, who are not legal experts, typically move between states without considering the legal implications. [21] So, even if same - sex couples are aware of the limitations on marriage in many states, it's not necessarily clear to them that moving to a new state could invalidate their marriage. The concept that a legally recognized family relationship could be voided by legal mechanisms is unfamiliar in contemporary American life and legal principles. [22] The landscape of same - sex marriage rights in the United States is complex and constantly changing. Just seven years ago, same - sex marriage was only legal in Massachusetts, but now it's available in seven states. Other states have had fluctuations in their laws regarding same - sex marriage, such as California and Maine, which once allowed it but now have different legal arrangements. [23]

Furthermore, states like Vermont and Connecticut, which initially offered civil unions to same - sex couples, now allow full marriage. Maryland recognizes same - sex marriages even though it doesn't perform them, a stance shared by New York until it legalized same - sex marriages in 2011. Additionally, there are ongoing lawsuits and legislative efforts in various states that could further alter the legal landscape. [24]

Given this ever - changing situation, it's neither practical nor fair to subject same - sex couples to the confusion and uncertainty that comes with these legal shifts, especially when other couples wouldn't have to endure the same uncertainty. In summary, my argument is that reliance and expectation interests in marriage should be evaluated both normatively and objectively. In states where equal marriage rights are recognized, there isn't a separate legal category for same - sex unions. A marriage is simply a marriage, and all marriages should be treated equally.

Furthermore, the reasons behind the longstanding rule of recognizing marriages based on the place of celebration—such as ensuring stability and predictability in legal relationships, facilitating free movement across the country, and preventing evasion of marital responsibilities—apply equally to same - sex marriages.

Therefore, same - sex couples should be entitled to the same expectations as other couples. The alternative viewpoint, which suggests that a couple's reliance interests and expectations should vary from state to state, is flawed. It would essentially force couples to give up their marital rights as a condition of moving for employment, education, family care, or any other routine life activities that may require a change of domicile.

Due process in its most basic sense

When a state attempts to void or deny recognition to a marriage through legal means, there isn't a clear explanation of what exactly happens from a formal legal perspective. Koppelman suggests that when a same - sex couple moves to a state with laws like mini - DOMA (Defense of Marriage Act), their marriage might cease to be recognized, or it could become dormant, with uncertainty about whether it would be reinstated if they return to the state where they were married. Alternatively, Koppelman raises the possibility that the marriage simply dissolves.

However, such outcomes seem highly problematic, especially considering the significance of marriage. Koppelman himself acknowledges the uncertainty created by these laws as "intolerable. " Therefore, having a right to marriage recognition becomes crucial for preserving the principles of due process. The right to marry is already protected under substantive due process. Moreover, I've previously outlined why there's a separate liberty interest in an existing marriage, supported by factors such as reasonable expectations, marital and family privacy, and established legal and social norms surrounding marriage recognition. Considering all these factors collectively, it's reasonable to conclude that when a state voids or refuses to recognize an existing marriage, it violates the parties' "liberty" as defined by the Due Process Clause.

Furthermore, this violation occurs "without due process of law" because the state doesn't offer any form of legal proceedings or adjudication before effectively dissolving the marriage of same - sex couples. The Supreme Court's jurisprudence emphasizes the importance of proper procedures in protecting substantive rights, particularly in cases involving family privacy. In Santosky v. Kramer, the Court recognized the fundamental liberty interest of natural parents in caring for their children. This interest is crucial in safeguarding the integrity of family life.

The Court established that before a state can terminate parental rights based on allegations of parental unfitness, it must ensure that parents are provided with fair procedures. This includes granting them a hearing where the state must present clear and convincing evidence to meet the standard required for termination.

A migratory marriage cannot be properly classified as "voidable" because the state implementing mini - DOMA laws doesn't offer any adjudication or due process before declaring it null. It's also problematic from a federalism standpoint and logically flawed to label a migratory marriage

[21] See Larry Kramer, Rethinking Choice of Law, 90 Colum. L. Rev. 277, 336 (1990) (explaining that parties' "reasonable expectations" are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, at least when the expectations are "so widely shared as to be uncontroversial"

[22] Brandon R. Johnson, Note, "Emerging Awareness" After the Emergence of Rob erts: Reasonable Societal Reliance in Substantive Due Process Inquiry, 71 Brook. L.

[23] Id. at 1596 (emphasis omitted); see also Shreve, supra note 159, at 289 ("When we turn to the numerous conflicts policies that are capable of a second life under the Constitution, the policy that chosen law not disturb the reasonable expectations of a party seems a natural choice.")

[24] Johnson, supra note 223, at 1591 (emphasis omit

as "void" from the beginning. Clearly, the marriage wasn't void when it began—it was valid in the state where it was solemnized. By disregarding this fact and pretending that the marriage is void from the start in the eyes of the mini - DOMA state, we essentially allow that state to impose its laws extraterritorially. This has long been considered a violation of both constitutional due process and fundamental principles of federalism.

As Thomas Cooley articulated in 1868, the legislative authority of a state is confined within its territorial boundaries. A state's legislature cannot enact laws that govern the actions of people outside its jurisdiction. If a state deems a migratory marriage void from the outset, it implies that the state had some legitimate control over the marriage when it took place. However, this assertion is clearly untrue. Unless and until individuals like Helen and Jenny move to a new state and consent to be governed by its laws, that state has no legitimate authority over their lives or relationship. Once individuals like Helen and Jenny consent to be governed by Indiana's laws by relocating there, Indiana may indeed have a different perspective on whether their marriage should continue to be legally recognized. However, we shouldn't permit the state to unilaterally impose its decision by implementing a mini - DOMA that declares the marriage "void. " Instead, as I'll elaborate in the following section, we should carefully assess Indiana's state interests in relation to the couple's liberty interest in maintaining the validity of their marriage.

Assessing countering state interest

The due process principles outlined earlier provide justification for the argument that a migratory same - sex couple possesses a substantial liberty interest in ensuring the continuation of their marriage. While examine the opposing interests that a state may raise in order to oppose a due process right to recognize marriages.

State control over marital incidents

In traditional conflict - of - law principles, the validity of a marriage was primarily determined by the law of the place where the marriage was performed, known as the "place of celebration" rule. However, for certain aspects of marriage, known as marital incidents, local laws were consulted to decide if a married individual was eligible for specific rights under those laws. Until relatively recently, one of the key marital rights concerned the legal ability to live together, which has lost its significance today but was critically important when engaging in sexual activities outside marriage could lead to legal penalties. Applying local law to these rights was logical, especially when they were closely connected to the local criminal statutes. Typically, states would refuse to recognize the right to cohabitation in marriages deemed "micaceous" (interracial) or those considered to be "within prohibited degrees of consanguinity" (too closely related by blood). Even in cases where cohabitation was forbidden, states were occasionally prepared to acknowledge a marriage with regard to property rights, including the entitlement of a spouse to inherit assets after the death of the other. [25] An authority once noted that regardless of how repulsive the cohabitation of two individuals might be perceived, the principle that one of those individuals should have a property right following the demise of the other appears indisputable. [26]

Marital incidents can be broadly classified into three main categories due to their relevance to societal and legal frameworks. [27] The first category encompasses laws facilitating one spouse's authority to make healthcare decisions for the other and establishing a spouse as the default inheritor. [28] The second category focuses on marriage as a foundational setting for child - rearing, encompassing legal presumptions concerning the legitimacy and parentage of children born within the marriage. [29] The third category pertains to the financial dynamics expected (or recommended) to exist between spouses. This includes tax regulations and government benefits that typically recognize married couples as a single economic entity, along with laws related to the distribution of marital assets and property division in the event of a divorce. [30] When state supreme courts have overturned laws against same - sex marriage, they have dismissed claims suggesting that same - sex couples require fewer state - provided benefits and protections compared to opposite - sex couples, as well as the notion that restricting these benefits to heterosexual couples serves a legitimate state interest in saving limited resources. [31] The Vermont Supreme Court articulated this stance by emphasizing the profound importance of the legal benefits and protections derived from marriage. It stated that any legal exclusion from marriage must be based on public considerations of substantial importance, persuasiveness, and legitimacy to the extent that the fairness of such exclusion is beyond serious dispute.

Courts have diverged in their assessments of whether the reasons states have provided for not legalizing same - sex marriage meet a significant standard, a debate that is not the focus here. However, considering that the privileges associated with marriage do not intrinsically endorse or advance any specific form of marriage, the rationale for denying these privileges to same - sex couples lacks sufficient necessity or significance to outweigh the negative impact and disruption faced by couples who lose access to these benefits due to migration. The argument that such couples are somehow morally undeserving of the rights typically afforded through marriage does not constitute a compelling state interest. Furthermore, given that the United States does not issue marriage visas and that marital benefits are generally granted freely and automatically to almost all other couples who move, the exclusion of same - sex couples from these benefits does not align with the preservation of a state's marital regulations. [32] Therefore, imposing such a widespread

[25] . C.W. Taintor, II, What Law Governs the Ceremony, Incidents and Status of M riage, 19 B.U. L. Rev. 353,
[26] Id.
[27] . Id. at 362
[28] David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev
[29] Id. at 454-56.
[30] Id. at 476—78
[31] d. at 471.
[32] Baker v. State, 744 A.2d 864, 884 (Vt. 19

and indiscriminate disadvantage is so at odds with the justifications provided that it appears to be driven by nothing more than prejudice.

Encouraging heterosexual procreation

Some state courts have denied the right to marry for same - sex couples, supporting the viewpoint that states have a valid interest in favouring heterosexual marriages due to procreation. For instance, in the case of Andersen v. King County, the Washington Supreme Court highlighted the traditional association of marriage with procreation and the continuation of the human species, noting that only heterosexual couples have the capacity to produce biological children of the couple. Consequently, the court recognized that legislators could have a rationale in restricting marriage to heterosexual couples to promote procreation. Similarly, the New York Court of Appeals described "marriage and its associated benefits" as incentives for heterosexual couples to enter into serious, long - term commitments to each other. This view was underpinned by observations that such relationships can frequently be casual or short - lived and that a critical role of marriage is to lend more stability and durability to the unions responsible for bringing children into the world. Acknowledging the promotion of heterosexual procreation as a significant motive behind a state's decision not to legalize same - sex marriage does not justify the refusal to acknowledge existing same - sex marriages from other states. For a same - sex couple already married, no form of "encouragement" or "incentive" related to the benefits of heterosexual marriage alters the reality of their existing union. Permitting a same - sex couple married in State A to retain their marital status in State B does not undermine State B's procreation - focused marriage policies, just as these policies are not undermined by the fact that numerous unmarried heterosexual couples live together and have children. While a state may promote heterosexual procreation by extolling heterosexual marriage, the era of penalizing non - marital procreation and disadvantaging children born outside of marriage, or threatening single parents with child removal, has passed. Similarly, it is unacceptable for a state to inflict harm on same - sex couples by nullifying or refusing to acknowledge their marriages, just as it would be unacceptable to penalize heterosexual couples for having children outside of wedlock.

Fairness to long – term resident

A state might contend that it would be unjust for migratory same - sex couples to access the rights and privileges of marriage while those are withheld from its own gay and lesbian residents. However, setting aside the option for the state to rectify this disparity by permitting same - sex couples within its borders to marry, the perceived unfairness in this scenario lacks substance. Such objections do not constitute a significant justification for nullifying or refusing to recognize marriages that originated in other states. Voiding a marriage that occurred in another jurisdiction is unnecessary to uphold a state's marriage policy. This principle aligns with the longstanding practice of recognizing marriages based on the place where they were celebrated, even if the state itself wouldn't have authorized such unions. The perceived unfairness in this situation is akin to past instances where couples sought recognition for common - law marriages or unions within prohibited degrees of consanguinity, despite their domiciliary states disallowing such unions. For example, Maryland follows the place of celebration rule, recognizing same - sex marriages even though it doesn't authorize them. Similarly, New York adopted a similar stance before it began issuing licenses for such marriages in 2011. Secondly, if we acknowledge that recognizing marriages holds substantial importance as a liberty interest protected by the Due Process Clause for all married individuals, then a state that grants recognition to heterosexual marriages while denying it to same - sex marriages faces an equal protection issue. In this scenario, the state would have two groups of citizens residing within its jurisdiction who are similarly situated but treated differently under the law: heterosexual couples with valid marriages (including many who have migrated from other states), whom the state Favors, and homosexual couples with valid marriages, whom the state disfavours.

Marriage Recognition and the Principle of Federalism

A policy of recognizing marriages would establish a reasonable and essential balance, particularly in terms of federalism. It would permit each state to determine whether to legalize same - sex marriage for its residents. However, it would also underscore that in a highly mobile society like the United States, acknowledging the validity of a marriage from another state is an inherent aspect of participating in a federal system where states possess equal sovereignty. As noted, one of the strengths of territorial federalism lies in its capacity to accommodate conflicting communities of commitment within a unified national framework while enabling individuals to move freely among them. [33] This nuanced interpretation of federalism, which seeks to evaluate the specific significance of state interests and to harmonize state and national interests in a coherent manner, is indispensable for states to promote their collective welfare without unduly compromising their distinctiveness and the innovative energies that arise from such diversity. [34] Federalism operates under the assumption that each state has the freedom to implement its policies within the boundaries of respecting the identical rights of all other states. However, these policies can be thwarted not only by the central government but also by sister states. The current landscape, characterized by non - recognition laws in a significant majority of states, has led to what Georgia congressman Bob Barr has termed "one - way federalism. "[35] This arrangement shields states that oppose recognizing same - sex marriages granted by other states. In states with mini - DOMA laws, same - sex marriage is prohibited for residents, and marriages from sister states may be invalidated or denied recognition. Consequently, the ongoing state - level experimentation in the United States is not solely about determining the extent of rights granted to same - sex couples but primarily concerns the level of restrictions imposed on same - sex relationships. [36]

[33] Seth F. Kreimer, Territoriality and Moral Dissensus: Thoughts on Abortion, Slav ery, Gay Marriage and Family Values, 16 Quinnipiac L.R

[34] Barry Friedman, Valuing Federalism, 82 Minn. L. R

[35] Bob Barr, Opinion, No Defending the Defense of Marriage Act, L.A. Times, Jan. 5, 2009, available at /i/r/?://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009 jan05,0,1855836.story

[36] Knauer, supra note 190, at 43

In competitive federalism, fairness is paramount, and a level playing field is essential. The ability for marriages to be recognized across state lines is a fundamental aspect of American marriage. When a state with mini - DOMA laws disregards a marriage license from a sister state, it not only infringes upon the rights of the married individuals but also denigrates the policies of the other state. Andrew Koppelman contends that such laws are incompatible with a federal system and have no place within it. [37] He argues that no law, regardless of popular support from a majority of states, should diminish the official acts of any state. Federalism cannot tolerate a state's refusal to recognize other states' laws or judgments on the basis of perceived inferiority or unacceptability. [38] While states have the right to protect their interests by not recognizing marriages evasively obtained by their residents, the proposal for a right of marriage recognition does not alter this principle. Ultimately, in a functional federalism, if one state has the authority to determine which marriages it licenses, it must also respect the marriages established by other states for their own residents.

State variations regarding same - sex marriages reflect what Naomi Cahn and June Carbone describe as contrasting "blue family paradigm" and "red family paradigm. "[39] The blue family paradigm prioritizes principles of autonomy, equality, and sexual freedom, leading to support for same - sex marriage. In contrast, the red family paradigm, influenced by religious beliefs, advocates for more traditional gender roles and places importance on the unity of sex and marriage. [40]

Effective federalism necessitates a clear understanding of the proper boundaries, constraints, and interactions among each state's authority. Constitutional jurisprudence has long recognized the principle that states stand "on an equal footing" and possess equal power and dignity. However, the Constitution lacks explicit guidance on how to address conflicts when states fail to respect each other's authority or how to manage tensions between their respective jurisdictions. Additionally, there are no concrete limitations on actions that indirectly hinder the regulatory efforts of other states.

2. Conclusion

Courts, legislators, and the public are actively debating whether the constitutional right to marry should extend to same - sex couples. However, amidst this discussion, the plight of many couples who have already entered into such marriages is often overlooked. These couples face the risk of losing their marital status if they relocate to a state that does not recognize their union due to job changes, educational pursuits, or family obligations. The traditional conflicts doctrine is ineffective in addressing this issue as it has become obsolete in light of legal and societal shifts, with most states disregarding its prescriptions in such situations. To address the challenges faced by existing same - sex marriages in a rational and equitable manner, it is necessary to turn to the Constitution. The proposed right of marriage recognition would not compel states to legalize same - sex marriage, but it would prevent them from unfairly harming couples who have already married. This constitutional intervention offers a targeted solution to a pressing issue concerning interstate relations and human dignity, drawing upon historical precedent and careful consideration.

[37] Koppelman, supra note 70, at 96
[38] Melissa Rothstein, The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages, 31 Fam. L.Q. 571, 582 (1997) (quoting 142 Cong. Rec. S5931, S5932 (daily ed. June 6, 1996) (letter from Lawrence Tribe to Senator Kennedy)).
[39] See Naomi Cahn & June Carbone, Red Families v. Blue Families (2010)
[40] See id. at 1-2.