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Marriage ≠ Marriage: Querying the Relevance of Equality to the Interstate Recognition of Same-Sex Relationships

JEFFREY A. REDDING*

This essay seeks to explore and complicate the contemporary U.S. interstate same-sex relationship-recognition debate and, in particular, to offer a reconsideration of the relevance of popular notions of equality to this debate. Indeed, to the extent that equality is meant to treat identical things identically, it is not a value that is easily applicable to the radical plurality of American family law—a plurality that complicates even the translation of any state’s ‘marriage’ as ‘marriage’ outside of that state. Ultimately then, this essay’s explorations lead to an uncomfortable possibility—for liberals and conservatives alike—namely that same-sex marriages and civil unions cannot simplistically be inter-jurisdictionally translated in the United States as ‘marriage’ always, but neither can opposite-sex ‘marriage’ itself. Indeed, insisting on the identity, or equality, of marriage from U.S. state to U.S. state occludes the inter-jurisdictional differences that are always present—if often ignored—in translating (for example) a ‘Massachusetts marriage’ as a ‘Mississippi marriage,’ or vice-versa.

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* Associate Professor, Saint Louis University School of Law. Previous versions of this article were presented at a McGill University Faculty of Law conference on “After Equality: Family, Sex, Kinship” in April 2013, at a panel discussion on “Private International Law Beyond the State” during the October 2013 Annual Meeting of the American Society of Comparative Law and, finally, at a Saint Louis University Center for Intercultural Studies conference on “Translating Culture, Negotiating Difference: Religion, Law, and Business” in March 2014. I thank participants in all of these conferences and discussions for their helpful feedback. Saint Louis University School made the writing of this article possible with a summer research grant, and Heather Slawson and Leslie Dunlap provided invaluable research assistance. This essay is dedicated to Micah Stanek, for crossing so many borders with me, with so many more to go.

I. INTRODUCTION

The interstate recognition of relationships has posed numerous foundational questions for time immemorial. For example, both in United States and transnational practice, the portability of marriage and other interpersonal relationships, as well as the portability of these relationships' terminations through devices like divorce, has raised fundamental questions about the nature of 'family' and how this concept gets translated across jurisdictional borders. Indeed, over the years, officially monogamous European nations have had to decide the extent to which they will recognize the polygamous marriages of persons emigrating from places like North Africa or South Asia. And, in the United States, one of the more vexing issues in family law—and still unresolved after the recent Supreme Court decisions in *United States v. Windsor*¹ and *Hollingsworth v. Perry*²—has been whether an officially heterosexual U.S. state should (or must) recognize a same-sex marriage or civil union entered into within the boundaries of another U.S. state. Whether European or American, inter-jurisdictional relationship-recognition has posed deep and important questions as to the comparability and compatibility of different jurisdictions' family law practices.

This essay seeks to explore and complicate the contemporary U.S. interstate same-sex relationship-recognition debate, but from an untraditional perspective—one which might be labeled not only untraditional, but also 'queer.' As with all explorations, and especially queer ones, this essay's destination is far from certain and not necessarily a conclusive one. That being said, one primary goal of this essay is to urge a reconsideration of the relevance of popular notions of equality to the interstate relationship-recognition debate in the United States. Indeed, as this essay will suggest, to the extent that equality intends to treat identical things identically,³ it is not a value that is easily applicable to the radical plurality of American family law—a plurality that complicates even the translation of any state's 'marriage' as 'marriage' outside of that state. Quite simply, then, this essay seeks to explore what interstate relation-

1. 133 S. Ct. 2675 (2013) (holding that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional but not addressing Section 2 of the Act regarding the interstate recognition of same-sex marriages). Section 3 of DOMA legislated a U.S. federal definition of marriage, which conflicted with several U.S. states' definitions of marriage. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)).

2. 133 S. Ct. 2652 (2013) (holding that proponents of Proposition 8, an amendment to California's Constitution that defined marriage as only between a man and woman, did not have standing to appeal the district court's finding of unconstitutionality, thus not considering the issue of recognition of out-of-state same-sex marriages).

3. See WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE (2006). Brown notes that "[l]iberal equality is premised upon sameness; it consists in our being regarded as the same or seen in terms of our sameness by the state." *Id.* at 36.

ship-recognition might look like if the inter-jurisdictional equation looked less like ‘marriage = marriage’ and more like ‘marriage ≠ marriage.’

A great deal of (liberal) academic writing and political and legal work on interstate same-sex relationship-recognition has attempted to use the idea of equality to argue for the universal recognition of a legally-conducted same-sex marriage, regardless of whether or not a ‘receiving state’ conducts same-sex marriages itself. For example, under this view, equality dictates that Missouri recognize the same-sex marriage of a couple who marries in the bordering state of Iowa, a state that conducts same-sex marriages, regardless of Missouri’s extant legal prohibition on conducting same-sex marriages in Missouri itself. As this ‘marriage equality’ thinking often tautologically goes, ‘marriage is marriage’ and, hence, a same-sex marriage conducted in one jurisdiction should be recognized *equally* as a marriage in all other jurisdictions.⁴

This essay, however, aims to queerly complicate this easy conclusion concerning ‘migrating same-sex unions’⁵ by querying whether all states’ marriages are, in fact, the same institution—even putting aside the question of differences between states on *same-sex* marriage specifically. Moreover, in problematizing the view that all U.S. states are essentially trying to do the *same* thing via the marriages these states

4. See, e.g., Bourke v. Beshear, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014) (holding that “Kentucky’s denial of recognition for valid same-sex marriages violates the United States Constitution’s guarantee of equal protection under the law”); *Respect for Marriage Act*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/respect-for-marriage-act> (last updated Mar. 24, 2014) (noting how “[p]rior to a June 2013 ruling by the U.S. Supreme Court, the Defense of Marriage Act (DOMA) singled out lawfully married same-sex couples for unequal treatment under federal law. This law discriminated in two important ways . . . [including] allow[ing] states to refuse to recognize valid civil marriages of same-sex couples [entered into in other states]”); Steve Sanders, *A New Front for Marriage Equality: Recognizing Same-Sex Marriages from Other States*, AM. CONST. SOC’Y BLOG (July 31, 2013), <http://www.acslaw.org/acsblog/a-new-front-for-marriage-equality-recognizing-same-sex-marriages-from-other-states> (noting how a federal judge in Ohio very recently characterized “an amendment to [the Ohio] state constitution in 2004 . . . [as] mak[ing] a glaring exception to [Ohio’s general interstate recognition] rule: it will not recognize same-sex marriages lawfully obtained in other states” and, moreover, opining how “[t]his discrimination . . . violates the [U.S. Constitution’s Fourteenth Amendment] Equal Protection Clause”). While Elizabeth Glazer’s work certainly cannot be placed in the marriage equality camp, it is worth noting that a recent article of hers highlights how the debate over interstate same-sex relationship-recognition often implicates equality concerns. See Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 133–34.

5. See generally Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153, 156 n.10 (2008), for a discussion of the term ‘migrating’ to explain the numerous kinds of traveling relationships in which I am interested here. Like Cossman, I am interested in “the full range of traveling marriages and civil unions, that is, marriages and unions that are entered into in one jurisdiction, and for a variety of reasons, then travel to another jurisdiction where some legal recognition [by the state] is sought.” *Id.*

individually conduct, this essay also aims to problematize any simplistic grafting of equality onto the contemporary interstate relationship-recognition debate concerning same-sex relationships specifically.

Any suggestion that even an *opposite-sex marriage* cannot easily be translated as ‘marriage’ outside of this marriage’s home state will be a difficult one for many readers of this essay to digest. Indeed, as Part II of this essay’s brief summarization of both historical and contemporary U.S. approaches to the interstate recognition of formal interpersonal relationships (as well as their official terminations) suggests, any highly pluralistic approach to U.S. family law has tended to pose uncomfortable and distressing possibilities for many U.S. judges, lawyers, and legal academics alike.⁶

As a result of this American discomfort with pluralism, another lens on interstate relationship-recognition is needed (at least for this essay’s purposes). Part III of this essay, then, builds upon the author’s background as a comparativist, using experience from the United Kingdom (“U.K.”) and the dilemmas it has faced about whether to recognize overseas divorces, to demonstrate how one influential legal context has viewed the highlighting of inter-jurisdictional family law pluralism to be not only plausible but also desirable.

Part IV returns the focus back to the contemporary United States, exploring what the implications of adopting a U.K.-like, pluralism-embracing approach might be for the contemporary interstate relationship-recognition debate in the United States. Indeed, as this concluding Part’s pluralism-oriented discussion of different U.S. states’ marriage definitions will suggest, if one does not shy away from how ‘marriage’ is legislatively defined differently in different U.S. states, one finds that ‘marriage’ is never simply—or equal to—‘marriage’ *anywhere* in the United States. As a result, it is far from clear that sameness-oriented equality plays necessary, relevant, or desirable roles—at least in the ways it is often claimed to play such roles—in the contemporary U.S. interstate relationship-recognition debate.

Ultimately, this essay’s queer explorations will lead to an uncomfortable possibility—for liberals and conservatives alike—namely that same-sex marriages and civil unions (or domestic partnerships) cannot simplistically be inter-jurisdictionally translated in the United States as ‘marriage’ always, but neither can opposite-sex ‘marriage’ itself. Indeed, insisting on the identity, or equality, of marriage from U.S. state to U.S.

6. *But see generally* Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT’L L. & POL. 941, 972–1014 (2008) (demonstrating the highly pluralistic nature of family law in the United States and the ways in which this pluralism corresponds to everyday family law pluralism in other nations’ legal systems).

state occludes the inter-jurisdictional differences that are always present—if often ignored—in translating, for example, a ‘Massachusetts marriage’ as a ‘Mississippi marriage,’ or vice-versa.

II. INTERSTATE RECOGNITION OF RELATIONSHIPS IN THE UNITED STATES AND THE ‘PLURALISM PROBLEM’

The recent U.S. debate concerning interstate recognition of same-sex relationships has transpired on a number of different fronts, many of them counter-intuitive in their deep relationship to both divorce and opposite-sex marriage. For example, a relatively contentious kind of legal case implicating interstate recognition of same-sex marriage has not concerned marriage per se but, rather, post-marriage, or divorce. In this kind of case, one party to a same-sex marriage entered into in State A moves to State B and attempts to initiate a divorce case against the other marital party in State B. The legal controversy arises when State B refuses to recognize any same-sex marriage as ‘marriage’ in the first instance. As a result, State B’s courts have to confront whether they have the power to hear post-‘marital,’ divorce actions. In these situations, the legal question for State B goes something like this: Where there can be no (same-sex) marriage, can there be (same-sex) divorce?⁷

In the contemporary United States, different states and different courts have answered this question differently, with there being little evidence of a national consensus or standard.⁸ Moreover, for courts that

7. For scholarship on this issue, see generally Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011); Colleen McNichols Ramais, *Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013 (2010).

8. For example, in *Kern v. Taney*, a 2010 Pennsylvania divorce case concerning a same-sex marriage between two women entered into in Massachusetts, the trial court concluded that “this court, based on the law in Pennsylvania as it currently exists, cannot grant a divorce to these parties. Their marriage, perhaps considered valid in Massachusetts and some other states, is not recognized in Pennsylvania. Without a legally recognizable marriage, relief under the Divorce Code is simply not available.” *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 563 (Ct. Com. Pl. 2010). But, in *Dickerson v. Thompson*, a 2010 decision from the State of New York Supreme Court, Appellate Division, a N.Y. appellate court determined that the trial court erred in concluding that it had no power to dissolve the same-sex couple’s civil union obtained earlier in Vermont. *See Dickerson v. Thompson*, 897 N.Y.S.2d 298, 301–02 (2010). For an even more recent case, see *Stankevich v. Milliron*, regarding a same-sex divorce and child custody dispute between a Michigan same-sex couple who had earlier gotten married in Canada. *See generally Stankevich v. Milliron*, No. 310710, 2013 WL 5663227 (Mich. Ct. App. Oct. 17, 2013). In this case, decided by a State of Michigan appellate court, the court refused to recognize that the plaintiff had standing as a ‘parent’ vis-à-vis the child custody issue because “to recognize plaintiff’s same-sex union as a marriage under the equitable parent doctrine would directly violate the [Michigan] constitutional provision that, ‘the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.’” *Id.* at *3 (emphasis in original). While the court in *Stankevich* did not decide whether a Michigan trial court had the power to

have both granted and denied interstate recognition of same-sex relationships outside of their home states, these kinds of cases appear to be fraught ones, causing much distress. This distress seems to result from the ostensibly unbearable uncertainties about a family's legal status that a lack of national consensus on interstate same-sex relationship-recognition allegedly gives rise to.

For example, U.S. Supreme Court Justice Anthony Kennedy, writing recently about a somewhat different debate concerning same-sex marriage, but nonetheless expressing his misgiving about 'too much unpredictability' in family status, fretted that "creating two contradictory marriage regimes within the same State . . . forces same-sex couples to live as married [in one context] but unmarried [in another context], *thus diminishing the stability and predictability of basic personal relations.*"⁹ And, recently, a Texas appellate court tried to characterize its refusal to issue a Texas divorce for a Texas-based same-sex couple that had earlier married in Massachusetts as almost an act of benevolence—because this refusal opened up another legal solution that would supposedly be more widely recognized across the country.¹⁰ As this court saw it, or at least tried to claim, a Texas divorce would have less interstate purchase than a simple voiding of the marriage would. The court wrote:

We reject appellee's contention that a declaration of voidness in his case would not be effective in other jurisdictions as well. We also note . . . that in this case a decree of divorce *would actually create greater uncertainty* than a declaration of voidness, in light of existing Texas authority that [suggests] a divorce decree would be void and subject to collateral attack.¹¹

This distress about the uncertainty of persons' familial status is somewhat understandable, given that it has been quite some time since U.S. courts have had to confront what might be considered 'radical' family law pluralism in the United States. For example, it has been seventy years since the U.S. Supreme Court intervened to resolve bigamy prosecutions arising from states' then wildly different divorce practices and the refusal of some states to recognize other states' divorces.¹² As a

adjudicate the plaintiff-spouse's simultaneous divorce claim, it is likely that the court would have resolved that issue against the plaintiff-spouse as well.

9. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added).

10. *See generally In re Marriage of J.B.*, 326 S.W.3d 654 (Tex. App. 2010).

11. *Id.* at 679 (emphasis added).

12. Before the Supreme Court's intervention in the 1940s, a marital spouse who traveled outside of his divorce-hostile state and obtained a divorce in a divorce-friendly state (e.g., Nevada) could find himself still married in his home state. A situation like this prompted the Supreme Court to intervene in the 1940s. The Supreme Court intervened when a 'Nevada divorced' husband returned to his home state of North Carolina, remarried there, and promptly faced bigamy charges by North Carolina authorities. *See generally Williams v. North Carolina*, 317 U.S. 287

result of this Supreme Court intervention, states began to converge in their divorce practices (by broadly liberalizing the availability of no-fault divorce), even while maintaining differences with respect to other important family law issues—for example, interracial marriage. Yet even the issue of interracial marriage—on which there was deep national disagreement and differing state practices—was resolved in a pan-national way nearly fifty years ago by *Loving v. Virginia*.¹³ The possibility and the reality of radical family law pluralism in the United States,¹⁴ then, seems to be the stuff of history books. At the very least, it is not a phenomenon that many contemporary U.S. legal actors seem to be comfortable with.

Pluralism between the states with respect to the definition and understanding of ‘family’ and ‘relationships’ did not simply disappear in the late-twentieth century United States, however. At the very least, the idea and possibility of legal pluralism maintained its potency, as recent legal developments certainly confirm. In this respect, the creation of same-sex marriage, civil unions, domestic partnerships, and other formal relationships in some states—but not others—has highlighted the fact that interstate disagreement about relationship and family norms has persisted even with the pan-U.S. facilitation of divorce and interracial marriage.

The robustly pluralistic bent of U.S. family law is also evident in a surviving section of the U.S. federal government’s 1996 Defense of Marriage Act,¹⁵ concerning interstate recognition of marriage. In this section, Congress—ostensibly acting on its powers to define the reach of the U.S. Constitution’s ‘full faith and credit’ provisions¹⁶—explicitly

(1942). In *Williams*, the Court invalidated these bigamy charges, holding that as long as a divorcing state’s domicile and divorce practices were properly complied with, other states would have to recognize that divorce even if they would themselves not have divorced the marital couple in question. *See id.* at 303. *See also* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 519–25 (2008) (discussing how the legal situation was actually a bit more complicated, as seen in the follow-up case of *Williams v. North Carolina*, 325 U.S. 226 (1945)).

13. 388 U.S. 1 (1967).

14. While it is often underplayed, there still remain significant differences between the states on issues pertaining to minimum age of marriage, conceptions of marital property, and the significance (or legality) of cohabitation. *See generally* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 437–45 (2005).

15. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C (2012)). *United States v. Windsor* ruled that Section 3 of DOMA, with regards to the federal definition of “marriage,” was unconstitutional. *See* 133 S. Ct. 2675, 2695–96 (2013).

16. *See generally* U.S. CONST. art. IV, § 1 (declaring that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”). DOMA ostensibly picked up on the

confirmed states' powers to refuse recognition to same-sex marriages entered into outside of their borders. The federal affirmation of such a state power to refuse inter-jurisdictional recognition of same-sex marriages both countervailed, and also aligned with, historical practice concerning interstate recognition of marriages. The general practice of U.S. states has been to recognize marriages entered into in any other U.S. state as long as local laws and rules in that other state, the 'place of celebration,' were complied with.¹⁷ Yet there has always been a 'public policy' exception to this general 'place of celebration' recognition rule, even if the reach of that exception has varied in the minds of states and scholars.¹⁸

While family law pluralism has thus persisted at many levels and in many different ways in the United States, the recent judicial, political, and scholarly discussion of interstate recognition of same-sex relationships has largely revolved around trying to minimize or ignore this pluralism. In these discussions, one might say that the focus has been on 'the *United States*,' rather than 'the *United States*.' Moreover, in these discussions, the question presumed and presented—whether by supporters or opponents of the interstate recognition of same-sex relationships—is one concerning whether a generic 'marriage' entered into in one U.S. jurisdiction should be recognized as a generic 'marriage' in another U.S. jurisdiction (whether for purposes of marriage itself or post-marriage/divorce).¹⁹ Indeed, the 'marriage'-register of this discus-

Constitution's delegation to Congress to determine the reach and scope of Article IV, Section 1, but then declared that Congress would not compel any state to extend 'full faith and credit' to any other state's same-sex marriage, thereby essentially giving *no* effect to Article IV, Section 1 with respect to same-sex marriages. The specific text of the relevant section of DOMA is as follows:

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.

Defense of Marriage Act § 2.

17. This 'place of celebration' rule is embodied in the Restatement (Second) of Conflict of Laws. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

18. See generally William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1387–90 (2012) (discussing states' and scholars' different understandings and practices with respect to recognizing a marriage entered into in a 'foreign' state's jurisdiction); see also Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist*, 16 QUINNIPIAC L. REV. 61, 66–67 (1996) (concluding that, at the time, the public policy exception was not widely deployed by most U.S. state courts).

19. See, e.g., Baude, *supra* note 18, at 1419–20 (referring to marriage as a "transsubstantive status"); Grossman, *supra* note 14, at 487–88 (arguing against "[c]ategorical non-recognition of same-sex marriage def[y]ing] both the modern approach to conflict of laws and the historical approach to marriage recognition," and arguing that "[h]istory in this context . . . shows the value states once placed on comity and interstate respect in the marriage context. Tolerance of disfavored marriages was an important and widespread value, which was honored by a strong

sion is mostly inescapable, even for some of the most interesting interventions into this discussion.²⁰ As a result, migrating ‘civil unions’ or ‘domestic partnerships’ get inter-jurisdictionally translated as ‘marriages’ in this conflicts debate²¹—and, just as oddly, ‘Massachusetts marriages’ get equated with ‘Mississippi marriages’—without evident inter-jurisdictional conflicts about the nature of formal relationships sparking any critical discussion about whether these kinds of ‘marriage’ translations are correct.

This is not to say that these kinds of translations are necessarily implausible or undesirable, but it is to say that more critical attention—and respect—could be paid to actual legal categories and nomenclatures rather than assuming that every legal system, whether domestic or foreign, operates in the same way, and for the same purposes, with the same notions of family and marriage.²² In other words, more respect for family law pluralism could be realized. The next Part of this essay turns to an example of a jurisdictional context that has felt the need to highlight pluralism in family law practices, rather than to bury it.

general rule of marriage recognition.”); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriage and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2143 (2005) (arguing that “[s]ame-sex marriage is here. . . . Other states have virtually the same status Are these statuses exportable? Will same-sex unions be recognized in other states? The answer should not be mysterious.”); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1432 (2012) (arguing against local variance in defining and recognizing relationships by claiming that “marriage and family are not understood today as merely ‘state legislatures’ . . . political creation.”) (quoting NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 54 (2000)).

20. Hillel Levin’s work provides such an interesting exception. See Hillel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47 (2011). However, despite Levin’s provocative title invoking ‘non-marriage,’ his analysis of how non-marital relationship statuses should be trans-jurisdictionally translated and operationalized still interpellates a ‘marriage’-register to this entire issue. See *id.* at 53. In this respect, Levin writes: “[U]ntil now, scholars have focused nearly exclusively on conflicts that arise between states that recognize same-sex marriage and those that offer them no recognition at all, ignoring the *marriage/marriage-like/marriage-lite* conflicts This Article fills this lacuna and offers a new framework for resolving the *marriage/marriage-like/marriage-lite* conflicts.” *Id.* at 47 (emphasis added).

21. See, e.g., *Dickerson v. Thompson*, 897 N.Y.S.2d 298, 299 (N.Y. App. Div. 2010).

22. Again, I am intrigued by Hillel Levin’s recent work in this respect, and especially his invocation of a French conflicts-of-law doctrine concerning legal ‘equivalents’ to resolve some of the inter-jurisdictional ‘marital conflicts’ that he identifies. See generally Levin, *supra* note 20, at 74–89. However, his particular use of this doctrine does raise the question as to whether he is comparing apples with oranges, especially when he tries to resolve ‘true’ inter-jurisdictional *family law* conflicts by resorting to interstate similarities in the *contract law* dimensions of different jurisdictions’ relationship-recognition categories. See *id.* at 78. This does beg the question, then, as to whether family is family, contract, or something else altogether in different jurisdictions and whether there are adequate translations which can bridge these epistemological divides.

III. PLURALISM IN AN ENGLISH ACCENT

The sovereign U.S. states offer up a particular kind of family law pluralism. While this family law pluralism is evident, it is arguably the case that European states have existed in a context of relatively more heightened sovereignty and consciousness of family law pluralism.²³ At the very least, the softening touch of English lingual homogeneity—and the accompanying ‘luxury’ of translating ‘marriage’ as ‘marriage’ inter-jurisdictionally—often does not exist when interstate relationship-recognition is done in Europe. Because of Europe’s especially deep acquaintance with family law pluralism, this Part engages in a European case study—in particular, one from the United Kingdom—as a helpful exemplar of how one could surface some of the family law plurality which is present but nonetheless suppressed in the U.S. interstate relationship-recognition debate.

The United Kingdom was perhaps the European country historically most implicated in colonial enterprises around the globe. As a result of these colonial enterprises, the United Kingdom has faced a steady stream of legal questions concerning the marital status of people who have migrated from its former colonies and, despite this migration, have still chosen to conduct some of their family law matters in their countries of origin. Such a situation is on full display in the well-known U.K. case of *Chaudhary v. Chaudhary*.²⁴ *Chaudhary* is a relatively old case, dating from 1985, and also one whose day-to-day relevance has been overtaken in many ways by more-recent statutory law.²⁵ Nonethe-

23. See generally Aude Fiorini, *Rome III—Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?*, 2 INT’L J.L. POL’Y & FAM. 178, 179 (2008) (noting that “[t]he substantive law pertaining to legal separation continues to differ widely between the [European Union] Member States; from Maltese Law where there is a prohibition of divorce to Finnish or Swedish Law where no actual grounds of divorce are required. Moreover there is an equally wide divergence with regard to conflict of law rules on the matter”); Jan-Jaap Kuipers, *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, 18 EUROPEAN L.J. 201, 201–03 (2012) (describing how “[t]he law on divorce differs widely between the [European Union] Member States. Malta is the only Member State that does not allow for divorce at all. Finland and Sweden, on the other hand, have the most liberal divorce law. . . . These Member States do not require any ground for divorce, but a consideration period of six months may be applicable. Some Member States allow for divorce by mutual consent, but may require a previous period of factual separation. The longest period can be found in Ireland (four years). Nine Member States allow for a divorce based on the fault of one of the spouses”).

24. *Chaudhary v. Chaudhary*, [1985] Fam. 19 (C.A.) (U.K.). For two academic articles attesting to *Chaudhary*’s importance, see Hon. David Pearl, *The 1995 Noel Coulson Memorial Lecture: The Application of Islamic Law in the English Courts*, 12 ARAB L.Q. 211 (1997), and see also Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT’L & COMP. L. REV. 311 (1996).

25. In particular, the legislative situation has changed as a result of the Family Law Act of 1986. For a discussion of this legislative act, as well as the previous legal situations obtaining in this area of U.K. law, see *Divorce*, U.K. BORDER AGENCY, available at <https://www.gov.uk/>

less, the underlying facts and judicial discussion in this rich and complicated case still provide an illuminating illustration of how one influential legal context has viewed the highlighting of inter-jurisdictional family law pluralism to be not only plausible, but also desirable. Moreover, more recent statutory interventions in the United Kingdom have generally tended to confirm the pluralistic orientation of *Chaudhary*, thereby still making it a very relevant case—if not the most important one. For these reasons, this case is the focus of this Part.

In this complicated case concerning the inter-jurisdictional recognition of (post-)marriage, the main question presented was whether a *talaq* effectuated in Pakistani-controlled Kashmir (also known as Azad Kashmir) by a U.K.-residing husband served—in the eyes of the United Kingdom—to terminate the marriage of this husband with his wife (who was also from Azad Kashmir but who had recently arrived in the United Kingdom). This is the essential question that both the U.K. trial court and the Court of Appeal had to decide.²⁶ Both of these courts' opinions are relied on here in the course of explicating the complicated facts of this case. After this explication, this Part concludes with an analysis of how the Court of Appeal's resolution of this case engages in an inter-jurisdictional pluralism-promoting approach to family status—an approach that many U.S. legal actors would find distinctly troubling.

The husband whose actions were in question in *Chaudhary* was Khan Mohammed Chaudhary. Mr. Chaudhary was born in Azad Kashmir in 1932. After marrying at an early age, he divorced that wife and married Bibi Saira Chaudhary.²⁷ In 1963, Mr. Chaudhary was able to obtain a work permit and entered the United Kingdom for the first time.²⁸

After coming to the United Kingdom, Mr. Chaudhary infrequently returned to Azad Kashmir²⁹ but kept his Pakistani nationality and never obtained U.K. citizenship.³⁰ In fact, Mr. Chaudhary seems to have essentially settled down in the United Kingdom soon after his initial arrival in 1963, so much so that he took a second wife. Mr. Chaudhary married

government/uploads/system/uploads/attachment_data/file/267931/divorce.pdf. See also Reed, *supra* note 24, at 333.

26. *Chaudhary*, Fam. at 21–22.

27. See *id.* at 23. Per an examination of the trial court opinion in this case, the precise dates of this first marriage and first divorce are not ascertainable. Indeed, the trial court judge himself noted that “[Bibi Saira Chaudhary] is, in fact, [Mr. Chaudhary’s] second wife and shortly after marrying her, he divorced a wife whom he had married when he was very young. I do not know the date of the earlier marriage or of the divorce.” *Id.*

28. See *id.*

29. See *id.*

30. The trial court lists Mr. Chaudhary and Bibi Saira Chaudhary as Pakistani nationals. See *id.* at 22.

Hamida Begum (who was known as Sue Chaudhary) in December of 1967 at the Hammersmith Register Office in London.³¹ While the two were first married in London in 1967, they married again in a Muslim ceremony in Beirut, Lebanon in 1969.³² In 1972, upon a return trip to Pakistan—his first since arriving in the United Kingdom in 1963³³—Mr. Chaudhary informed Bibi Saira Chaudhary that he had taken a second wife.³⁴ According to his testimony to the trial court, paraphrased by the trial court judge, “his wife [Bibi Saira Chaudhary] was sympathetic and raised no objection, provided that he maintained both families.”³⁵

Whether there was really no objection was cast into some doubt by what transpired next. In late 1975, Bibi Saira Chaudhary, as well as her and Mr. Chaudhary’s four children, arrived in the United Kingdom on a trip financed by Mr. Chaudhary.³⁶ All five visitors, along with Mr. Chaudhary and Hamida Begum, “crowded into” a property that Mr. Chaudhary and Hamida Begum normally shared together as a home.³⁷ Cohabitation lasted less than two weeks, however, and Bibi Saira Chaudhary returned to Pakistan with three of her children.³⁸

Shortly thereafter, Mr. Chaudhary sought out and received a *talaq* from Bibi Saira Chaudhary at a London mosque.³⁹ As the trial court described this legal event, “[Mr. Chaudhary] went to the mosque . . . and pronounced an oral *talaq* three times in Urdu before two witnesses. . . . As the wife was in Pakistan it was decided that in addition a *talaknama* or written document should be made out and a copy sent to her.”⁴⁰ While Mr. Chaudhary claimed that this *talaknama* was sent to Bibi Saira Chaudhary in Azad Kashmir, there is some question as to whether she actually received it.⁴¹ In any event, it appears that ultimately she did learn of Mr. Chaudhary’s pronouncement of *talaq* and, as a result, decided to return to the United Kingdom in July 1977.⁴²

31. *See id.* at 24.

32. According to the trial court, “on 18 August 1969 the husband went through a second ceremony of marriage with Hamida in a Muslim court in Beirut. He gave as the reason for this second ceremony that the certificate of marriage from there would be acceptable world wide.” *Id.* While not the focus of this litigation, in this second ceremony in Beirut, again we see people’s concern with the portability of their relationships and also a concern that ‘marriage’ in a secular proceeding creates, at least in some instances, less of an internationally-recognized status than does a religious proceeding.

33. *See id.* at 23.

34. *See id.* at 24.

35. *Id.*

36. *See id.*

37. *Id.*

38. *See id.* at 24.

39. *See id.* at 25.

40. *Id.*

41. *See id.*

42. *See id.*

In February 1978, Bibi Saira Chaudhary filed a claim against Mr. Chaudhary in a U.K. civil court alleging desertion and failure to maintain.⁴³ Three months later, in May 1978, Mr. Chaudhary traveled to Azad Kashmir, where “he once again pronounced an oral talaq three times in front of two witnesses”⁴⁴ and was again issued a *talaknama*, which he transmitted to Bibi Saira Chaudhary.⁴⁵

The ability, or willingness, of the United Kingdom to legally recognize this second *talaq* was the central question confronted in *Chaudhary* by both the trial court⁴⁶ and the Court of Appeal.⁴⁷ In particular, both the trial court and the Court of Appeal had to determine whether a ‘bare *talaq*,’ as it was described in the litigation,⁴⁸ was obtained via a ‘proceeding,’ such that the Recognition of Divorces and Legal Separations Act of 1971 (“1971 Act”) could recognize this *talaq* as a divorce in the United Kingdom. This 1971 Act permitted U.K. recognition of divorces and legal separations that were “obtained by means of judicial *or other proceedings* in any country outside the British Isles; and . . . [which were] effective under the law of that country.”⁴⁹

The trial court held that a bare *talaq* was *not* something obtained via an ‘other proceeding’—i.e., a proceeding other than a judicial proceeding, which Mr. Chaudhary clearly did not engage in to get the *talaq* in question—and thus the 1971 Act was not applicable.⁵⁰ Upon Mr. Chaudhary’s appeal to the Court of Appeal, the members of the Court of Appeal panel that heard Mr. Chaudhary’s case responded differently to

43. *See id.*

44. *Id.*

45. *See id.* at 25.

46. The trial court noted that Mr. Chaudhary’s attorney placed more weight on the efficacy of the second *talaq*, though it is not clear from the reported case why that was the case. *See id.* at 27.

47. *See id.* at 30.

48. This terminology is used to describe the kind of *talaq* ‘divorce’ that Mr. Chaudhary pronounced (twice) in the set of events described in this Part. There are other kinds of *talaq* procedures recognized by the many schools of thought that give shape to the classical Islamic tradition. These other kinds of *talaq* are as effective as the kind that Mr. Chaudhary utilized (i.e. three pronouncements in one sitting) but are generally viewed with more religious favor and sanction, seeing that they give the marital couple more opportunity for reconciliation.

49. Recognition of Divorces and Legal Separations Act, 1971, c. 53, § 2(a)–(b) (U.K.) (emphasis added). A secondary question was also presented in this litigation in the event that the 1971 Act *could* recognize a bare *talaq* as a divorce, namely whether the United Kingdom could still refuse recognition to this kind of *talaq* on grounds of public policy. *Chaudhary*, Fam. at 34. According to the trial court, public policy was a residual common law consideration in inter-jurisdictional relationship-recognition cases in the United Kingdom, and was also specifically legislated by the 1971 Act at Section 8(2) as a principle that could be used to limit the United Kingdom’s recognition of some kinds of ‘divorces’ otherwise cognizable under the 1971 Act. *See id.* at 28–29.

50. *Chaudhary*, Fam. at 28. The trial court also held that, even if the 1971 Act’s ‘other proceedings’ requirement had been met, there were public policy grounds for refusing recognition to this kind of *talaq*. *See id.* at 29.

the question presented. However, all three concurred that the 1971 Act did not contemplate recognizing Mr. Chaudhary's 'bare *talaq*' as a divorce in the United Kingdom because it had not been accomplished via 'proceedings.'

Interestingly, in so deciding, all three translated the Urdu/Arabic word '*talaq*' as 'divorce' in English, but then refused to inter-jurisdictionally translate 'divorce' (Azad Kashmir-style) as 'divorce' (United Kingdom-style). For example, Lord Justice Cumming-Bruce's lead opinion quoted with approval from an opinion in an earlier Court of Appeal decision⁵¹ to the effect that:

In [my] judgment, the phrase ['proceedings'] must be intended to exclude those divorces which depend for their legal efficacy solely on the act or acts of the parties to the marriage or one of them. In such cases, although certain *formalities* or *procedures* have to be complied with, there is nothing which can properly be regarded as 'proceedings.'⁵²

With this understanding of 'proceedings' in mind, Cumming-Bruce eventually held that the 1971 Act⁵³ could not recognize Mr. Chaudhary's *talaq* as a divorce or a legal separation.⁵⁴

Lord Justice Oliver concurred with the legal result reached by Cumming-Bruce and also had the following to say about a 'bare *talaq*-cum-divorce' and why such divorce is actually not divorce, at least for the purposes of the United Kingdom:

The essentials of the bare *talaq* are, as I understand it, merely the private recital of a verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple.

51. See *Quazi v. Quazi*, [1980] A.C. 744 (C.A.) 788–89 (appeal taken from U.K.).

52. *Chaudhary*, Fam. at 37 (emphasis added) (quoting *Quazi*, A.C. at 788–89). Later in his opinion, Cumming-Bruce also opined that the pronouncement of a bare *talaq* finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition. Certainly by that tradition the pronouncement is a solemn religious act. It might doubtfully be described as a ceremony, though the absence of any formality of any kind renders the ceremony singularly unceremonious.

Id. at 38 (emphasis added).

53. The legislative situation upon which this judgment sits is actually a bit more complicated, given that the 1971 Act was amended and expanded upon in 1973 by the Domicile and Matrimonial Proceedings Act. See generally Domicile and Matrimonial Proceedings Act, 1973, c. 45, §§ 1–17 (U.K.). Nonetheless, all three members of the Court of Appeal panel did not view the 1973 amendments as material to the proper construction of the 1971 Act's use of the phrase "other proceedings." See *Chaudhary*, Fam. at 39, 43, 47.

54. Cumming-Bruce also refused to overrule the trial court's denial of recognition of Mr. Chaudhary's *talaq* for reasons of public policy. See *Chaudhary*, Fam. at 40.

It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. Thus, though the public consequences are very different, *the essential procedure differs very little from any other private act such as the execution of a will* and is *akin to the purely consensual type of divorce* recognised in some states of the Far East.⁵⁵

Finally, Judge Balcombe also wrote to concur that, in his precedent-informed view, not all overseas divorces should count as divorces in the United Kingdom:

In giving the judgment of the Court of Appeal in [the precedent] *Quazi v. Quazi* . . . [Lord Justice] Ormrod . . . pointed out . . . that the inclusion in . . . the Act of 1971 of the requirement that the overseas divorce must have been obtained “by means of judicial or other proceedings” must have been intended as a limitation on the scope of the section; if those words had been omitted the only relevant question would be: “Is the divorce effective under the relevant law?” Some forms of divorce must, therefore, be excluded, and the filter is the phrase “judicial or other proceedings.”⁵⁶

Read together, one can characterize the Court of Appeal panel members’ opinions in *Chaudhary* as willing to translate the Islamic legal practice of *talaq* as ‘divorce,’ but unwilling to translate a *talaq*/divorce performed in Azad Kashmir into a divorce enforceable in the United Kingdom. In other words, after reading these opinions, one is left with the distinct feeling that ‘divorce’ is very much not a generic practice across the world. In the United Kingdom, at least, ‘divorce’ connotes a non-unilateral practice conducted with the knowledge and oversight (however limited) of another party external to the marriage. For the Court of Appeal, however, an Azad Kashmir ‘divorce’ is not like a United Kingdom ‘divorce’—and, in fact, is perhaps more akin to a private testamentary will.⁵⁷

The relevant law in the United Kingdom has changed since the 1985 decision in *Chaudhary*.⁵⁸ However, the attention that the Court of Appeal gave to Mr. Chaudhary’s practices (or lack thereof) in pursuing

55. *Id.* at 42 (emphasis added).

56. *Id.* at 45 (quoting *Quazi*, A.C. at 788).

57. See *supra* text accompanying note 55.

58. See *supra* note 25.

his (second) *talaq* provides an intriguing exemplar of how and why a given jurisdiction might deploy pluralism-embracing analyses of other jurisdictions' family law practices. The next Part turns to how the kind of pluralism-oriented analysis deployed in *Chaudhary* could play out in the contemporary U.S. debate over interstate recognition of same-sex relationships. In this debate, the assumption amongst many is that a generic 'marriage' is the register most appropriate to any interstate same-sex relationship-recognition analysis, as well as that 'equality' is necessarily deeply imbricated in this ongoing social and legal debate.

IV. MARRIAGE \neq MARRIAGE

The *Chaudhary* case is not only a testament to the possibility that *legal statuses* may not easily translate across jurisdictional borders—being 'divorced' in one place may not mean being 'divorced' in another place—but, relatedly, that fairly fundamental *legal categorizations* may not translate so easily either. With respect to this latter observation, one particularly intriguing aspect of the set of opinions issued in *Chaudhary* is Lord Justice Oliver's observation that Mr. Chaudhary's actions in Azad Kashmir were perhaps more akin to will-making than divorcing—or, read at another level, more involving an act pertaining to property law rather than family law.⁵⁹

Taking inspiration from *Chaudhary*'s pluralism-embracing approach to interstate relationship-recognition, this concluding Part explores how the particulars of U.S. states' legislative definitions of 'marriage' make it difficult to translate 'marriage' as 'marriage' across jurisdictional lines—whether that 'marriage' is same-sex or opposite-sex. As in *Chaudhary*, the different ways states fundamentally categorize relationship status—as belonging to family law or another legal domain altogether—contribute to this interstate translation conundrum.

To help get an initial grasp on the plurality of U.S. states' marital practices, this Part first takes a brief and non-comprehensive 'road-trip' across different U.S. states and these states' different definitions of marriage. This Part then concludes with a discussion of how a deeper focus on various states' (post-)marriage definitions and practices can problematize the 'marriage equality' analysis that many academics, activists, and legal actors are demanding with respect to the interstate recognition of same-sex relationships.

A. *Marriage Road-Tripping*

U.S. states not only define marriage differently, but do so in a num-

59. See *supra* text accompanying note 55.

ber of different ways. For example, some states have come to define marriage via their state constitutions, others have left marriage to be defined by state statutes, and others do both. Some states have chosen not to legislatively define marriage per se at all, instead just legislating *restrictions* on who is eligible for an otherwise undefined ‘marriage.’⁶⁰

Beyond differences in the particular *method* by which U.S. states define marriage, states’ *substantive* definitions also vary wildly. For example, an Alabama statute declares that “[m]arriage is inherently a unique relationship between a man and a woman. . . . Marriage is a sacred covenant, solemnized between a man and a woman . . . which is recognized by the state as a civil contract.”⁶¹ While Michigan’s definition of marriage echoes Alabama’s emphasis on the uniqueness of marriage—with Michigan defining marriage as a “unique relationship between a man and a woman”⁶²—Michigan seemingly has less faith that the language of contract comports with that uniqueness. Thus, in the same statutory provision that mentions the uniqueness of opposite-sex marital relations, Michigan refers to same-sex marriages—which it refuses to recognize—as relationships merely “contracted between individuals of the same sex.”⁶³

Traversing the country to Arizona, one finds Alabama-like ‘covenant marriage,’ but not in Arizona’s basic definition of marriage. Indeed, no Arizona statute directly defines ‘marriage simpliciter’—rather than defining marriage, the emphasis is on who may *not* marry.⁶⁴ However, a specific Arizona statute does allow people to enter into a *special* kind of marriage—known as a ‘covenant marriage’—going on to declare that this type of marriage “is a covenant between a man and a woman who agree to live together as husband and wife for as long as they both live.”⁶⁵

60. Of course, all states’ legislative definitions of marriage are further developed and given additional shape and nuance by judicial common law as well.

61. ALA. CODE § 30-1-19(b) to (c) (2014).

62. MICH. COMP. LAWS § 551.1 (2014).

63. *Id.*

64. See, for example, ARIZ. REV. STAT. ANN. § 25-101(A)–(C) (2013), declaring the following marriages “[v]oid and prohibited”:

A. Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.

B. Notwithstanding subsection A, first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.

C. Marriage between persons of the same sex is void and prohibited.

65. *Id.* § 25-901(B)(1) (2013).

Traveling even farther west, to California, one finds marriage defined differently still. Until the recent set of events opening up marriage in California to both same-sex and opposite-sex couples, California defined marriage as “a personal relation arising out of a civil contract between a man and a woman”—the restriction on the gender of marital partners has now been removed but the rest of the definition remains.⁶⁶ In this definition, there is little trace of the religiosity accompanying both Alabama’s and Arizona’s covenant-oriented marital definitions, yet, simultaneously, there is overlap with Alabama’s and Michigan’s ‘relational’ language. Like California, Idaho too has declared marriage to be a “personal relation arising out of a civil contract” (and has restricted the contracting parties to “a man and a woman”).⁶⁷

All the way back on the east coast, Connecticut contributes a noteworthy definition of marriage to the national landscape. Connecticut defines marriage without explicitly referencing the marital parties’ genders but also suggests a *fusion* of these parties—rather than their dyadic *relationship*—when it defines marriage as “the legal union of two persons.”⁶⁸ Interestingly, Georgia echoes Connecticut’s ‘union language’ but re-genders such a union; according to the Georgia constitution, “[t]his state shall recognize as marriage only the union of man and woman.”⁶⁹ Florida’s definition of marriage also invokes the language of “union” while, like Georgia, also gendering such a union. In this respect, a Florida statute declares: “For purposes of interpreting any state statute or rule, the term ‘marriage’ means only a legal union between one man and one woman as husband and wife.”⁷⁰ Louisiana’s definition of marriage is very similar to this Florida definition.⁷¹

To conclude this brief road-trip of U.S. states’ different marital definitions, Kentucky’s definition of marriage is one of the more unique and intriguing ones. This definition confirms the *civil* status of Kentucky marriages, yet also the *union* of one man and one woman that sits at their core:

As used and recognized in the law of the Commonwealth, “marriage” refers only to the *civil* status, condition, or relation of one (1) man

66. CAL. FAM. CODE § 300(a) (West 2013). This definition of marriage was determined to be unconstitutional by *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). In that case, the California Supreme Court determined “that the language of section 300 limiting the designation of marriage to a union ‘between a man and a woman’ is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.” *Id.* at 453.

67. IDAHO CODE ANN. § 32-201(1) (2014).

68. CONN. GEN. STAT. § 46b-20(4) (2013).

69. GA. CONST. art. 1, § 4, ¶ I.

70. FLA. STAT. § 741.212 (2014).

71. See LA. CIV. CODE ANN. art. 86 (2014).

and one (1) woman *united* in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is found on the distinction of sex.⁷²

Here then, arguably, we have marriage not as marriage, but as civil union.

As should be clear by now, ‘marriage’ is not a simple or univalent phenomenon in the United States. Yet many scholarly discussions and judicial decisions in the United States assume, or insist, that marriage means essentially one thing—whether that ultimately means that a marriage entered into in one state is recognized as a marriage in another state, or even when it is *not*.⁷³ Moreover, civil unions, domestic partnerships, and other formal relationships are problematized, as if their translation across state borders is uniquely difficult. Yet, as we have seen in the context of Kentucky, a marriage might already be a civil union. Moreover, this Part’s marital road-trip has suggested that even a marriage may not be a marriage, at least outside of the marriage’s home jurisdiction. The next section explores what the U.S. context of radical family law pluralism might mean for the current U.S. interstate same-sex relationship-recognition debate and, in particular, the relevance of equality to this debate.

B. *What Marriage? Why Equality? Marriage Equality How?*

Much recent U.S. scholarship and (liberal) activism on the interstate same-sex relationship-recognition debate has demonstrated a deep fondness for what is often called ‘marriage equality.’⁷⁴ Such scholarship and activism has worked to (1) argue for same-sex marriage in various U.S. states as the self-evident outcome of a constitutional equality analysis, and also worked to (2) limit the options of whichever uncooperative, outlier states remain by requiring them to recognize same-sex marriages entered into in other U.S. states—again using arguments pertaining to a certain idea of equality.⁷⁵ A pincer effect is the desired result, with

72. KY. REV. STAT. ANN. § 402.005 (West 2014) (emphasis added).

73. For a particularly notable and interesting exception, see generally Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012). Abrams’ piece is dedicated to exploring the multiple federal and state doctrines and tests that have developed over time to determine whether a particular marriage, or divorce, is a ‘real’ marriage or, instead, an attempt to defraud either one of the marital partners or the state. As Abrams notes, both proponents and opponents of ‘marriage equality’ problematically “assume that ‘marriage,’ even as its meaning has shifted over time, has a stable meaning today.” *Id.* at 63.

74. See *supra* note 4 and accompanying text.

75. In this respect, Brenda Cossman has observed how “scholars who argue in favor of the interjurisdictional recognition of same-sex marriages are deploying the technical tools of their trade to advance a pro-same-sex marriage politics, a liberal politics of recognition and equality.” Cossman, *supra* note 5, at 162. Meanwhile, “[t]heir opponents—the scholars who argue against any interjurisdictional recognition of same-sex marriage—are, conversely, deploying their

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same-sex marriage rights across the United States the desired eventual outcome.

This concluding section problematizes this liberal ‘marriage equality’ strategy, focusing on its interstate dimensions. Previous work of this author has demonstrated dangers and shortcomings in any marriage equality analysis as applied *within* a particular jurisdiction.⁷⁶ Here, however, the focus is on problematizing the ways in which scholars and activists want ‘marriage equality’ to work *between* and *across* (state) jurisdictions. As is evident from the following discussion—and also liberal scholars’ and activists’ extant legal strategies—the intra and interstate dimensions of marriage equality cannot be neatly separated from each other. That being said, each of the three problematizations of marriage equality sketched out here will have an explicit interstate relationship-recognition analysis attached to it.

The first problematization stems from questions about how much interstate ‘marriage’ recognition the idea of equality can accomplish, especially in light of this essay’s observations about the intense plurality of family law in the United States. For example, returning to the example of Kentucky, it is likely the case that eliminating the requirement in Kentucky’s statutory marriage definition that marital parties be opposite-sex would result in the conducting of same-sex marriages *in* Kentucky. Yet, it is not clear that that marriage would actually open up marriage for Kentuckian same-sex marital partners *outside* of Kentucky. Indeed, drilling down into what marriage actually means or implies in Kentucky, it may be that a ‘Kentucky marriage’—whether same-sex or opposite-sex—is best understood as a ‘civil union.’⁷⁷ In other words, the interstate translation of this ‘Kentucky marriage’ using sameness-oriented equality as a translation filter might result in a ‘civil union’—not a ‘mar-

technical tools in the service of a conservative politics of the traditional family. Both sides wear their recognition or nonrecognition politics on their sleeves, notwithstanding the attempt to dress them up in more technical clothes.” *Id.*

Hillel Levin’s work provides an important exception to the kind of scholarship that Cossman describes. He strongly supports same-sex marriage rights in the United States but is simultaneously hesitant about using conflicts analysis or anti-DOMA strategies to pursue these rights. See Hillel Y. Levin, *Conflicts and the Shifting Landscape Around Same-Sex Relationships*, 41 CAL. W. INT’L L.J. 93, 94 (2010). Levin is particularly worried about using a conflicts analysis to achieve same-sex marriage rights because same-sex marriage advocates, like him, “have argued that this is a matter internal to the states. Thus, to turn around and use conflicts as a wedge to achieve recognition in other states would be disingenuous. . . . We have used conflicts as a shield; to now use it as a sword would be a mistake.” *Id.* at 102.

76. See, e.g., Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791 (2010).

77. See *supra* text accompanying note 72.

riage’—in a state like Illinois.⁷⁸ Section 60 of the recently enacted Illinois civil union statute reads as follows: “A marriage between persons of the same sex, a civil union, or a substantially similar legal relationship other than common law marriage, legally entered into in another jurisdiction, shall be recognized in Illinois as a civil union.”⁷⁹ As a result, the use of equality arguments in this kind of interstate context might have *no marital consequences*.

The second problematization is not one of *no* marital consequences, but *undesired* marital consequences. These undesired consequences can be of at least two sorts: ‘not enough marriage’ and ‘too much marriage.’ With respect to ‘not enough marriage’ and, for example, imagining that same-sex marriage becomes available in Idaho,⁸⁰ it is worth remembering that Idaho’s definition of marriage characterizes marriage as a “personal relation arising out of a civil contract.”⁸¹ As a result of this definition, a couple married in Idaho may find another state—using an equality lens—merely recognizing their marriage as a dyadic *contract* with few or none of the benefits that marriage supposedly brings via its recognition by the state and other third parties. ‘Even *worse*,’ that state may consider the Idaho marriage as creating simply a friend-like relationship with few legal implications attaching to that kind of *interpersonal relation*.⁸² With respect to ‘too much’ interstate recognition, here the states that define marriage as involving some sort of covenant create the conundrum. For example, partners marrying in a state like Alabama—which describes marriage as being, at least in part, “a sacred covenant, solemnized between a man and a woman”⁸³—and then moving to a state like Arizona—i.e., a state not only possessing an undefined ‘marriage simpliciter’ but also a specifically legislated ‘covenant marriage’—may find that equality gives them a kind of marriage in Arizona that neither Alabama partner would have previously contemplated or desired. Arizona’s special covenant marriage, for example, puts limits on no-fault divorce.⁸⁴

The third problematization of the use of equality in the interstate

78. Illinois civil unions are available for both same-sex and opposite-sex couples. See Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/10 (2014).

79. *Id.* at 75/60.

80. See generally *Latta v. Otter*, No. 13-CV-00482, slip op. at 9 (D. Idaho May 13, 2014) (holding Idaho’s constitutional and statutory prohibitions against same-sex marriage unconstitutional under the Fourteenth Amendment), *argued*, Nos. 14-35420 & 14-35421 (9th Cir. Sept. 8, 2014).

81. See *supra* text accompanying note 67.

82. See generally Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191, 202 (2007) (describing and critiquing how current U.S. law dismissively treats friendship).

83. See *supra* text accompanying note 61.

84. See ARIZ. REV. STAT. ANN. § 25-903 (2013).

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relationship-recognition domain relates to how the value of equality is being misused by many in the ‘marriage equality’ movement more generally. As this author has argued elsewhere, the marriage equality movement has too often sought equality without asking important questions about whether equality comports with other important progressive values.⁸⁵ The impulse has seemed to be ‘sameness first, questions later.’ With the interstate relationship-recognition debate, it appears that equality is again being used to advocate sameness, if also to imagine it out of evident difference. Indeed, it is quite questionable whether Connecticut’s ‘fusion marriage’⁸⁶ is really the same thing as Idaho’s ‘civil-relational marriage’⁸⁷ or, more generally, whether any two U.S. states actually have mutually intelligible ‘marriage.’

To be sure, U.S. states do recognize each other’s marriages, but not for reasons of equality precisely—a reality that marriage equality advocates’ work often occludes. Indeed, more so than equality, it appears that a very strong U.S. desire to encourage marriage-*qua*-marriage—a desire matched in its strength by the strength of the United Kingdom’s desire to discourage *talaq*/divorce—is what drives interstate recognition of marriage in the United States. In line with this larger cultural impulse, mainstream gay and lesbian advocates have also largely decided to valorize marriage—for all people everywhere—using arguments pertaining to family stability, the welfare of children,⁸⁸ and other traditional values and priorities. This essay has suggested how this valorization of marriage—now using a simplistic version of equality—gets repeated, however oddly, in the interstate domain.

In response to this use of an antiseptic equality in order to valorize marriage, this essay has suggested, however, an important and overlooked question, ‘What marriage?’ And in elaborating this question-response, this essay has explored the ramifications of a difference-oriented, pluralism-embracing lens on the contemporary interstate same-sex relationship-recognition debate. While this pluralism lens might

85. See, e.g., Jeffrey A. Redding, *Querying Edith Windsor, Querying Equality*, 59 VILL. L. REV. TOLLE LEGE 9, 9 (2013).

86. See *supra* text accompanying note 68.

87. See *supra* text accompanying note 67.

88. For example, Joanna Grossman has argued, vis-à-vis DOMA, that “[t]he traditional, more sensible [pre-DOMA] approach to [interstate] recognition . . . permit[ted] consideration of competing interests like the expectations of the parties [and] the impact of non-recognition on the couple’s children,” going on to later lament how a “Georgia appellate court . . . ruled . . . that a woman was not ‘married’ to her civil union partner for purposes of measuring her compliance with an order specifying that visitation with her children would not be allowed when she was cohabitating with an adult to whom she was not legally married. The court’s ruling relied in part on the fact that a civil union, under Vermont law, is not a ‘civil marriage.’” Grossman, *supra* note 14, at 436, 485.

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seem a highly implausible one for the *United States*, it is also the case that an equality lens has, to this point, been an impossible achievement for the *United States*. With ‘marriage equality’ as well, it remains to be seen whether marriage, or robust equality, prevails.