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Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate

Jeffrey L. Rensberger*

Abstract: This Article discusses the role of federalism in the debate over interstate recognition of same-sex marriages. It examines and rejects as simplistic the argument that the role of full faith and credit is to promote greater national uniformity. Instead, full faith and credit requires a balancing between the policy of uniformity and its counterweight, state autonomy and particularism (which is termed "interstate pluralism"). The Article identifies how interstate pluralism is reflected in a wide variety of ways in the law. It then seeks to demonstrate the benefits to the individual of being able to choose from different legal communities. It then uses extensive economic and demographic data to demonstrate just how pluralistic states are. It concludes that states should generally apply forum law to decide whether to recognize same-sex marriages.

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This Article discusses the role of interstate pluralism—a term I use to refer to a particular thread of federalism—in the same-sex

marriage debate. There has been much written about what one may call the substance of same-sex marriages. This body of scholarship addresses whether there is a constitutional right to wed someone of the same sex¹ and whether same-sex marriages are a good idea as a matter of family law or other policy.² In addition, much has been written on what might be called the procedural aspects of same-sex marriage. This latter category of scholarship addresses the interstate recognition issues raised by same-sex marriages, such as whether one state must or should recognize a same-sex marriage created in another state.³ Much of this literature focuses on whether the Full Faith and Credit Clause or other law requires a sister state to recognize such a marriage, an issue of compulsion. Whether a state should recognize the marriage assuming it is not compelled to do so is less frequently explored.

These two bodies of literature approach same-sex marriage from different perspectives. Those addressing a constitutional right to same-sex marriage logically focus on the individuals involved. Those addressing the interstate recognition issues logically tend to focus on the interests of the states—both the interests of the state that created

1. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004); Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271 (2005); Robert A. Sedler, *The Constitution Should Protect the Right to Same-Sex Marriage*, 49 WAYNE L. REV. 975 (2004); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003 (2004).

2. See, e.g., Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL'Y 949 (2006); Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181 (2005); Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005); Lynn D. Wardle, *The "End" of Marriage*, 44 FAM. CT. REV. 45 (2006).

3. See, e.g., Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005); Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205 (2005); Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531 (2005); William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393 (2005); Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 934–39 (2006); Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497 (2005).

the marriage and the interest of the states in which recognition is sought. Although the primary focus of this Article is the interests of the states involved, it will attempt to bring these two wings of the analysis together. It is my position that a properly functioning federal structure in which marriage is defined differently from state to state will actually facilitate the individual's participation in marriage.

Lacking from much of the discussion is an analysis of the role that federalism has to play in same-sex marriages. To the extent it is discussed, it is usually in the context of full faith and credit. That is, in analyzing the application of full faith and credit to same-sex marriages, some argue that federalism requires states to give full faith and credit to a same-sex marriage from another state. Federalism means different things in different contexts. I will explain below in detail the conception of federalism upon which my thesis rests. For now, the concept of federalism I have in mind concerns the relationship between the states as co-equals, which is sometimes referred to as horizontal federalism. In the context of interstate same-sex marriages, I will invoke the term "interstate pluralism," which is intended to give some flavor of the interstate relations that I have in mind.

Part I of this Article introduces the premise that uniformity is the goal of the Full Faith and Credit Clause and explores its bases in Supreme Court case law. Part II argues that this conception of full faith and credit is an oversimplification and identifies the competing value of interstate pluralism. Part II then demonstrates the existence of interstate pluralism in a variety of areas of the law and identifies its benefits. Part III responds to the argument that the states are really not that different and that there is but one national shared culture. It makes extensive use of demographic and economic data to illustrate the degree of difference among the states. Part IV then sets out the implications of the foregoing for interstate recognition of same-sex marriages.

I. NATIONAL UNIFORMITY, FULL FAITH AND CREDIT, AND INTERSTATE PLURALISM

It is commonly stated that full faith and credit exists to create a single unified nation from the constituent parts—the states.⁴ The

4. See *infra* notes 23–26 and accompanying text. Mark Rosen has provided an insightful account of the overuse of the goal of uniformity. He argues primarily that explaining

Supreme Court has said this several times.⁵ Many commentators on interstate recognition of same-sex marriages rely on the policy of unification said to underlie full faith and credit to support their arguments for interstate recognition.⁶ But basing full faith and credit solely upon a foundation of uniformity is a gross oversimplification. Full faith and credit is not concerned only with uniformity; rather, it is a complex balance between uniformity and a competing policy. The competing policy sometimes goes under the heading of horizontal federalism. That will do, but as I explain below, the term “interstate pluralism” better captures the nature of this countervailing policy.

A. *The Overstated Goal of Uniformity*

Although this Article is not about the Defense of Marriage Act (DOMA),⁷ some of the arguments about DOMA illustrate the point I do wish to discuss.

Congress enacted DOMA under the power granted by the Full Faith and Credit Clause.⁸ The first sentence of that clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”⁹ The second sentence provides that “Congress may by general Laws prescribe” the “[e]ffect” of such state judicial proceedings, legislation, and records.¹⁰ Thus, DOMA is an exercise of Congress’s power under the second sentence to prescribe the interstate effects of state law.¹¹

full faith and credit as being solely driven by uniformity misreads the Supreme Court’s cases. See Rosen *supra* note 3, at 934–39. He concludes that the Full Faith and Credit Clause “aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct politics.” *Id.* at 935. The discussion in this Part largely agrees with his analysis.

5. See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 223 (1998); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439–40 (1943); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935).

6. See *infra* notes 19–22 and accompanying text.

7. 28 U.S.C. § 1738C (1996).

8. See *infra* note 11.

9. U.S. CONST. art. IV, § 1.

10. *Id.*

11. Congress rested its legislative power to enact DOMA on the Effect Clause. See Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 411 n.5 (1998).

So far, so good, except for prior judicial interpretations of the first sentence of the Full Faith and Credit Clause. The Supreme Court has for many years applied the first sentence of the Full Faith and Credit Clause as if it were self-executing.¹² That is, even in the absence of effectuating legislation by Congress, the Supreme Court has reversed state courts for having failed to give full faith and credit to another state's laws or judgments.¹³ This is possible only if the first sentence of the Full Faith and Credit Clause in itself and without any assistance from the second sentence places limitations on the states. This presents an interesting puzzle.

If the Constitution itself (the first sentence) requires a certain level of full faith and credit (as the Supreme Court's case law suggests), then how can Congress ever fulfill its function of prescribing the interstate effects of state law and state judgments? Any legislation by Congress to set an "effect" of sister-state law would appear to be an impermissible alteration of a constitutional command. This is the argument that has been raised against DOMA as a matter of constitutional law.¹⁴ That is, it is argued that DOMA is an impermissible attempt by Congress to amend the self-executing Full Faith and Credit Clause by ordinary legislation.

One of the proposed exits from the entanglement created by the two sentences of the Full Faith and Credit Clause is to read the first sentence of the Full Faith and Credit Clause ("Full Faith and Credit shall be given in each State . . .") as self-executing to the extent it sets a floor of full faith and credit—a minimum constitutionally required core of interstate recognition. Congress's role in prescribing effects is limited to laying on additional levels of increased interstate

12. See *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908) ("The validity of [the] judgment . . . is, as we believe, the result of the Constitution as it always has been understood"); see also *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154–59 (1932). But see Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 466–70 (2005). Whitten argues that the Full Faith and Credit Clause was designed only to assure that "public acts (or statutes), non-judicial records, and judicial proceedings (or judgments) of each state had to be admitted into evidence as conclusive proof of their own existence and contents," and was not intended to "command that any particular effect be given to the statute, record, or judgment." *Id.* at 466.

13. *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980) (plurality opinion) ("Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation.").

14. See *infra* notes 17–22 and accompanying text.

recognition.¹⁵ Congress, under this view, can legislate to provide for greater, but never less, national uniformity of state laws and judgments than already exists under the Full Faith and Credit Clause's first sentence.¹⁶

Under this reading of the Full Faith and Credit Clause, some argue DOMA is unconstitutional,¹⁷ for it purports to give less interstate effect to a state judgment than the residual self-executing portion of the Full Faith and Credit Clause requires.¹⁸ This argument dovetails neatly into the policy argument made against DOMA alluded to above: the whole point of full faith and credit is to create a single nation out of many states by enhancing uniformity, and DOMA, which allows states to not recognize same-sex marriages, cuts against the unifying purpose of full faith and credit. In summary, it is argued that full faith and credit strives to create uniformity, that Congress can increase, but not decrease, uniformity, and for these reasons DOMA is both unconstitutional and unwise.

Going beyond DOMA, commentators on the issue of same-sex marriage have used the presumptive aim of national unity to argue that interstate recognition of same-sex marriages is required by the Full Faith and Credit Clause. For example, Andy Koppelman argues that DOMA is unconstitutional because the "preeminent purpose of the Full Faith and Credit Clause is to promote uniformity of result across the nation,"¹⁹ and the Act instead "permits bald invitations to forum-shopping";²⁰ DOMA thus "corrodes" uniformity.²¹ Likewise, Larry Kramer argues that the uniformity principle behind the Full Faith and Credit Clause means that a state may not constitutionally deny application of another state's laws on the ground of public policy:

15. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2006 (1997). See the discussion and a collection of authorities in Rosen, *supra* note 3, at 934–35.

16. I collected the authorities arguing this point in an earlier work of mine. See Rensberger, *supra* note 11, at 412 n.6; see also Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 44–45 (2005).

17. See sources cited in Rensberger, *supra* note 11, at 412 n.6.

18. For a discussion of the case law on the application of the Full Faith and Credit Clause to judgments, see *infra* notes 30–55 and accompanying text.

19. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 22 (1997).

20. *Id.* at 23.

21. *Id.*

With respect to full faith and credit in particular, the whole point was that states should not be free to dismiss or ignore the laws of sister states; the states were to be a community, with mutual obligations to respect each other's laws and judgments. The central object of the Clause was, in fact, to eliminate a state's prideful unwillingness to recognize other states' laws or judgments on the ground that these are inferior or unacceptable. If anything should be off-limits in such a system, it is the public policy doctrine.²²

These commentators do have support in the case law. The idea that full faith and credit exists to create a single nation out of discrete entities has been a part of the Supreme Court's understanding for decades. For example, the Court has stated that the "full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation."²³ And in 1935, in the context of enforceability of another state's tax judgment, the Court stated:

The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.²⁴

Again, in assessing the effect of full faith and credit on a sister-state judgment in a workmen's compensation case, the Court spoke of the Full Faith and Credit Clause as a "nationally unifying force."²⁵ The Court stated the purpose of the Full Faith and Credit Clause is to

22. Kramer, *supra* note 15, at 1986. For more recent works using uniformity to argue for interstate recognition of same-sex marriages, see Singer, *supra* note 16, at 49 ("[T]he Full Faith and Credit Clause was intended to knit us together as one nation."); and J. Spencer Jenkins, *Til Congress Do Us Part: The Marriage Protection Act, Federal Court-Stripping, and Same-Sex Marriage*, 40 NEW ENG. L. REV. 619, 657 (2005-2006) ("[F]ull faith and credit mandates that marriages performed in one state should be honored as valid in all other states, in order to maintain a 'nationally unifying force' of marriage laws." (quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943))).

23. *Baker v. General Motors Corp.*, 522 U.S. 222, 234 (1998) (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948)).

24. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

25. *Magnolia Petroleum*, 320 U.S. at 439.

establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. . . . Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.²⁶

For reasons explained in the following section, an account of full faith and credit that rests solely on a policy of national unification is inadequate and indeed wrong. But to understand full faith and credit more adequately, one must first examine how the Supreme Court has applied the Full Faith and Credit Clause. For now, it suffices to note that the Supreme Court's statements that full faith and credit exists to engender national unification come in the context of the interstate enforceability of judgments.

*B. Understanding the Goal of Uniformity:
Judgments and Choice of Law*

The Court has not been expansive in explaining what is good about national uniformity or which type of uniformity is essential to nationhood. One may imagine several reasons for promoting uniformity. I will attempt to unpack the full faith and credit goal of uniformity so that its underlying policies and premises can be examined and applied to same-sex marriage.

1. The case law on uniformity and full faith and credit

As noted above, the Court's statements about the unifying purpose of full faith and credit are almost without exception given in the context of considering the effect of full faith and credit on sister-state judgments.²⁷ This observation may help to explain the

26. *Id.* at 439–40.

27. One exception to this is *Hughes v. Fetter*, 341 U.S. 609 (1951). The Court there spoke of “the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.” *Id.* at 612. At issue in *Hughes* was not a sister-state judgment but an attempt to close the door of local courts to a cause of action arising under another state's law.

underlying goals of the uniformity policy. But before exploring that possibility, a small dose of basic full faith and credit law is needed.

The Full Faith and Credit Clause has two operational modes, which fall temporally on either side of the first judgment in a dispute. In one mode, the question is the effect of full faith and credit before a judgment has been reached as to a particular dispute. Before a judgment, the question is simply choice of law; or more precisely the question is a potential inability to choose law because of the limiting force of the Full Faith and Credit Clause. In multistate disputes not yet reduced to a judgment, courts normally choose the applicable law by resorting to their own local choice of law rules. The full faith and credit issue in such cases is whether a particular choice of law is constrained by the Constitution such that the court must apply the law of a particular state or may not apply the law of a particular state.

The Supreme Court has taken a minimalist approach on the effect of full faith and credit on choice of law. The constitutional test for whether a state may apply its own law requires only that the state have “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”²⁸ It is generally agreed that the Supreme Court has applied this test in a benign, even toothless, manner.²⁹

The other operational mode of full faith and credit occurs after a judgment has been reached. In this context, full faith and credit has been interpreted by the Court to act in a much more exacting manner than in the pre-judgment, choice of law mode. The Supreme Court has generally held that a state must give the same *res judicata* effect to a judgment as would the court that rendered it. As Justice Holmes put it, “the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced.”³⁰ In contrast to the choice of law context, full faith and credit is as to judgments much more exacting. The public policy of the state is, for example, entirely relevant—indeed, it is really the key question—in the choice

28. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

29. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 241–42 & n.276 (2004).

30. *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (quoting *Hampton v. McConnel*, 16 U.S. 234, 235 (1818)).

of law context.³¹ But there is little room (if any) for a state to use its public policy to decline enforcement of a sister state's judgment.

The general irrelevance of state policy to the question of enforcing a sister-state judgment is perhaps best illustrated by *Fauntleroy v. Lum*.³² The Supreme Court in *Lum* reversed a Mississippi decision that had declined to enforce an earlier Missouri judgment between the same parties. The dispute was between two residents of Mississippi who had contracted in Mississippi on a cotton future.³³ Mississippi law made such contracts unenforceable and in fact criminalized them.³⁴ The Missouri courts, using transient jurisdiction, entered judgment for the plaintiff despite the apparent applicability of Mississippi's invalidating law.³⁵ The Court held, however, that Mississippi had to enforce the Missouri judgment, giving as a general rule for full faith and credit as to judgments that "the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced."³⁶ Because the judgment was unassailable in Missouri, Mississippi had to enforce it despite the strong local policy against the result.³⁷

Notwithstanding *Lum* and other cases of similar import,³⁸ the Supreme Court has recognized a few exceptions to the requirement that a state enforce a sister-state judgment. The closest the Court has ever come to expressly adopting the view that local policy of the enforcing state can excuse enforcement is *Thomas v. Washington Gas*

31. See, e.g., *Allstate Ins.*, 449 U.S. at 319 (allowing the state to apply its own law because Plaintiff's residence in the state created "an interest in [Plaintiff's] recovery, an interest which the court below identified as full compensation for 'resident accident victims' to keep them 'off welfare rolls' and able 'to meet financial obligations'" (quoting *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978))).

32. 210 U.S. at 237.

33. *Id.* at 233-34.

34. *Id.* at 234.

35. *Id.* at 234.

36. *Id.* at 236 (quoting *Hampton v. McConnel*, 16 U.S. 234, 235 (1818)) (internal quotations omitted).

37. *Id.* at 237 ("[W]hether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action.").

38. Another good example of the Court's rigid application of the Full Faith and Credit Clause is *Yarborough v. Yarborough*, 290 U.S. 202 (1933). In *Yarborough*, the Court held that South Carolina could not modify a child support order to increase support to a resident minor because the order was a lump sum judgment that was not subject to modification in the state that rendered it. *Id.* at 212-13.

*Light Co.*³⁹ In *Thomas*, a plurality of the Court found that a prior workmen's compensation award by a Virginia administrative agency could be supplemented by an additional award in the District of Columbia,⁴⁰ even though Virginia law provided that an award under its workmen's compensation system was exclusive of any other remedies.⁴¹ Normally, full faith and credit requires that a state give the same res judicata effect to a sister-state judgment as would the courts of the state that rendered the judgment.⁴² This is true despite whatever considerations of policy prevail in the second state. The Supreme Court has said, for example, that it is "aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to a judgment outside the state of its rendition."⁴³

The *Thomas* plurality, however, allowed a second forum to enter a judgment that would have been barred by the res judicata law of the state that rendered the first judgment. It did so in part because in its analysis workmen's compensation commissions differ from courts,⁴⁴ but also because "the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause."⁴⁵ Thus, *Thomas* appears to recognize an exception to the full faith and credit owed to judgments based on a conflict with the public policy of the forum.

39. 448 U.S. 261 (1980) (plurality opinion).

40. *Id.* at 286.

41. *Id.* at 265 n.4.

42. See *Lum*, 210 U.S. at 236; *supra* text accompanying note 30.

43. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943). The Court in *Thomas* overruled *Magnolia* as to worker's compensation cases.

44. See *Thomas*, 448 U.S. at 281-82 (plurality opinion). But see *id.* at 286-87 (White, J., concurring) (criticizing the plurality's analysis).

45. *Id.* at 285 (plurality opinion). Tellingly, on this point the Court cites Justice Stone's dissent in *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (Stone, J., dissenting). For a description of *Yarborough*, see *supra* note 38. Stone dissented because

it would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its own territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it.

Id. at 225. In short, Justice Stone asserted that the interests of the second forum might be so great as to outweigh the interest of interstate res judicata.

Thomas is but a plurality, albeit one that finds support in the Second Restatement of Conflict of Laws.⁴⁶ Other cases hint at limited exceptions to the full faith and credit owed judgments. Full faith and credit, for example, does not require a forum state to honor a sister-state judgment that purports to transfer title to land within the forum.⁴⁷ Nor, at least according to dicta from the Supreme Court and lower court case law, must a forum honor an anti-suit injunction from another state.⁴⁸ Likewise, a forum need not honor an injunction that prohibits a potential witness from testifying in the forum's courts.⁴⁹

On this last issue, in *Baker v. General Motors Corp.*, the Supreme Court held that Missouri could subpoena a witness for litigation in its courts even though the witness had been enjoined by a Michigan court from testifying against General Motors, the defendant in the Missouri proceeding.⁵⁰ As the Court said, "[a] court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*."⁵¹ As is often the case with Supreme Court generalities, it pays to mind the adjectives carefully. To be sure, the cases do not establish a "roving" public policy exception for full faith and credit in the context of judgments. But the adjective implies that there is a role for public policy in judgments, albeit one that must be closely tethered, rather than allowed to "rove." Perhaps in an effort to avoid creating the appearance that it was recognizing a public policy exception, the Court was careful to place the focus on the impropriety of the Michigan judgment rather than on an exception to the enforcement

46. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971) ("A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.").

47. See *Fall v. Eastin*, 215 U.S. 1, 13 (1909).

48. See *James v. Grand Trunk W. R.R. Co.*, 152 N.E.2d 858, 867 (Ill. 1958); see also *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 (1998) (dictum).

49. See *Baker*, 522 U.S. at 237. The Court stated that a state need not honor another state's judgment that would "control courts elsewhere by precluding them, in actions brought by strangers to the . . . litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth." *Id.* at 238.

50. *Id.* at 228-30, 240-41.

51. *Id.* at 233.

of a valid judgment. Thus, it said, "Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth."⁵²

Even though the Court in *Baker* was careful to limit the scope of its holding by referring to a lack of power in the rendering court rather than an exception to enforcing an unqualifiedly proper sister-state judgment,⁵³ the decision is inexplicable without reference to a desire to allow Missouri to effectuate its policies. In explaining why "Michigan lacks authority" to affect the Missouri litigation, the Court referred to the other rights of states to determine "for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth."⁵⁴ Although the Court framed the issue in terms of a lack of power in the rendering state, the reason it gave for the rendering state lacking authority was other states' prerogative to "determin[e] for themselves" their law of evidence.⁵⁵ This is a circumlocutory way of saying that a forum may decide evidence issues for itself. But the law of evidence in Missouri does not fall from the sky. It is the product and expression of the state's public policy. Thus, *Baker* ultimately supports a public policy exception while appearing to deny that one exists.

2. *Why uniformity matters more in the judgment context*

Because more full faith and credit is given to judgments than to choice of law, one might wonder whether the policy behind uniformity can be explained through this dichotomy. Indeed, the language from the Supreme Court ascribing the goal of uniformity to the Full Faith and Credit Clause appears in judgment, not choice of law, cases.⁵⁶ One can imagine several reasons why the goal of

52. *Id.* at 238.

53. "[T]he Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court." *Id.* at 239.

54. *Id.* at 238.

55. *Id.*

56. *See, e.g.*, sources cited *supra* notes 22–26 and accompanying text. To be sure, the Court in *Magnolia Petroleum Co. v. Hunt* also said that the Full Faith and Credit Clause altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial

national unification has special significance for full faith and credit relative to judgments. First, full faith and credit as to judgments has a narrower bite than it does as applied to choice of law. This may argue for giving more teeth to that bite, because of its narrowness. Second, a greater investment (in judicial resources) has been made in the case of a sister-state judgment. One may imagine full faith and credit operating to protect that investment. Third, full faith and credit has a special practical importance in the context of interstate enforceability of money judgments. A lack of strong interstate enforceability in that context poses a threat to interstate commerce.

First, a conflict of laws problem as to a judgment is of different magnitude than a choice of law problem. A forum that yields in its local policy in order to enforce a judgment of another state does so on a one-time basis. It is only in the particular case and only for the parties before the court that forum policy is abrogated. In *Lum*, for example, Mississippi could continue to enforce its policy against cotton futures contracts in all cases other than the one in which a contrary judgment had been reached.⁵⁷ In the context of judgments, the intrusion upon local policy is thus of limited effect. In contrast, when the problem is choice of law, requiring the forum to subordinate its policies to that of another state would affect a whole class of cases, persons, and transactions that are subject to the substantive rule in question. In particular, all transactions or disputes with the same connection to another state would have to be decided under that state's policy. Thus, requiring a state to subordinate its policy in choice of law to another state's policy results in a much greater denigration of local policy.

Second, judgments are of course the result of adjudications, which require a significant investment of resources, both public and private. One could sensibly conclude that after the investment of

proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.

320 U.S. 430, 439 (1943) (emphasis added). It thus appears to say that states must not only respect sister states' judgments, but also enforce their laws ("obligations"), which would ascribe the unifying force of full faith and credit to choice of law. However, this is dicta on the facts of *Magnolia Petroleum*, which addressed the effect of a sister-state judgment. Moreover, the very same sentence in which the Court said that states may not ignore the "obligations created under the laws" of other states, also limits that duty to situations in which "rights judicially established in any part are given nation-wide application," *id.* (emphasis added), meaning that the Court's concern is indeed the *res judicata* wing of full faith and credit.

57. *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908). See *supra* text accompanying note 31.

resources made in a judicial determination of rights, the one-time interests of another state in upholding its substantive policy may be disregarded. In the choice of law context, in contrast, no investment in the decision of a particular outcome as between private parties has been made. All that has been done is a generalized act of lawmaking (by the legislature or by the judicial common law process). The costs of this lawmaking—in terms of an investment of legislative or judicial resources—are properly attributable to and may be spread out over all potential future cases. Generalized lawmaking is thus amortized over a vast number of future disputes, while a judgment must be paid for by the social benefit of resolving only the dispute of the parties before the court. Of course, a common law court making a new precedent is also deciding a particular case before it. So, to be more precise, in the case of judicial lawmaking, the investment of judicial resources is partly justified (or paid for) by the need to resolve the individual litigants' case and partly justified by the application of the new rule announced to future cases. To put it extremely finely, the cost of that part of the opinion that consists of the reasoning and analysis that produces the new rule is spread out over all litigants, present and future; the part that consists of the application of the rule to the parties in question is spread out to only the present parties. Notably, this is exactly where full faith and credit draws its line. The resolution of the particular parties' dispute is entitled to strong full faith and credit. Other states must enforce that judgment. But the judicial creation of a new legal rule is not given much protection under full faith and credit. Thus, the greater investment in judgments serves to explain why they are given more full faith and credit than mere "laws" in the choice of law context.

Third, the most concrete concern about a lack of national uniformity is found in the degree of interstate enforceability of money judgments. Without a strong Full Faith and Credit Clause for judgments, and money judgments in particular, commercial relations between persons located in different states would be problematic. Consider a proposed extension of credit between a New York lender and a California start-up business venture. One part of the lender's decision to extend credit is the ability to obtain a judgment and execute upon the California borrower's assets. Even assuming that the New York lender can obtain jurisdiction in the courts of his

home state,⁵⁸ a New York judgment is of little utility unless it is enforceable in a place in which the debtor has assets. However, full faith and credit as to judgments operates to assure the New York lender that his New York judgment will be enforced in California.⁵⁹ Without such an assurance, the commerce of the United States would economically balkanize due to significantly increased transaction costs in all interstate business. The net effect would be the accidental or intentional erection of trade barriers between the states. It is no doubt for this reason that the Supreme Court has linked the Full Faith and Credit Clause with the Commerce Clause in stating that both have the purpose of national unification:⁶⁰

The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.⁶¹

Outside the context of judgments—that is, when a dispute has not yet been reduced to a judgment and the question is simply choice of law—the concern for economic balkanization is not as great. Here, the Full Faith and Credit Clause allows for uncertainty as to which law applies to an interstate dispute. But the dichotomy in the Supreme Court cases between strong full faith and credit in the judgment context and weak full faith and credit in the choice of law context reflects the conclusion that choice of law uncertainty is not a fatal cost to interstate commerce. Our New York creditor may not be

58. This is not an unlikely assumption, especially under modern notions of personal jurisdiction. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (upholding jurisdiction over a Michigan franchisee in Florida, the home of the franchisor).

59. *See, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) (“Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.”).

60. *See, e.g.*, *Michigan v. Doran*, 439 U.S. 282, 287–88 (1978) (linking Extradition Clause together with Full Faith and Credit Clause and Commerce Clause as all serving to further “important national objectives of a newly developing country striving to foster national unity. . . . In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy”).

61. *Magnolia Petroleum*, 320 U.S. 439.

certain *ex ante* whether California or New York law will apply to an action it brings to collect on the loan, but unless one law or the other wholly bars recovery, he is faced merely with a less favorable outcome, rather than an entire loss of his capital. This risk may be accounted for in valuing the risk of the loan, as is the case with the many other risks of nonpayment.

Finally, it is important to recognize that every full faith and credit case, whether with respect to judgments or simple choice of law, involves a conflict with sister-state law. In the choice of law context, the full faith and credit problem is which of two state laws may be applied, and the competition between two state laws is apparent. In the context of interstate recognition of judgments, it is a misconception to think of the problem as simply dealing with a judgment on the one hand and another state's duty, *vel non*, to enforce it on the other. Instead, the problem consists of choosing between a judgment and another state's law. In *Lum*,⁶² for example, the conflict was between Missouri's judgment enforcing a futures contract and Mississippi law that made such contracts illegal. The judgment won against the law of Mississippi. And that is the general lesson of full faith and credit in its two operational modes (as to judgments and as to choices of law): judgments almost always trump competing laws, but laws almost never trump other competing laws.

II. THE LIMITS OF THE UNIFORMITY POLICY AND THE COUNTERWEIGHT OF INTERSTATE PLURALISM

We all should be at once suspicious of any legal argument that runs only in the direction of a particular result.⁶³ The analysis of full faith and credit laid out above that explains it as a function of creating national uniformity argues only for ever-increasing interstate recognition. It offers no counterweight to the virtues of interstate recognition. Is full faith and credit truly an area in which there is only one policy to consider? If so, it should be an easy subject to master. But full faith and credit is not an easy subject; nor is it true that if some national uniformity is good, then any increase in uniformity is better. There are limits to the goal of national uniformity. These limits are the product of a policy that acts as a

62. See *supra* notes 32–37 and accompanying text.

63. See Rosen, *supra* note 3, at 937 (“Analysis considering only one pole in a dialectic is methodologically suspect.”).

counterweight to national uniformity. This countervailing policy is what I shall call interstate pluralism.

A thought experiment will illustrate the counterweight of interstate pluralism to the goal of uniformity. Suppose that law commentators have proposed the recognition of a new tort cause of action. Suppose, for example, that some have argued extensively for allowing grandparents to recover for loss of consortium in wrongful death cases. A case is adjudicated raising this issue in, let us say, Massachusetts involving Massachusetts parties and events. The Massachusetts Supreme Court decides to recognize the new tort cause of action. Thereafter, another suit on similar facts and raising the same legal issue is brought by a different plaintiff against a different defendant in another state, New York, involving New York parties and events. Can the second plaintiff successfully demand that the Massachusetts court's ruling assures a win in the New York case? Or, more generally, what effect does the first case have on the second?

Well, of course the standard, easy, and correct answer is that the first case has no effect on the second except for whatever persuasive value the New York court may accord the Massachusetts case as a precedent. *Res judicata* is inapplicable because the action is against a new defendant,⁶⁴ and perhaps because the issue is purely one of law.⁶⁵ More importantly for our purposes, full faith and credit does not apply: New York does not unconstitutionally deny full faith and credit to Massachusetts if it chooses not to adopt the Massachusetts tort cause of action. As explained above, the constitutional test for whether a state may apply its own law requires only that the state have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."⁶⁶ New York has such contacts because we have posited New York parties and events.

Note however that if full faith and credit were different and did require application of Massachusetts law, national uniformity would be enhanced. The usual arguments to ratchet up full faith and credit would apply: the states would be more tightly bound together,

64. See *Hansberry v. Lee*, 311 U.S. 32 (1940).

65. See RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1980) (providing for limited issue preclusion when an issue is one of law).

66. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

commerce between states would be facilitated, and certainty would be enhanced. As is argued in the context of same-sex marriage, people—such as the grandparents and grandchildren—frequently travel from state to state or make a permanent relocation. Such movement would be facilitated by New York applying Massachusetts law. Yet these arguments, even an argument that the grandparents once lived in Massachusetts, are not sufficient to require other states to apply Massachusetts law. Why not?

The thought experiment reveals that there are considerations under full faith and credit other than promoting national uniformity. New York is not required to recognize Massachusetts law because to do so would be an intrusion upon *its sovereign prerogatives*. Without some limit to national uniformity, New York would be cheated of the chance to create and apply its own legal solution to the social problem of grandparents' familial loss. New York would lose the opportunity to discover, shape, and express its public policy on this matter. The uniformity that full faith and credit helps us attain comes at the cost of state autonomy and individualism. This should be obvious, but it is often overlooked. A group of things cannot be both uniform and varied at the same time. To the extent we unify, we also strip components' individuality. The key task for full faith and credit analysis, therefore, is to create the appropriate balance between the good of uniformity and the good of diversity. This diversity is what I call interstate pluralism.

Under the Full Faith and Credit Clause, then, the goal must not be just to create a single community—the United States—for that slights the states as distinct elements. Nor can it be simply to preserve the states' autonomy, for then there would be no whole of which the states can be a part. Instead, the vision must be of the nation as a community of communities.⁶⁷

A. Interstate Pluralism Defined

Interstate pluralism is the feature of our federal system that reflects the ability of each state to establish itself as a distinct community. It entails the ability to make and enforce choices on foundational matters such as fundamental ordering of commercial relations, family relations, property ownership, incidents, obligations, and aesthetic values. It is the ability of each state to regulate what

67. For a discussion of states as communities, see *infra* Part II.D.

Justice Harlan termed “primary private activity”⁶⁸ in the context of the *Erie* doctrine.⁶⁹ Interstate pluralism seeks to protect each state’s ability to create and enforce these fundamental orderings and thereby define its society.

For example, in a distinction reaching back to the founding of the United States, some states are “debtor states” and others are “creditor states.” That is, some states have laws tending to favor individual debtors while others favor creditors. So fundamental was this policy choice that it is thought by some to have been the reason for the constitutional grant of diversity jurisdiction to the federal courts.⁷⁰ The differentiation between creditor and debtor states runs along an axis of the relative level of protection of creditors and of debtors.⁷¹ As such, the dichotomy is reflective of both the economic history of a state as having predominantly lenders or borrowers and of current conceptions of minimum levels of social welfare.

As to family structures, states define the participants in the family and their prerogatives through their laws on the rights of biological but unwed fathers in adoption,⁷² the role of grandparents in matters such as visitation, custody, adoption,⁷³ and claims for loss of consortium,⁷⁴ and the rights of unmarried cohabitants.⁷⁵ Family law thus operates to include and exclude individuals from a role in decisions about children. It grants or denies financial protection from losses due to death, injury, or change in household composition. They collectively answer the immensely important question of what constitutes a “family.”

68. See *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

69. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

70. See Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 210 (1982) (reviewing T. FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* (1981)).

71. See generally G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 230–31 (2000) (describing the phenomenon of a person relocating to a state with more expansive exemptions from creditor levies on the eve of bankruptcy).

72. See generally Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223 (2003) (discussing the recognition of parental rights for unwed biological parents).

73. See generally Michelle Ognibene, *A Constitutional Analysis of Grandparents’ Custody Rights*, 72 U. CHI. L. REV. 1473 (2005) (discussing grandparents’ interests in the custody context).

74. See generally Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitation Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391 (2005) (arguing that unmarried cohabitants be allowed loss of consortium recovery).

75. See *id.*

Property rules may seem arcane and unrelated to a state's fundamental ordering of persons and their relationships, but in fact they are profoundly expressive of a state's definition of its community. Property rights, for example, define the extent of an owner's theoretically autocratic right to exclude others from his property, thereby balancing the owner's rights against claims of access for the social good.⁷⁶ More specifically, states categorically limit an owner's right to exclude others under its laws prohibiting discrimination in housing and public accommodations. Property rules also limit an owner's right to control the disposition of his property upon his death. One example of this is the surviving spouse's elective share. Another example is the elimination of the owner's ability to control future ownership through generations, such as by abolishing the fee tail estate⁷⁷ or by creating and applying the state's rule against perpetuities. These state property laws are far more than blind, dumb, and mute black-letter rules. Rather, they collectively answer one of the most profound questions a society can answer: what form of private property, if any, shall our citizens have?

Within each state, these laws and others accumulate in their effect. In the aggregate they shape and define a state's culture. Culture, being a soft concept, is not easily capable of quantification or even precise description. But few would doubt that Kansas, California, and Maine each have a different feel to them, and this difference in feel is reflective of their different cultures. This healthy difference is interstate pluralism.

B. Interstate Pluralism Policy Demonstrated

In order to facilitate the interstate pluralism outlined above, the role of full faith and credit to enforce national unity—contrary to the standard account⁷⁸—is relatively narrow. To illustrate the point, I will modify the thought experiment previously introduced.⁷⁹ Suppose

76. See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (reversing a trespass conviction where access was sought to the landowner's property in order to provide legal advice and medical care to migrant farm workers).

77. See Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 969 (2006) ("The English law of inheritance became an easy target of criticism in revolutionary America, standing for an outmoded way of ordering social and political relations.").

78. See *supra* notes 4–26 and accompanying text.

79. See *supra* notes 64–66 and accompanying text.

that all the parties and events in the second suit are, as in the first suit, local to Massachusetts. The second suit, however, is litigated in New York. With this change to the hypothetical, full faith and credit would now limit the freedom of the second state (New York) and require it to apply Massachusetts law.⁸⁰

But the reason full faith and credit limits the second state here has little to do with national uniformity. Rather, full faith and credit requires the second state to apply Massachusetts law because the matter is—upon these changed facts—so closely connected to Massachusetts that to allow another state to apply its law usurps Massachusetts' authority and prerogatives. As such, what full faith and credit is protecting is Massachusetts' right to its own identity. That is, in the context of choice of law, full faith and credit operates precisely not to unify, but to allow space for political diversity among the states.

Any attempt to promote uniformity through choice of law is ultimately a fool's errand. There is a reason that problems of this type are called "choice of law." The choice of law enterprise is always undertaken against a backdrop of diversity, not uniformity. In any choice of law case, there are two or more competing laws on the issue in question. Whatever the outcome of the case, one will be applied and one will not. But the failure to apply one of the laws does not make that law disappear. The law will survive and be applied in future cases. The lack of uniformity between the competing laws will persist.

The most that can be said for promoting uniformity in choice of law is that for a particular case we might devise a choice of law rule; that the choice of law rule is adopted by all possible forums; and because the particular choice of law rule we adopt does not take as one of its inputs the identity of the forum,⁸¹ the result in the

80. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (noting that to apply its law, a state must have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair" (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981))).

81. That is, the rule is "forum neutral." In contrast, some choice of law rules, particularly modern ones, are not designed to be forum neutral. See Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521, 535 (1993–1994) (discussing Brainerd Currie's interest analysis scheme). Others tend to be biased toward the law of the forum whether designed that way or not. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 8 (1991); Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 945–46 & n.69 (2004) (collecting authorities critical of the

particular case will be the same regardless of where the suit is brought. This type of uniformity—the same outcome for a case regardless of forum—is to be sure a choice of law policy,⁸² but the type of uniformity it achieves is far from the national uniformity that has incorrectly been said to underlie full faith and credit as to choice of law. Choice of law necessarily limits the uniformity achieved to assurances that a particular case under adjudication will come out the same as if it had been adjudicated in another forum. Indeed, the uniformity sought here is not between different states, but between a real case—the one before the court—and an entirely hypothetical case, one that we imagine between the same parties and concerning the same events in another jurisdiction. Such a case is necessarily hypothetical because, in fact, the case is not before another court and can never be once the matter is reduced to a judgment because of the strong effect of the Full Faith and Credit Clause as applied to judgments.⁸³

As we have seen, full faith and credit is strong in the context of judgments but weak when it comes to choice of law. This result reflects a policy of allowing each state, within broad limits, to promote its own forum policies. There are exceptional choice of law cases in which a state is not permitted to further its own policies, but in those cases the goal is not to make the two states alike, but rather to preserve the individuality of the other state and to allow for state-to-state differentiation. Thus, in the choice of law aspect of full faith and credit, the goal is interstate pluralism. This is exactly the opposite of the goal of uniformity on the judgment side of full faith and credit. Within full faith and credit, we can thus concern ourselves with the balance between uniformity and interstate pluralism.

better law approach for its forum bias); Rensberger, *supra* at 576–77 (discussing the “better law” approach to choice of law).

82. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(f) (1971) (listing as among the factors to be used in deciding choice of law cases the concerns of “certainty, predictability and uniformity of result”).

83. See Rensberger, *supra* note 81, at 569 (explaining the hypothetical nature of the concern for identity of outcome).

*C. Interstate Pluralism Reflected in Areas Other Than
Full Faith and Credit*

The foregoing demonstrates that the policy of interstate pluralism can be found in the structure of full faith and credit. Moving beyond full faith and credit, one can find evidence of this policy in other areas of the law. Indeed, interstate pluralism is deeply woven into the fabric of our federal structure. One finds protection of interstate pluralism in both the context of vertical federalism and horizontal federalism. That is, our federal structure has been ordered in such a way as to protect states both from the threat from above (an overreaching federal government) and the threat from abroast (peers, for example states that attempt to overreach).

1. Protecting interstate pluralism in the context of vertical federalism

*Erie R.R. v. Tompkins*⁸⁴ is, of course, one of the most obvious examples of the Supreme Court acting to protect interstate pluralism from a vertical threat. *Erie* rests directly on a foundation of protecting states from an over-powerful federal judiciary. Under *Swift v. Tyson*,⁸⁵ federal courts in diversity were free to depart from the rule of law adopted by the state in which the court sat unless the matter was governed by a state statute.⁸⁶ This had the effect of diminishing a state's ability to govern within its borders, as legal outcomes for in-state transactions differed depending upon whether the litigation was in state court or federal court. This problem was not appreciated at the time of *Swift*. Ironically, the vision of federalism underlying *Swift* was consonant with that of those today who call for national uniformity through full faith and credit. It was believed in the *Swift* era that federal courts exercising diversity jurisdiction would, if given a free hand to ignore state law, act as a magnetic north of reason, drawing to their rule of decision the previously wayward and scattered states and their common law rules. This followed from the then-current conception of law as monolithic and objective, the "brooding omnipresence in the sky" that Holmes

84. 304 U.S. 64 (1938).

85. 41 U.S. 1 (1842).

86. See *Erie*, 304 U.S. at 71.

caricatured.⁸⁷ But by the time of *Erie*, that conception was displaced by the realist and positivist understanding of the law as an expression of social and political policy. This tension between the pursuit of national uniformity and state autonomy was succinctly captured in *Erie*. While *Swift* attempted “to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.”⁸⁸ In reversing the course taken under *Swift*, the Court in *Erie* shifted the balance away from national uniformity and toward interstate pluralism precisely to protect states’ abilities to define themselves politically. Our federal structure “recognizes and preserves the autonomy and independence of the States.”⁸⁹ Thus, except for instances in which the constitution specifically removes state autonomy, “[a]ny interference with [state legislative or judicial action] . . . is an invasion of the authority of the State and, to that extent, a denial of its independence.”⁹⁰

Modern cases construing the *Erie* doctrine continue to protect states from federal intrusion. In *Hanna v. Plumer*,⁹¹ the Court appeared to be steering the course back toward the more frequent application of federal law. It held that a conflict between a federal rule of procedure or a federal statute and state law is not subject to an *Erie* analysis. Instead, under *Hanna*, validly enacted federal statutes and rules of procedure trump absolutely conflicting state law.⁹² This is true, it seems from *Hanna*’s language, regardless of how much the federal law might intrude upon state prerogatives. But the impulse to protect state autonomy from overreaching federal

87. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”).

88. *Erie*, 304 U.S. at 75.

89. *Id.* at 78 (quoting *Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

90. *Id.* at 79.

91. 380 U.S. 460, 469–74 (1965).

92. *Id.* at 471. Under *Hanna*, a federal court in diversity is bound to apply a valid and controlling Federal Rule of Civil Procedure over conflicting state law:

When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–15 (1941)).

power refused to go away. In cases subsequent to *Hanna*, the Court has created an informal rule of construction: when a federal rule of civil procedure could be read to control over a state policy that seems substantive, the Court has read the federal rule narrowly, to avoid its application under *Hanna*.⁹³ In *Gasperini v. Center for Humanities, Inc.*,⁹⁴ the Court summarized the hard rule of *Hanna* that favors Federal Rules of Civil Procedure and explained how that rule is softened by solicitousness for state interests:

It is settled that if the Rule in point is consonant with the Rules Enabling Act . . . and the Constitution, the Federal Rule applies regardless of contrary state law. See *Hanna v. Plumer* Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies.⁹⁵

Thus, based on *Eric* and subsequent cases, federal statutes (and Rules of Procedure) are constrained in their operations so as to avoid interfering with state prerogatives.

2. Protecting interstate pluralism in the context of horizontal federalism

The other threat to state pluralism comes from sister states, which by their assertion of power may undermine other states. This threat may come in the form of an assertion of judicial jurisdiction over events or persons to which the aggressor state lacks an appropriate connection. The due process limitation on state court jurisdiction reflects this concern. Although one might expect that a due process objection to a state's assertion of jurisdiction over a defendant would be based on injury to the individual defendant, the early understanding of personal jurisdiction was that a state exercising inappropriate jurisdiction was violating the rights of other states. As the Court said in *Pennoyer v. Neff*:

The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle,

93. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 n.22 (1996) ("[The Court] 'has continued . . . to interpret the federal rules to avoid conflict with important state regulatory policies.'" (quoting R. FALLON, D. MELTZER & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729-730 (4th ed. 1996))).

94. *Id.* at 415.

95. *Id.* at 427 n.7.

that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.⁹⁶

The modern approach to due process and jurisdiction not surprisingly has shifted the focus to the question of fairness to the defendant.⁹⁷ But, interestingly, the old horizontal federalism strand of *Pennoyer* refuses to die. The modern minimum contacts test looks not only to the defendant's contacts with the state, but also to a series of factors that go to the question of the reasonableness of jurisdiction.⁹⁸ Among these factors is the "forum State's interest in adjudicating the dispute."⁹⁹ Making personal jurisdiction turn in part on the existence of the forum state's interest is the modern descendant of the sovereignty strand of *Pennoyer*. Indeed, the Court has been quite explicit in this: the minimum contacts requirement of course "protects the defendant against the burdens of litigating in a distant or inconvenient forum," but it also "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."¹⁰⁰ A state lacking a sufficient forum interest but nonetheless asserting jurisdiction intrudes upon the other states that do have such an interest.

A state may also intrude upon another state's prerogatives by an overly aggressive application of its law. Protection against this lies in the Full Faith and Credit Clause, which precludes states from applying their law if they lack an interest in doing so.¹⁰¹ In addition, the due process clause also protects states from abuse by another state in the application of the other state's law. In *BMW of North America, Inc. v. Gore*,¹⁰² the Court held that a punitive damages

96. *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877).

97. *See Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945) (holding that due process asks, *inter alia*, whether there are "such contacts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation . . . is relevant in this connection" (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930))).

98. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

99. *Id.*

100. *Id.* at 292.

101. *See supra* notes 28 & 79 and accompanying text.

102. 517 U.S. 559, 568–74 (1996).

award of \$4,000,000 for failing to disclose presale repairs of a new car violated the due process clause because of its excessive size. The plaintiff attempted to justify the award by arguing that the defendant had a nationwide policy and that an award of that size was necessary to induce the defendant to change that policy.¹⁰³ The Court rejected that argument as an intrusion upon the autonomy of other states. The forum state could act against the defendant for local conduct, but assessing punitive damages for conduct that occurred in another state would be to allow the forum to set the policy of that other state:

[B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws . . . must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.¹⁰⁴

3. Protecting interstate pluralism in the context of constitutional interpretation and application

Interstate pluralism has also helped to form the contours of individual constitutional rights. In this context, the threat to interstate pluralism is organic. It comes not from a sister state or from a branch of the federal government, but directly from the Constitution—or at least from a proposed interpretation of the Constitution. Because the proposed interpretation would injure interstate pluralism, it is rejected. The Constitution is of course the charter of federalism, but in this context, one input into determining the constitutional rule is interstate pluralism.

In *Miller v. California*,¹⁰⁵ the Supreme Court set out the test for obscene material that is outside the protection of the First Amendment. Material is obscene if “the average person, applying

103. See *id.* at 572.

104. *Id.* at 572–73.

105. 413 U.S. 15, 23–24 (1973).

contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."¹⁰⁶ By incorporating "community standards" into the test, the Court explicitly allowed for diversity within the United States of what is obscene. As the Court explained, although a "National Constitution" requires legal standards that "do not vary," the factual question of what is "prurient" will necessarily vary from community to community because "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all [fifty] States in a single formulation."¹⁰⁷ The Court found:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.¹⁰⁸

Miller is a response to concerns of federalism.¹⁰⁹ The Court starts with an assumption—which so far as I know is empirically untested but certainly more than plausible—that people in different states have significantly different attitudes toward sexually explicit material.¹¹⁰ When such a disagreement exists, a uniform national standard runs the risk of either forcing the most pornography-tolerant states to forego locally acceptable material in order to satisfy the sensibilities of the most easily offended states or, on the other hand, of forcing the most sensitive states to lower (or raise) their standards to that of the most tolerant state. It is for this reason that a

106. *Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

107. *Id.* at 30.

108. *Id.* at 32–33.

109. See Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1655 (2005). Koppelman writes that *Miller*'s "solution is consistent with the idea of federalism as one response to deep moral disagreement: Different regions can hold different moral views, and no one of these views can be forced upon the nation as a whole." *Id.* Ultimately, however, Koppelman rejects *Miller*'s appeal to federalism: "But, of course, there is another possible response to moral disagreement: the idea of the sovereign individual, who cannot be bullied out of his views even by an entire community." *Id.*

110. Rudyard Kipling captures the divergence of community conceptions of propriety in the following lines:

And the wildest dreams of Kew are the facts of Khatmandhu,
And the crimes of Clapham chaste in Martaban.

Rudyard Kipling, *In the Neolithic Age*, available at http://www.poetryloverspage.com/poets/kipling/in_neolithic_age.html.

healthy concern for interstate pluralism calls for an interpretation of the Constitution that allows states to have breathing room so as to be able to define their culture.

In other areas of constitutional law, the Court has similarly crafted protections of constitutional rights to vary based on differences among the states. The Constitution protects property rights in the Due Process and Takings clauses.¹¹¹ In interpreting these provisions, the Court has long made the content of state law a predicate for the constitutional right: One must have a property interest to fall under the Constitution's protection, and the question of whether there is "property" or not turns upon state law.¹¹² The result is much like that which obtains under *Miller*. There is a unitary standard of constitutional law (prurient interest under *Miller*, property under the due process and takings clauses), but the application of this standard varies from state to state as the underlying state law changes. The case law on takings and due process avoids federalizing state definitions of property, thereby reserving this role for the states.

D. The Benefits of Interstate Pluralism

Pluralism is often conceptualized on the basis of the individual. That is, in discussing pluralism or diversity, people often speak of differences from one individual to another. A "diverse student body," a "diverse community," a "diverse society" all rest on this conception. I will refer to this conception as "house-to-house pluralism." House-to-house pluralism is satisfied only if each household on each street is *potentially* different than the one next door. One house may have Caucasian residents, another, Hispanic. Across the street it is possible that a Presbyterian family lives next door to a Jewish family. Some houses may have married occupants, some single, and some contain unmarried co-habitants. And in this model, total diversity is not properly attained unless on every street

111. See U.S. CONST. amend. XIV, § 1 (stating that "property" shall not be taken without "due process"); U.S. CONST. amend. V (stating that "property" shall not be taken without compensation).

112. See *Paul v. Davis*, 424 U.S. 693, 709 (1976) ("[Property interests are] 'created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings.'" (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))).

in every state in the United States, one of these houses *may* be occupied by a married same-sex couple.

But there is another pathway to diversity, one that paradoxically requires some homogeneity. This type of pluralism depends upon the presence of diverse communities. Each community within itself must have a commonality, otherwise it would not be a community in any sense. But because of the presence of multiple and differing communities, the individual acquires an ability to choose his or her community and to achieve goals within that community which would otherwise be impossible or difficult to obtain while acting alone. This type of pluralism I will call community pluralism.¹¹³ Interstate pluralism is a type of community pluralism, one in which the relevant scale of the community is the state.¹¹⁴

Civic organizations of various types give ready examples of community pluralism. The Sierra Club, for example, is not comprised of a distribution of all types of persons that mirrors the general population. There are no anti-environmentalists in the Sierra Club. But we do not think of the Sierra Club as exclusionary or limiting of people as they try to express themselves. In fact, the contrary is true. Organizations like the Sierra Club facilitate the expression of individuality, as like-minded people work together for a common cause. Others may find their fulfillment in the National Rifle Association, or the Rotary Club, or the community choir. But

113. For a very insightful discussion of these concepts, see Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005). Gerken defines first-order diversity along the lines of my discussion of “house-to-house” pluralism. Likewise, her concept of “second-order diversity” accords with this Article’s definition of community pluralism. *See id.* at 1102 (“Second-order diversity involves variation among decisionmaking bodies, not within them.”). Gerken’s work, however, focuses on facilitating the participation of electoral minorities rather than, as this Article does, on realization of the autonomous individual. *See id.* at 1104. There is, however, significant overlap between her thesis and mine, in that one of the benefits she sees to second-order diversity is that it allows for a fuller and more varied view of the different segments in society, which comes rather close to the benefits of interstate pluralism I describe in the text:

If every decisionmaking body mirrored the population, as with first-order diversity, we would expect the decisions rendered roughly to mirror the preferences of the median voter. By avoiding the push to the middle in every case, heterogeneity among decisionmaking bodies reveals the views of the full democratic spectrum. Second-order diversity not only makes electoral minorities visible, it does so in a manner that showcases division and dissent within groups, providing a kaleidoscope view of group difference.

Id.

114. For a discussion of the question of the appropriate scale of the community, i.e. whether it should be the state or some other unit, see *infra* note 136.

for these organizations to allow an outlet for self-expression and individual attainment, they must first, ironically, be allowed to exclude in order to establish themselves as communities.

It is these considerations that have led the Supreme Court to recognize and protect associational rights. In *NAACP v. Button*,¹¹⁵ the Court struck down, on First Amendment grounds, a state's attempt to restrict an organization—the NAACP—from providing litigation support for cases in which it had a policy interest. The Court recognized that “there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity.”¹¹⁶ This type of group activity is essential to effectuating individual autonomy:

Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups¹¹⁷

The same concern for allowing a community the autonomy to exclude in order to fulfill the aspirations of its individual members led the Court in *Boy Scouts of America v. Dale* to allow the Boy Scouts to expel a homosexual scoutmaster, despite state anti-discrimination law that would have forbidden this.¹¹⁸ The “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends” is “implicit in the right to engage in activities protected by the First Amendment.”¹¹⁹ To be meaningful, “[f]reedom of association . . . plainly presupposes a freedom not to associate.”¹²⁰ The successful argument for the Boy Scouts in *Dale* was that the inclusion of this particular person would undermine their group expressive activities.

115. 371 U.S. 415, 444–45 (1963).

116. *Id.* at 430.

117. *Id.* at 431 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957) (plurality opinion)).

118. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655, 659 (2000).

119. *Id.* at 647 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

120. *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

The "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."¹²¹

Dale is the paradigm case for understanding the distinction between house-to-house pluralism and community pluralism. The argument for inclusion of the gay scoutmaster was based on house-to-house pluralism. Each community must be equally open, it is argued, to all types of persons, regardless of their characteristics.¹²² The argument for the Boy Scouts was based on community pluralism. Different organizations exist and each seeks to fulfill the unique goals of its members. Without an ability to differentiate, to exclude, it is impossible to have a community. And it is the community that functions to enable the individual. One may disagree where the line between house-to-house and community pluralism should be drawn. One may argue that in *Dale* the Court went too far in favor of communities over the individual. But the important point is that both conceptions of pluralism exist and are valued in our federal system. One cannot account for pluralism without accounting for the idea of community pluralism.

Dale and like cases arise in the context of private organizations engaging in expressive activity. The organization's exclusion of an individual is held to be protected from governmental attempts to force inclusion. But the importance of community pluralism runs beyond lofty First Amendment concerns. Wholly apart from constitutionally protected activities, community pluralism is a basic organizing principle of our society. Educational institutions, even public ones, are inherently discriminatory and exclusionary. The student body of the University of Michigan, for example, is not reflective of a bell curve of all college students in Michigan or nationally. Some are excluded and go to other schools, including other public schools, such as Wayne State or Central Michigan. The institution is crafting a community by choosing whom to admit. The basis of inclusion or exclusion may be SAT scores, high school grades, geographic origin, athletic ability, personal achievement,

121. *Id.*

122. *See id.* at 663 (Stevens, J., dissenting) ("New Jersey 'prides itself on judging each individual by his or her merits' and on being 'in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.'" (quoting *Peper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 478 (N.J. 1978))).

race,¹²³ and many other factors. But whatever the criteria, the resulting educational community is designed to better fulfill the needs of its students than would a community that is a simple cross-section of the entire pool of applicants. "The freedom of a university to make its own judgments as to education includes the selection of its student body."¹²⁴

Zoning regulations likewise seek to differentiate in order to fulfill the individual. The whole idea of zoning is that it is proper for communities *not* to be diverse on a house-to-house basis. High rise apartments are not to be placed next to single family residences. Commercial uses are separated from residential. In the context of zoning and urban development, the Supreme Court has explicitly recognized that it is a proper aim of government to facilitate restricted communities. In *Berman v. Parker*,¹²⁵ the Supreme Court upheld a broad urban renewal program that required condemnation of both squalid buildings and others which though neither unhealthy nor dangerous were in the same blighted area.¹²⁶ The Court envisioned a broad governmental power to shape communities based on aesthetic values:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.¹²⁷

Likewise, in *Village of Belle Terre v. Boraas*, the Court upheld a governmental land-use restriction that permitted only single-family residential use.¹²⁸ The arguments against the ordinance echo the

123. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

124. *Id.* at 329 (quoting *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (plurality opinion)).

125. 348 U.S. 26 (1954).

126. *Id.* at 34.

127. *Id.* at 33 (citation omitted).

128. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974). The ordinance defined a family as "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." *Id.*

claims of house-to-house pluralism. The ordinance was said to be invalid, *inter alia*, because “it bars people who are uncongenial to the present residents,” because “social homogeneity is not a legitimate interest of government,” and because it was “antithetical to the Nation’s experience, ideology, and self-perception as an open, egalitarian, and integrated society.”¹²⁹ Writing for the Court, Justice Douglas disagreed with the premise that a government lacks a legitimate interest in shaping a community:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹³⁰

Boraas is cut from the same cloth as *Dale*. The action in each case—by a local government in *Boraas* and by a private association in *Dale*—excluded certain persons in an attempt to create a community. Both exclusions did indeed cut against the grain of house-to-house pluralism. But in each, the Court upheld the competing claims of the community, recognizing that without exclusion, there is no community, and without community, the ability of individuals to realize their aspirations is limited.

Interstate pluralism has other values beyond fulfilling the individual. Speaking in the context of federalist structure of joint sovereigns, the Court in *Gregory v. Ashcroft* identified several of these benefits,¹³¹ two of which are particularly relevant here. First, having multiple states with sovereign power to define themselves “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society.”¹³² The heterogeneity of the societies in our states—a matter I shall seek to demonstrate

129. *Id.* at 7.

130. *Id.* at 9.

131. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[Interstate pluralism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.” (internal citations omitted)).

132. *Id.*

below¹³³—calls for an equally heterogeneous mixture of states in order to respond to the particularized needs of the people. Second, a robustly federal structure “makes government more responsive by putting the states in competition for a mobile citizenry.”¹³⁴ Because interstate pluralism allows for state-to-state differentiation,¹³⁵ it encourages individuals to relocate to take advantage of a particular social policy, be it low taxes, high employment, a high level of social services, or personal safety. And after individuals have chosen, the “competition” that the Court recognizes gives feedback to the government in a very tangible way on the wisdom and success of a chosen social policy.¹³⁶

133. See *infra* Part III.

134. *Gregory*, 501 U.S. at 458.

135. On these two federalism policies—responsiveness to differing needs and interstate competition—see John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 509–10 (2002).

Federalism . . . creates a marketplace in which state governments must compete, much like private associations. By placing state governments in competition with one another, it forces them to be efficient in addressing externalities like pollution or criminal violence within their jurisdictions. As with other forms of spontaneous order, states produce goods (in this case, public goods) to address the problems within their jurisdiction in a manner that efficiently responds to the preferences of their members (in this case, the citizens of their state). Furthermore, because of the spontaneous ordering of competing states, they will readily copy the successful innovations of other states. Here, that means creating a “laboratory of democracy” where the successful experiments of yesterday become the effective public policy of tomorrow. Second, like different associations, different states provide different political niches for a diverse people, responding to different preferences with different goods. Inhabitants of San Francisco simply have different preferences and needs from those in Dubuque, and uniform rules failing to take account of this diversity will leave them alienated from their government.

Id.

136. For an interesting proposal that local governments—not states—should be allowed to regulate marriage, and in particular to grant or not grant same-sex marriages, see Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005). Many of the benefits that this Article proposes for a federalist approach to marriage are made by Schragger at the local government level:

The very idea of decentralizing regulatory authority is to permit local majorities to enact preferences that broader or more diffuse majorities might reject. Decentralizing the regulation of marriage eligibility does not appear to put any unrepresented minorities at risk. In fact, it allows a group that normally falls within that category—gays and lesbians—to obtain a more favorable rule in a smaller jurisdiction.

. . . . If it is true that localities compete for a mobile citizenry, then it makes sense to permit localities to differentiate themselves by regulating in areas that are of true public concern as long as the spillover effects are minimal. Marriage eligibility is a strong signal of the values of a particular community; there is no reason that

III. THE DIMENSION OF INTERSTATE PLURALISM: HOW MUCH ALIKE ARE WE?

In deciding how to adjudicate disputes that touch upon several different states, it is important to balance the desire to create a sufficiently uniform structure so that we truly have a nation with a concern for preserving appropriate spheres of autonomy to each state. As shown above, courts engage in this balancing in a wide variety of contexts—personal jurisdiction, choice of law, interstate enforcement of judgments, enforcement of constitutional norms, and the law applied by the federal courts. The end result is a federal structure that is neither too amorphous and heterogeneous (otherwise, we would not have a single nation) nor so narrow and homogenous that there is insufficient diversity among the states.

The ultimate question is how wide is the river of interstate pluralism? Where is the mainstream, and how do we find what lies outside the mainstream? If one accepts that a divergence between the states is necessary and desirable for our federal structure, the question remains as to how much divergence we are to allow. Our federal structure presumes a community of communities. The communities—the states—must be given sufficient space for divergence in order to be definable as distinct communities. But if they drift too far apart, the overall community—the nation—becomes too diffuse.

The question as to the degree of pluralism among the states is twofold. One might simply wonder, as a descriptive matter, how different the states of the United States really are in cultural, legal, and social terms. One might concede that our federal structure legally *allows* for state idiosyncrasies while maintaining that at present few such idiosyncrasies *actually exist*. The other question is about legal norms, and, in particular, the Constitution. There must be a mainstream to the river; the limitations imposed upon the states by

localities should not be able to compete for citizens on that basis. The advantage, if the competitive model is correct, is that more individuals will find governments that fulfill their preferences.

. . . . [L]ocal determinations of marriage eligibility are responsive to the values of community self-definition and association; smaller-scale institutions are better suited to expressing the kinds of communal norms implicated by marriage eligibility determinations.

Id. at 166 (citations omitted). Although I agree with Schragger on the benefits of allowing divergent views of marriage, I would put the scale of decision on what constitutes a marriage where it has always been, on the state.

the Constitution (and by Congress acting under the authority that the Constitution gives it) ensure that the mainstream remains intact. No state may exceed those limits. The degree of latitude given by the Constitution to the states defines in law the dimensions of our pluralism. The question then is how intrusive is the Constitution (and congressional power) upon choices that states might otherwise make.

As to these issues of divergence and convergence, some have argued in the context of same-sex marriage that states do not really differ that much from each other and that a state should not be allowed to decline to recognize a sister-state marriage (or any other sister-state law) on the ground that it offends local public policy. There are two prongs to this argument. First, it is asserted as a factual matter that we have a shared national culture,¹³⁷ that among the states our “basic values are widely shared.”¹³⁸ The differences that do exist are merely “the stuff of late-night TV jokes and friendly sports rivalries.”¹³⁹ Second, apart from these voluntarily shared values, the “federal Constitution . . . takes a number of contentious problems off the table for individual states and screens out laws inconsistent with widely shared national values.”¹⁴⁰ Under this argument, there is little room for the traditional public policy exception to choice of law, under which a forum will refuse to apply the law otherwise designated by its choice of law rule because it is repugnant to public policy.¹⁴¹ Public policy must have a narrow scope because “among states of the United States, very few laws that are also constitutional can fairly be characterized as violating ‘fundamental principles of justice’”¹⁴² (which is the usual standard for invoking the public policy exception to the application of another

137. See Kramer, *supra* note 15, at 1989 (“The states of the United States, in contrast, share what is, for practical purposes, a single culture.”).

138. *Id.*

139. *Id.*

140. *Id.*

141. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) (“No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.”); *id.* § 283(2) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

142. Kramer, *supra* note 15, at 1973 (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918)).

state's laws). The more general point of those who take this view is that interstate pluralism is not very important because it does not exist in fact and cannot legally exist under the limitations of the Constitution.

A. Interstate Pluralism and the Maximalist Constitution

Taking the second point first, the argument that the "Constitution . . . screens out laws inconsistent with widely shared national values"¹⁴³ begs an enormous question about the scope of the Constitution's constraints upon state freedom of action. Many have debated the proper role of the Supreme Court in interpreting the Constitution, and I do not presuppose to offer the final word on that subject here, but a few points on this question are especially relevant in the context of interstate pluralism.

One might imagine a maximalist constitution, one that is broad in scope, imposing many limitations on governmental action. Suppose, for example, a rational basis test for constitutionality that not only has teeth, but fangs. Under this hyper-rational basis scrutiny, there is always just one rational approach to any problem. Any state that deviates from that rational answer fails the rational basis test. State laws would then be at once very uniform. In fact, over time the discerned rationality would become an all-comprehensive code for all facets of the law.

What I have just described would serve as a rough description, a caricature, of what was wrong with the *Lochner* era¹⁴⁴ of Supreme Court decisions. It is generally agreed that the Court erred in those days by having too narrow a conception of the permissible range of state choices. Today, we agree with Holmes that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics."¹⁴⁵ But at the same time, we still have a healthy, indeed vigorous, substantive due process doctrine that does limit state choices. I am not suggesting that we have now or are in danger of soon entering a neo-*Lochner* era. My point instead is more modest. One cannot blithely say that the "Constitution . . . screens out laws inconsistent with widely shared national values"¹⁴⁶ without at least

143. *Id.* at 1989.

144. See *Lochner v. New York*, 198 U.S. 45 (1905).

145. *Id.* at 75 (Holmes, J., dissenting).

146. Kramer, *supra* note 15, at 1989.

acknowledging the ghost of *Lochner*. How broadly one defines our “widely shared national values” is key. The broader the national values are, the less autonomous and diverse are the states. In particular, it is perilous to assert that states do not much differ because they are *constitutionally forced* to be the same in all respects that are significant. Such a view seems to reflect an assumption that indeed the Constitution does provide only a single permissible answer to all policy questions, leaving to the states only “the stuff of late-night TV jokes and friendly sports rivalries.”¹⁴⁷

B. How the States Differ: An Empirical Snapshot

As noted, another argument against interstate pluralism as a value is that it does not exist in fact. That is, we have a shared national culture and only insignificant regional or state differences. But this is of course an empirical argument. In this section, I set out to show that there are in fact very significant differences among the states on a wide variety of social and cultural matters.

Interstate pluralism is both the result and product of differing legal choices made by the states. It is no doubt true that local values and sentiments affect the shape of a state’s laws. But it is also true that state laws act as the shaper of a culture. A state that chooses to grant grandparents a voice in adoption cases,¹⁴⁸ for example, makes that choice based on the inputs from its social system. But once that choice is made, the legal inclusion of the grandparent changes the dynamic of the family in that state and the expectations of family actors. Likewise, abortion rates may be higher in states that have chosen to publicly fund abortions.¹⁴⁹ One might conclude from this phenomenon that law shapes society. But the existence of a law, in this case public funding for abortions, is reflective of the culture and values of the state that has made that legal choice. In looking for data to measure cultural divergence among the states, it is difficult, if not impossible, to separate out the cause and effect between social institutions and legal institutions. Nor is it a simple thing to trace back from a particular cultural difference to a particular legal choice that is related to that difference. For these reasons, I shall not

147. *Id.*

148. *See supra* note 73 and accompanying text.

149. For the data, which suggests that public funding of abortions does increase the rate of abortions, see *infra* note 171 and accompanying text.

attempt to show that State A has one law, State B has a different law, and that this difference in law produces X result in cultural differentiation. Instead, it is enough to demonstrate that whatever shared national culture we have, we also have deep and abiding cultural differences among the states.

1. Marriage, divorce, and births

Because this Article discusses same-sex marriage, I will begin by looking at some of the differences in families. Figure 1 shows the rate of marriages and divorces per 1000 of population for 2004.¹⁵⁰ As to marriages, the data is based on the number of marriages performed (or in some cases, on the issuance of a license), not on the residence of the celebrants. For this reason, Nevada and Hawaii should be set aside; their rate is no doubt inflated by out of state couples coming to the state for a tourist's wedding.

Figure 1: Marriages and divorces per 1000 population, 2004

State	Marriages	Divorces	State	Marriages	Divorces
Nev.	62.5	6.4	Colo.	7.4	4.4
Haw.	22.9	no data	N.M.	7.4	4.6
Ark.	13.4	6.1	N.C.	7.3	4.2
Tenn.	11.4	4.9	Mo.	7.1	3.8
Idaho	10.7	5.0	Neb.	7.1	3.4
Utah	9.8	4.1	Kan.	7.0	3.3
Ala.	9.4	5.0	N.D.	7.0	3.1
Vt.	9.4	3.9	Iowa	6.9	2.8
Wyo.	9.4	5.3	Md.	6.9	3.2
Fla.	9.0	4.8	N.Y.	6.8	3.0
Ky.	8.8	4.9	Ariz.	6.6	4.3
Alaska	8.5	4.3	Ohio	6.6	3.6
Me.	8.5	4.3	Mass.	6.5	2.2
S.D.	8.4	3.1	Okla.	6.5	4.9
Va.	8.3	3.9	Wash.	6.5	4.3
S.C.	8.2	3.2	Cal.	6.3	no data
La.	8.1	no data	Wis.	6.2	3.1

150. Derived from *U.S. Census Bureau, Statistical Abstract of the United States: 2007*, Table 119, available at <http://www.census.gov/prod/2006pubs/07statab/vitstat.pdf>.

Figure 1 continued

State	Marriages	Divorces	State	Marriages	Divorces
Or.	8.1	4.1	Del.	6.1	3.7
N.H.	8.0	3.9	Ill.	6.1	2.6
Tex.	7.9	3.6	Mich.	6.1	3.4
Ind.	7.8	no data	Miss.	6.1	4.5
Ga.	7.7	no data	Minn.	6.0	2.8
R.I.	7.6	3.0	Pa.	5.9	3.0
Mont.	7.5	3.8	Conn.	5.8	3.1
W. Va.	7.5	5.0	N.J.	5.8	3.0
			D.C.	4.5	1.9

Setting aside Nevada and Hawaii, the other states at the top of the list—such as Arkansas, Tennessee, Idaho, and Utah—show a marriage rate more than double that of the states at the bottom. One factor tending to drive a marriage rate higher is the age of the population. Younger people are more likely to become married than older people, many of which are already married. Figure 2 demonstrates the lower rate of eligibility for marriage of older populations.¹⁵¹ So, all other things being equal, states with a younger population would tend to have a higher marriage rate.

Figure 2: Percent of Population Married by Gender and Age, 2005

151. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, tbl.55, available at <http://www.census.gov/prod/2006pubs/07statab/pop.pdf>.

But not all other things are equal. It is true that many of the states with the lowest marriage rates also have the lowest percentage of their population in the 20–29 age group in the 2000 Census.¹⁵² Connecticut, Pennsylvania, New Jersey, and Wisconsin had the third, sixth, eighth, and eleventh lowest percentages of their populations between ages 20 and 29.¹⁵³ Because these states also all fall into the bottom ten on marriage rates (Figure 1), they tend to confirm the hypothesis that marriage rates are simply a function of the age of the population. But other states do not fit this mold. Mississippi has the ninth *highest* percentage of its population in the 20–29 age group in the 2000 Census, and yet it has sixth *lowest* marriage rate. Clearly, marriage as an institution is not as popular in Mississippi as it is in other states. Likewise, the District of Columbia has the single lowest marriage rate in Figure 1. But in the 2000 Census, it had the highest percentage of 20–29 year olds (18.3% of its population was in that age band).¹⁵⁴ One may argue that the District is a special case because many younger adults are there temporarily from other states while working for the federal government or at the national headquarters of private organizations. These people are more likely to have emotional bonds to persons from their state of origin, and when and if they marry it will be “back home.” But assuming that is true, the presence of a large number of young single people who are not looking for a local marriage partner would give a distinctive cast to the District. In any event and whatever the case with the District of Columbia, it is clear that other factors beyond age drive marriage rates. What they are, I will not venture to try to demonstrate. But the fact remains that people in different states behave differently toward the institution of marriage.

Another way of getting at the relative importance attached to marriage by people in different states is to look at the rate of births to unmarried women. Figure 3 gives this data for 2003, expressed as

152. For a discussion of the states population distribution by age, see *infra* notes 210–14 and accompanying text.

153. Derived from U.S. CENSUS BUREAU, STATE SINGLE YEAR OF AGE AND SEX POPULATION ESTIMATES: APRIL 1, 2000 TO JULY 1, 2006 – RESIDENT, *available at* <http://www.census.gov/popest/datasets.html> (downloaded data from http://www.census.gov/popest/states/asrh/files/SC_EST2006_AGESEX_RES.csv).

154. *Id.*

a percentage of all births in the state,¹⁵⁵ and provides the marriage rate rank from Figure 1.¹⁵⁶ At first glance, this data tends to reinforce the marriage rate data. Some of those states with a lower marriage rate show up near the top of the list of the states with the highest rates of births to single women. The District of Columbia (53.6% of births to unmarried women), Mississippi (47.0% of births to unmarried women), and Delaware (41.9% of births to unmarried women), are examples of such states. But other states show a different pattern. In some, there is a low rate of marriage, but also a low rate of births to unmarried women. Minnesota, which ranks fifth from the bottom in unmarried births (27.7%), is also the forty-seventh ranked state in marriage rate. Likewise, Washington ranks eighth from the bottom in unmarried births (28.8%), but thirty-eighth (in the three way tie) in marriage rates. And New Jersey ranks ninth from the bottom in unmarried births (29.3%), but is tied for forty-ninth in marriage rates. In such states, unmarried women are not choosing to have a child outside of marriage, but choosing not to have a child until married. This reflects not a rejection of marriage, but a delay of it.

Figure 3: Percentage of Births to Unmarried Women, 2003

State	% Births to Unmarried Women	Marriage Rate Rank	State	% Births to Unmarried Women	Marriage Rate Rank
D.C.	53.6	51	Tex.	34.3	20
N.M.	48.4	26	S.D.	34.2	14
La.	47.5	18	Pa.	33.9	48
Miss.	47.0	46	Ky.	33.8	11
Del.	41.9	43	Cal.	33.5	41
Ariz.	41.5	36	Haw.	33.5	2
S.C.	41.1	16	Me.	33.5	12
Fla.	39.9	10	Wyo.	32.6	9
Nev.	39.1	1	Mont.	32.2	25
Ga.	38.1	22	Or.	31.7	17
Ark.	38.0	3	Kan.	31.6	31

155. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, 68 tbl.85 (2007), available at <http://www.census.gov/compendia/statab/2007/>.

156. See *supra* fig.1.

Figure 3 continued

State	% Births to Unmarried Women	Marriage Rate Rank	State	% Births to Unmarried Women	Marriage Rate Rank
Tenn.	37.2	4	Va.	30.4	15
Ind.	37.1	21	Wis.	30.4	42
Okla.	37.1	39	Conn.	30.0	50
N.Y.	36.5	35	Vt.	30.0	8
Ohio	36.2	37	Iowa	29.9	33
R.I.	35.8	23	Neb.	29.7	29
Mo.	35.6	30	N.J.	29.3	49
Ill.	35.3	45	Wash.	28.8	40
N.C.	35.3	28	N.D.	28.5	32
Ala.	35.0	7	Mass.	27.8	38
Md.	34.8	34	Minn.	27.7	47
Alaska	34.6	13	Colo.	26.7	27
Mich.	34.6	44	N.H.	24.8	19
W. Va.	34.6	24	Idaho	22.3	5
			Utah	17.2	6

Finally, one may look directly at the birthrates in relation to the population of women in that state to examine the importance of marriage. Figure 4¹⁵⁷ ranks the states by the number of births per 1000 women aged 15–44. This is expressed as the “fertility rate.”

Figure 4: Birth Rates per 1,000 Women
Aged 15-44, 2004

State	Fertility Rate	State	Fertility Rate
Utah	92.3	N.J.	64.2
Ariz.	79.5	Fla.	64.1
Idaho	77.3	Del.	63.8
Tex.	77.3	Iowa	63.8
Alaska	74.4	Ky.	63.6
Haw.	74.0	S.C.	63.6
Neb.	72.6	Tenn.	63.4
Nev.	72.6	N.D.	63.2

157. Derived from U.S. CENSUS BUREAU, *supra* note 155, at 65 tbl.80.

Figure 4 continued

State	Fertility Rate	State	Fertility Rate
S.D.	72.4	Mont.	62.7
N.M.	71.9	Ohio	62.7
Cal.	70.4	Ala.	62.4
Okla.	70.3	Md.	62.3
Ga.	70.1	Or.	61.8
Kan.	69.8	Wash.	61.7
Colo.	68.8	Mich.	61.4
Ark.	68.3	N.Y.	60.7
Miss.	68.3	Wis.	60.7
Ind.	67.0	Conn.	58.8
Ill.	66.7	W. Va.	58.3
La.	66.7	D.C.	58.2
Wyo.	66.5	Pa.	58.0
N.C.	66.0	Mass.	56.5
Va.	65.0	R.I.	55.0
Minn.	64.5	N.H.	53.4
Mo.	64.3	Me.	52.4
		Vt.	52.1

Figure 4 allows us to put a picture together. In the District of Columbia, fewer people get married (Figure 1). Also, relatively few (seventh from the lowest fertility rate in Figure 4) women are giving birth. But an unusually large number of the births are to women that are unmarried (Figure 3). In Utah, on the other hand, many births occur (Figure 4)—in fact, Utah has the highest fertility rate in the nation. And many more of the mothers are married. Utah also has the *lowest* rate of births to unmarried mothers in the nation (Figure 3). This is also consistent with Utah having the sixth highest marriage rate—fourth highest if one discounts Nevada and Hawaii as tourist wedding destinations—as Figure 1 shows. New Mexico, on the other hand, has both a high fertility rate (tenth highest in Figure 4 at 71.9%) and the second highest rate of births to unmarried women in the nation (48.4% of all births in Figure 3).

Before leaving data related to the family, abortion rates are worth examining. Figure 5¹⁵⁸ gives the rates of abortions per 1000 women aged 15 to 44 in each state.

**Figure 5: Abortions per 1,000 Women
Aged 15 to 44, 2000**

State	Rate	State	Rate
D.C.	68.1	N.M.	14.7
N.Y.	39.1	Ala.	14.3
N.J.	36.3	Pa.	14.3
Nev.	32.2	Minn.	13.5
Fla.	31.9	Mont.	13.5
Del.	31.3	La.	13.0
Cal.	31.2	Vt.	12.7
Md.	29.0	Alaska	11.7
R.I.	24.1	Neb.	11.6
Or.	23.5	N.H.	11.2
Ill.	23.2	Okla.	10.1
Haw.	22.1	Me.	9.9
Mich.	21.6	N.D.	9.9
Kan.	21.4	Ark.	9.8
Mass.	21.4	Iowa	9.8
Conn.	21.1	Wis.	9.6
N.C.	21.0	Ind.	9.4
Wash.	20.3	S.C.	9.3
Tex.	18.8	Idaho	7.0
Va.	18.1	W. Va.	6.8
Ga.	16.9	Mo.	6.6
Ariz.	16.5	Utah	6.6
Ohio	16.5	Miss.	5.9
Colo.	15.9	S.D.	5.5
Tenn.	15.2	Ky.	5.3
		Wyo.	0.9

One notable feature of Figure 5 is the astonishingly high rate of abortions in the District of Columbia. This serves to explain

158. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, 76 tbl.95 (2006), available at <http://www.census.gov/compendia/statab/2006/2006edition.html>.

somewhat its low fertility rate (sixth from the lowest fertility rate in Figure 4). And put alongside its low marriage rate (lowest in the nation in Figure 1), one begins to see that marriage is less popular in the District of Columbia than elsewhere, and is not seen as particularly relevant to the question of procreative acts (both as to births and as to as abortions). In Mississippi, as in the District, marriage rates are low (sixth from the lowest rate in Figure 1), and the abortion rate is fourth lowest in the country,¹⁵⁹ but the rate of births to unmarried women is fourth *highest*.¹⁶⁰ In Mississippi, as in the District of Columbia, procreation outside of marriage is not rare, but the outcome of extramarital procreation in Mississippi is much more likely to end in a live birth. In Utah a third pattern is found. Utah has the fifth lowest abortion rate at 6.6 abortions per 1,000 women aged 15–44.¹⁶¹ As noted above, it also has the lowest rate of births to unmarried women at 17.2% of all births,¹⁶² but the very highest birth rate.¹⁶³ Utah also has the sixth highest marriage rate, fourth highest if one discounts Nevada and Hawaii.¹⁶⁴ Putting all this together, in Utah, procreative acts are much more likely to occur in marriage and are much more likely to result in a live birth. Thus, in Utah, women are getting married and having children. In Mississippi, they are having children, but not getting married. In the District of Columbia, they are not getting married and are having abortions.

Finally, one may wonder whether the differences in abortion rates in Figure 5 are, in part, the result of legal rules. Because the Supreme Court has recognized a right to abortion, we have a relatively uniform law on abortion access.¹⁶⁵ The differences are in public funding¹⁶⁶ and parental consent.¹⁶⁷ As of 2004, seventeen

159. *See supra* fig.5.

160. *See supra* fig.3.

161. *See supra* fig.5.

162. *See supra* fig.3.

163. *See supra* fig.4.

164. *See supra* fig.1.

165. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163–65 (1973) (women have a right to abortion before viability of the fetus without undue state interference; states may restrict abortions “after fetal viability” with exceptions when the woman’s life or health is in danger; all states have an interest in protecting the health of both the woman and fetus).

166. *See* American Civil Liberties Union, *Public Funding for Abortion*, July 21, 2004, <http://www.aclu.org/reproductiverights/abortion/16393res20040721.html>.

states provide public funding for abortion.¹⁶⁸ Four have done so by legislation.¹⁶⁹ In the other thirteen states, public funding resulted from state supreme courts interpreting their state constitutions.¹⁷⁰ Figure 6 lists the states that provide public funding for abortion,¹⁷¹ their abortion rate,¹⁷² and where that state ranks.¹⁷³ States in bold are those that legislatively chose public funding.

Figure 6: States with Public Abortion
Funding, Rates, and Ranks

State	Abortion Rate	Ranking
N.Y.	39.1	2
N.J.	36.3	3
Cal.	31.2	7
Md.	29.0	8
Or.	23.5	10
Ill.	23.2	11
Haw.	22.1	12
Mass.	21.4	15
Conn.	21.1	16
Wash.	20.3	18
Ariz.	16.5	22
N.M.	14.7	26
Minn.	13.5	29
Mont.	13.5	30
Vt.	12.7	32
Alaska	11.7	33
W. Va.	6.8	45

From Figure 6, it would indeed appear that the decision to publicly fund abortions is linked to the abortion rate. As to cause and effect, one must be more careful. Public funding, once decided upon, may cause an increase in abortion rates as the service becomes

167. See Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 872-73 (2007).

168. See American Civil Liberties Union, *supra* note 166.

169. *Id.*

170. *Id.*

171. *Id.*

172. See *supra* fig.5.

173. *Id.*

more economically attainable by a wider array of the population. But it is also possible that the social factors that drove a state to adopt public funding are also responsible for the higher rates. That is, abortion (or choice) is more popular in some states, and as a result of that shared social policy, the state chooses to fund abortions *and* women choose to have them. The analysis is complicated by the fact that thirteen states have public funding not as a result of a legislative choice but by judicial decision. In those states, it is harder to correlate the existence of public funding with public sentiment. Still, the judicial process is hardly immune from public opinion, and in many states, the judiciary is selected, at least in part, through an elective process. In the end, one can say that people's conduct, their state laws, and the public sentiment and values are likely aligned. All of which makes public funding of abortion a nice example of the interstate pluralism. State culture and values are reflected in laws and behavior, and state laws at the same time help to shape and form behavior.

2. Suicide rates and mental health

States differ widely in their suicide rates. New Mexico, for example, has three times as many suicides relative to its population as does New York.¹⁷⁴ Figure 7 ranks the states from high to low on the number of suicides per 100,000 of population.¹⁷⁵

Figure 7: Suicides per 100,000 Resident Population, 2001

State	Suicide Rate	State	Suicide Rate
N.M.	19.8	Vt.	11.7
Mont.	19.3	Ala.	11.5
Nev.	18.4	Miss.	11.5
Wyo.	16.8	S.C.	11.5
Colo.	16.3	Ga.	11.1
Alaska	16.1	Haw.	11.1
Idaho	15.9	Va.	11.1
W. Va.	15.9	La.	11.0
Okla.	14.8	Neb.	10.9
Ariz.	14.5	Kan.	10.8

174. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-05, 83 tbl.106 (2005), *available at* http://www.census.gov/prod/www/statistical-abstract-2001_2005.html.

175. *Id.*

Figure 7 continued

Suicide Rate	Suicide Rate	Suicide Rate	Suicide Rate
Or.	14.5	Ohio	10.7
Ark.	14.2	Mich.	10.5
Fla.	14.1	Iowa	10.4
Utah	14.1	Pa.	10.4
S.D.	13.8	Tex.	10.4
Del.	13.6	Minn.	9.6
N.H.	13.3	Ill.	9.1
Mo.	12.9	Md.	8.4
Me.	12.5	R.I.	8.3
N.D.	12.4	Cal.	8.2
Tenn.	12.4	Conn.	8.2
Ky.	12.2	D.C.	7.0
N.C.	12.1	N.J.	6.9
Wash.	11.9	Mass.	6.7
Wis.	11.8	N.Y.	6.6
Ind.	11.7		

Is the difference in suicide rates a function of the ethnic composition of the state population? Different ethnic groups have different suicide rates.¹⁷⁶ A number of the states near the top of the list are western states, which may be skewed toward higher Hispanic and Native American populations. Indeed, Figure 8¹⁷⁷ shows some coincidence between some of the top suicide states and the percentage of Native American and Hispanic and Latino population:

Figure 8: Percentage of Population (2005) by Native American/Native Alaskan and Hispanic-Latino and Rank of Suicide Rate

State	Native American, Native Alaskan %	Hispanic, Latino %	Suicide Rate Rank
N.M.	10.19%	43.42%	1
Mont.	6.46%	2.44%	2
Nev.	1.42%	23.54%	3
Wyo.	2.38%	6.73%	4

176. See *infra* fig.9.

177. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 26 tbl.23.

Figure 8 continued

State	Native American, Native Alaskan %	Hispanic, Latino %	Suicide Rate Rank
Alaska	15.99%	5.09%	6
Okla.	8.14%	6.60%	9
Ariz.	5.05%	28.50%	10
S.D.	8.76%	2.07%	15
N.D.	5.30%	1.60%	19
Wash.	1.66%	8.77%	24

But such a hypothesis is belied by the fact that suicide is highly prevalent among white men. The suicide rate by race and ethnicity is shown in Figure 9.¹⁷⁸

Figure 9: Suicides per 100,000 by Ethnicity and Gender, 2004

	Male	Female
White, non-Hispanic	21.0	5.4
White ¹⁷⁹	19.6	5.0
American Indian, Alaska Native	18.7	5.9
Hispanic	9.8	2.0
Black	9.6	1.8
Asian, Pacific Islander	8.4	3.5

While the suicide rate for Native Americans is near that of Whites, it does not clearly exceed that of Whites, and so the higher incidence of suicides in western states does not appear to be chiefly a function of differential rates among ethnic subgroups. Indeed, while Montana ranks second in the suicide rate at 19.3 per 100,000, its population is 88.99% white,¹⁸⁰ which is near Minnesota's 86.32% white

178. Derived from U.S. CENTER FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2006, 230-32 tbl.46, available at [http://www.cdc.gov/nchs/data/06.pdf](http://www.cdc.gov/nchs/data/hus/06.pdf); see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 154, at 90 tbl.116. It should be noted that "[d]eath rates for the American Indian or Alaska Native and Asian or Pacific Islander populations are known to be underestimated." U.S. CENTER FOR HEALTH STATISTICS, *supra*, at 247 tbl.46 n.5.

179. For data reporting purposes, the "federal government considers race and Hispanic origin to be two separate and distinct concepts. Thus Hispanics may be of any race." U.S. CENTER FOR HEALTH STATISTICS, *supra* note 178, at 519 app. II. For this reason, there are two separate categories for "White," which includes Hispanics, and "White, non-Hispanic."

180. See *infra* fig.13.

population.¹⁸¹ However, Minnesota's suicide rate is on the low side at 9.6.¹⁸² It would thus appear that factors other than ethnicity drive the differences in suicide rates.

One factor may be the level of state expenditures on mental health. Figure 10¹⁸³ shows the average of expenditures per capita for mental health by state agencies for the years 1993, 1997, and 2001. The data is suggestive of a correspondence between the high spending states and those with lower suicide rates.

Figure 10: Mental Health Expenditures (per capita)
Average of Years 1993, 1997, 2001

State	\$ per Capita	State	\$ per Capita
D.C.	350	Kan.	56
N.Y.	140	Colo.	54
Haw.	110	S.D.	54
Conn.	103	Ohio	53
Vt.	99	Mo.	52
N.H.	96	Va.	51
Pa.	96	Wis.	50
Mass.	93	Ill.	50
Md.	89	Ala.	49
Me.	88	Wyo.	49
Minn.	87	Ind.	48
Mich.	84	Ga.	47
Mont.	84	Nev.	45
Alaska	82	Tenn.	43
Wash.	78	La.	42
N.J.	76	Neb.	41
Or.	75	Okla.	39
Del.	74	Iowa	38
Ariz.	72	Fla.	37
R.I.	71	Ky.	36
Cal.	67	Tex.	36
S.C.	65	Idaho	34

181. *See id.*

182. *See supra* fig.7.

183. Derived from U.S. CENTER FOR HEALTH STATISTICS, *supra* note 178, at 413 tbl.143. The expenditures for mental health are "[s]tate mental health agency per capita expenditures for mental health services." *Id.* The services are "for mental illness, excluding mental retardation and substance abuse." *Id.* at 414.

Figure 10 continued

State	\$ per Capita	State	\$ per Capita
N.C.	63	Ark.	29
Miss.	61	N.M.	29
N.D.	57	Utah	29
		W. Va.	24

Figure 11¹⁸⁴ shows the apparent relationship. It separates out the six states with the lowest suicide rate. Of these six states, three rank in the top five in mental health expenditures per capita, four rank in the top ten, and all are in the top twenty-one.

Figure 11: Suicide Rates and Mental Health Expenditures

State	Suicide Rate	Mental Health Expenditure Rank
N.Y.	6.6	2
Mass.	6.7	8
N.J.	6.9	16
D.C.	7.0	1
Cal.	8.2	21
Conn.	8.2	4

In fact, the correlation coefficient between suicide rates and mental health expenditures is relatively strong at -0.42. (This coefficient is negative because suicide rates trend down as expenditures increase).¹⁸⁵ For comparison purposes, the Law School Admission Test has a correlation coefficient to first year grades in law school of about 0.40.¹⁸⁶

Figure 12¹⁸⁷ shows the correlation between suicide rates and mental health expenditures graphically. Each point shown represents

184. See *supra* notes 174, 183.

185. A correlation coefficient of 0 means there is no correlation. A correlation coefficient of 1.0 or -1.0 indicates a perfect linear correlation.

186. See LISA ANTHONY STILWELL ET AL., PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2001-2002 CORRELATION STUDIES 5 tbl.2 (2003), available at <http://www.jsacnet.org/Research/Predictive-Validity-of-the-LSAT-National-Summary-of-the-2001%962002-Correlation-Studies.pdf>. The authors report a correlation coefficient of .40 and .39 for the years 2001 and 2002 respectively. *Id.*

187. Derived from the sources listed *supra*, notes 174, 183. For presentation purposes, the data for the District of Columbia is excluded. The correlation coefficient noted in the text includes the data for the District.

a single state's suicide rate (vertical, or Y axis) and that same state's per capita expenditures on mental health (horizontal, or X axis). It shows a general trend in which a state's suicide rate declines as its mental health expenditures increase.

Figure 12: Suicide Rate and Mental Health Expenditures
(with Linear Regression)

It bears emphasis that discovering a correlation such as this does not demonstrate causation. Instead, it merely shows that two variables tend to move together. It may be that lower suicide rates are caused by higher mental health expenditures. But it could be the case that there is some other factor—such as a greater social concern for and awareness of mental disease—that is the true causal agent that drives both a lower suicide rate and a higher spending rate on mental health. Whatever the causal relationship, the fact remains that mental health, both in terms of expenditures and outcomes, remains a striking instance of state-to-state differentiation.

States make very fundamental as well as very different choices in generating and spending revenue. Some states choose to spend more on mental health; others choose to spend less. The reasons for the choice may be varied. Some states choose to spend their revenue elsewhere, others desire to tax at a lower rate and have less revenue to spend, and still others spend less because their revenues are low, not because of a low tax rate, but because of a low tax base from which to generate revenue. But whatever the reasons for the choice of the fiscal and social policy, the empirical evidence is clear that this choice has real-world consequences for mental health.

3. Ethnicity and religion

The discussion of suicide rates introduced the topic of the ethnic composition of a state's population. The states vary widely as to their ethnic composition. Figure 13¹⁸⁸ ranks the states by ethnic diversity. It shows the percentage of a state's population attributable to different ethnic groups. The last column, which is used to rank the states, notes the size of the largest single ethnic group. The state having the smallest dominant ethnic group ranks as the most diverse.

Figure 13: Composition of State Populations by Ethnicity, 2005

State	Black	Native Am.	Asian	Haw./ Pac. Islander	Hisp. or Latino	Non-Hispanic White	Largest Single Group
Haw.	2.32%	0.35%	41.50%	8.95%	7.99%	23.48%	41.50%
N.M.	2.42%	10.19%	1.27%	0.13%	43.42%	43.14%	43.42%
Cal.	6.74%	1.17%	12.24%	0.42%	35.21%	43.81%	43.81%
Tex.	11.69%	0.68%	3.26%	0.11%	35.13%	49.18%	49.18%
D.C.	56.99%	0.34%	3.09%	0.07%	8.59%	31.11%	56.99%
Md.	29.29%	0.32%	4.77%	0.06%	5.70%	59.16%	59.16%
Ga.	29.76%	0.30%	2.69%	0.08%	7.13%	59.65%	59.65%
Miss.	36.95%	0.45%	0.74%	0.03%	1.74%	59.73%	59.73%
Nev.	7.74%	1.42%	5.72%	0.53%	23.54%	60.03%	60.03%
Ariz.	3.64%	5.05%	2.23%	0.19%	28.50%	60.43%	60.43%
N.Y.	17.38%	0.54%	6.66%	0.09%	16.11%	60.85%	60.85%
La.	33.10%	0.59%	1.38%	0.03%	2.84%	61.59%	61.59%
Fla.	15.74%	0.43%	2.09%	0.08%	19.49%	62.13%	62.13%
N.J.	14.47%	0.31%	7.22%	0.08%	15.23%	63.21%	63.21%
S.C.	29.25%	0.37%	1.08%	0.05%	3.29%	65.49%	65.49%
Ill.	15.10%	0.31%	4.06%	0.06%	14.31%	65.76%	65.76%
Alaska	3.66%	15.99%	4.57%	0.57%	5.09%	66.47%	66.47%
Va.	19.88%	0.31%	4.57%	0.08%	5.98%	68.24%	68.24%
N.C.	21.76%	1.29%	1.79%	0.07%	6.37%	68.28%	68.28%
Ala.	26.39%	0.49%	0.83%	0.04%	2.30%	69.32%	69.32%
Del.	20.67%	0.40%	2.67%	0.06%	6.03%	69.58%	69.58%
Colo.	4.09%	1.12%	2.57%	0.14%	19.46%	72.09%	72.09%
Okla.	7.74%	8.14%	1.54%	0.09%	6.60%	72.53%	72.53%
Conn.	10.09%	0.34%	3.20%	0.08%	10.89%	75.39%	75.39%

188. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 26 tbl.23.

Figure 13 continued

State	Black	Native Am.	Asian	Haw./ Pac. Islander	Hisp. or Latino	Non- Hispanic White	Largest Single Group
Ark.	15.72%	0.70%	0.97%	0.09%	4.71%	76.97%	76.97%
Wash.	3.52%	1.66%	6.39%	0.47%	8.77%	77.06%	77.06%
Tenn.	16.81%	0.28%	1.24%	0.05%	3.03%	77.89%	77.89%
Mich.	14.34%	0.59%	2.23%	0.04%	3.81%	77.90%	77.90%
R.I.	6.18%	0.60%	2.70%	0.12%	10.72%	80.00%	80.00%
Mass.	6.86%	0.29%	4.72%	0.08%	7.91%	80.32%	80.32%
Or.	1.80%	1.37%	3.45%	0.27%	9.88%	81.58%	81.58%
Kan.	5.88%	0.94%	2.10%	0.07%	8.32%	81.59%	81.59%
Pa.	10.61%	0.18%	2.22%	0.05%	4.07%	82.56%	82.56%
Mo.	11.51%	0.44%	1.33%	0.07%	2.68%	82.94%	82.94%
Ohio	11.94%	0.22%	1.43%	0.03%	2.27%	83.13%	83.13%
Utah	0.96%	1.33%	1.88%	0.72%	10.86%	83.55%	83.55%
Ind.	8.85%	0.27%	1.20%	0.05%	4.54%	84.33%	84.33%
Neb.	4.30%	0.95%	1.55%	0.07%	7.09%	85.39%	85.39%
Wis.	5.98%	0.94%	1.95%	0.04%	4.45%	85.97%	85.97%
Minn.	4.26%	1.17%	3.44%	0.05%	3.64%	86.33%	86.33%
S.D.	0.83%	8.76%	0.67%	0.04%	2.07%	86.78%	86.78%
Idaho	0.59%	1.40%	1.02%	0.11%	9.09%	86.97%	86.97%
Wyo.	0.88%	2.38%	0.63%	0.07%	6.73%	88.59%	88.59%
Ky.	7.51%	0.20%	0.91%	0.05%	1.96%	88.60%	88.60%
Mont.	0.38%	6.46%	0.52%	0.05%	2.44%	88.99%	88.99%
N.D.	0.77%	5.30%	0.65%	0.04%	1.60%	90.84%	90.84%
Iowa	2.33%	0.33%	1.45%	0.04%	3.67%	91.52%	91.52%
N.H.	0.97%	0.24%	1.75%	0.04%	2.22%	94.08%	94.08%
W. Va.	3.20%	0.18%	0.56%	0.02%	0.85%	94.42%	94.42%
Vt.	0.63%	0.35%	1.02%	0.03%	1.09%	95.93%	95.93%
Me.	0.75%	0.55%	0.82%	0.03%	0.99%	96.04%	96.04%

One would expect states with different ethnic compositions to have different cultures. *Cinco de Mayo*, for example, would presumably mean little in states like West Virginia or Maine, which have Hispanic/Latino populations of 0.85% and 0.99% respectively. In Texas, on the other hand, *Cinco de Mayo* is presumably significant—in Texas 35.13% of the population is Hispanic/Latino. But beyond culturally sourced holidays, it would be surprising if differences in state ethnic composition did not have some effect on

the outlook, social expectations, and political values—that is, the culture—of the states. Indeed, in *Grutter v. Bollinger*,¹⁸⁹ the Supreme Court accepted that diversity in higher education “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. . . . [C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”¹⁹⁰ The same is no doubt true of the political discourse in a racially diverse state. More concretely, in Presidential voting, African-Americans have long voted all but exclusively for the Democratic candidate. Figure 14 shows the percentages (based on survey data) for White and African-American voters since 1976 who voted for the Democratic Party candidate.¹⁹¹

Figure 14: Voters for Democratic Candidate for President by Race, 1976-2004

189. 539 U.S. 306 (2003).

190. *Id.* at 330 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849–50 (E.D. Mich. 2001) (internal quotations omitted)).

191. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 241 tbl.387. That table has the data for the 2000 and 2004 elections. The entire time series, from which fig.14 is derived, is available by downloading the MS Excel file at <http://www.census.gov/compendia/statab/elections> for tbl.387. The data excludes votes for third party candidates. *Id.* It is based on survey samples. *Id.*

The point to be drawn from Figures 13 and 14 is that there is wide fluctuation among the states in ethnic composition and that it would be foolish to pretend that a state's ethnic composition has no effect on its political and legal culture. The point is perhaps best made graphically, as Figure 15¹⁹² will show. The question to ask is whether anyone would expect the following states not to have significant differences.

Figure 15: Ethnic Distributions, Selected States

Religion also plays a part in shaping a state's culture. The states vary significantly in the religious identification of their population. The six most common religious self-identifications nationally, as of 2001, are shown in Figure 16.¹⁹³

192. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 26 tbl.23.

193. See BARRY A. KOSMIN ET AL., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2001, at 11–12 (2001), available at <http://www.trincoll.edu/NR/rdonlyres/AFCE53A-8DAB-4CD9-A892-5453E3361D35D/0/NEWARISrevised121901b.pdf>. The survey did not include Alaska and Hawaii.

Figure 16: Self-Identification in Religious Groups, 2001

National (2001)	Number	% of Pop.
Catholic	50,873,000	24.5
Baptist	33,830,000	16.3
Methodist/Wesleyan	14,150,000	6.8
Christian—no denomination supplied	14,190,000	6.8
Lutheran	9,580,000	4.6
Presbyterian	5,596,000	2.7
No Religion	27,486,000	13.2

These identifications differentiate at the state level. Figure 17¹⁹⁴ ranks the states in order of religious homogeneity, ordering them by the percentage size of each state's largest religious group.

Figure 17: Religious Composition of States, 2001
(as percentage of population)

State	Cath.	Bapt.	Christian Non- Denom.	Meth.	Luth.	Presb.	No Rel.	High
Utah	6	2	2	1	1	57 (LDS)	17	57
Miss.	5	55	4	9	1	2	7	55
R.I.	51	6	4	1		1	15	51
Mass.	44	4	3	2	1	1	16	44
S.C.	7	43	6	14	2	5	7	43
N.M.	40	10	5	2	2	4	18	40
Tenn.	6	39	7	10	2	3	9	39
N.Y.	38	7	4	6	2	2	13	38
N.C.	10	38	6	9	2	3	10	38
Vt.	38	3	4	6			22	38
Ala.	13	37	6	9	2	3	6	37
Ark.	7	37	5	9	1	2	13	37
Ga.	8	37	7	11	2	3	12	37
N.J.	37	8	4	6	3	4	15	37
La.	28	35	4	4	1	1	9	35
N.H.	35	6	5	3	1	1	17	35
N.D.	30	6	2	7	35		3	35

194. *Id.* at 40–43. A blank entry indicates a figure of less than 0.5%.

Figure 17 continued

State	Cath.	Bapt.	Christian Non- Denom.	Meth.	Luth.	Presb.	No Rel.	High
Ky.	14	33	8	5	2	1	13	33
Cal.	32	7	11	2	2	3	19	32
Conn.	32	10	7	4	4	1	12	32
Okla.	7	30	9	11	2	3	14	30
Va.	14	30	7	7	2	3	12	30
W. Va.	8	30	7	15	1	3	13	30
Ariz.	29	8	10	5	4	2	17	29
Ill.	29	11	7	6	7	3	15	29
Tex.	28	21	7	8	3	2	11	28
Wis.	28	6	5	7	22	2	14	28
D.C.	27	19	6	1	5	1	13	27
Neb.	27	8	4	10	15	4	9	27
Pa.	27	9	6	9	8	5	12	27
S.D.	25	4	4	13	27	4	8	27
Fla.	26	18	5	6	3	4	12	26
Minn.	25	5	7	4	24	2	14	25
Wash.	20	6	11	4	6	3	25	25
Me.	24	15	8	9	3	1	16	24
Nev.	24	15	9	5	3	1	20	24
Colo.	23	8	9	5	5	3	21	23
Iowa	23	5	5	13	16	3	13	23
Mich.	23	14	5	9	4	1	15	23
Md.	22	17	6	10	5	2	13	22
Mo.	19	22	8	7	4	2	15	22
Mont.	22	5	9	7	14	4	17	22
Or.	14	5	13	4	5	3	21	21
Del.	9	19	3	20	4	3	17	20
Ind.	20	14	10	9	6	2	16	20
Kan.	20	13	9	13	4	3	15	20
Wyo.	18	9	9	5	9	4	20	20
Idaho	15	9	9	9	3	3	19	19
Ohio	19	14	6	10	5	4	15	19

With this data, while some characteristics cross state boundaries, one also sees some clear regional differences. For example, a swath of

states in the northeast is heavily Catholic. Figure 18¹⁹⁵ shows the top ten Catholic states, seven of which fall in the northeast.

Figure 18: Leading Catholic States
(as percentage of population)

State	Cath.	Bapt.	Christian, Non- Denom.	Meth.	Luth.	Presb.	No Rel.
R.I.	51	6	4	1	-	1	15
Mass.	44	4	3	2	1	1	16
N.M.	40	10	5	2	2	4	18
N.Y.	38	7	4	6	2	2	13
Vt.	38	3	4	6	-	-	22
N.J.	37	8	4	6	3	4	15
N.H.	35	6	5	3	1	1	17
Conn.	32	10	7	4	4	1	12
Cal.	32	7	11	2	2	3	19
N.D.	30	6	2	7	35	-	3

In contrast, as Figure 19¹⁹⁶ shows, the states with the highest self-identification of Baptists fall almost entirely in the South.

Figure 19: Leading Baptist States
(as percentage of population)

State	Bapt.	Cath.	Christian, Non- Denom.	Meth.	Luth.	Presb.	No Rel.
Miss.	55	5	4	9	1	2	7
S.C.	43	7	6	14	2	5	7
Tenn.	39	6	7	10	2	3	9
N.C.	38	10	6	9	2	3	10
Ala.	37	13	6	9	2	3	6
Ark.	37	7	5	9	1	2	13
Ga.	37	8	7	11	2	3	12
La.	35	28	4	4	1	1	9
Ky.	33	14	8	5	2	1	13
Va.	30	14	7	7	2	3	12
W. Va.	30	8	7	15	1	3	13
Okla.	30	7	9	11	2	3	14

195. *Id.*

196. *Id.*

Likewise, Lutherans (Figure 20¹⁹⁷) are highly concentrated along the North-Central tier of states.

Figure 20: Leading Lutheran States
(as percentage of population)

State	Luth.	Cath.	Bapt.	No Rel.	Christian, Non-Denom.	Meth.	Presb.
N.D.	35	30	6	3	2	7	
S.D.	27	25	4	8	4	13	4
Minn.	24	25	5	14	7	4	2
Wis.	22	28	6	14	5	7	2
Iowa	16	23	5	13	5	13	3
Neb.	15	27	8	9	4	10	4
Mont.	14	22	5	17	9	7	4

Finally, the states with the highest level of a “no religion” self-identification (Figure 21¹⁹⁸) are rather scattered, but tend to be Western (eleven of the top fourteen).

Figure 21: Leading “No Religion” States

State	No Rel.	Cath.	Bapt.	Christian, Non- Denom.	Meth.	Luth.	Presb.
Wash.	25	20	6	11	4	6	3
Vt.	22	38	3	4	6		
Colo.	21	23	8	9	5	5	3
Or.	21	14	5	13	4	5	3
Nev.	20	24	15	9	5	3	1
Wyo.	20	18	9	9	5	9	4
Idaho	19	15	9	9	9	3	3
Cal.	19	32	7	11	2	2	3
N.M.	18	40	10	5	2	2	4
Ariz.	17	29	8	10	5	4	2
Del.	17	9	19	3	20	4	3
Mont.	17	22	5	9	7	14	4
N.H.	17	35	6	5	3	1	1
Utah	17	6	2	2	1	1	57 (LDS)

197. *Id.*

198. *Id.*

One must be careful in attaching too great a significance to religious self-identification. The survey from which this data is drawn asked respondents to self-identify their religion; it did not seek to limit membership in a religion by the respondent's intensity of conviction, level of observance, or orthodoxy of belief.¹⁹⁹ This may account for some of the surprises that result when one compares the religious identification data to other state variables. One might expect, for example, that the leading Catholic states would be those with lower abortion rates because of the Catholic teaching on abortion. In fact, the opposite is true. The abortion rate tends to *rise* as the percentage of Catholic self-identification goes up.²⁰⁰ Figure 22²⁰¹ shows the scatter-plot of states by percentage of population that is Catholic and the corresponding abortion rate. There is actually a *positive correlation* coefficient of about 0.32 between abortion rates and the percentage of the state's population that self-identifies as Catholic, a fairly high level of covariance. The correlation goes up to .37 if one excludes the District of Columbia, whose abortion rate (68.1 per 1,000 women aged 15–44)²⁰² seems to be an outlier (the next highest state is New York at 39.1).²⁰³

199. *Id.* at 6. The Survey addresses the subjective nature of the self-identification sought: Moreover, the self-description of respondents was not based on whether established religious bodies, institutions, churches, mosques or synagogues considered them to be members. Quite the contrary, the survey sought to determine whether the respondents themselves regarded themselves as adherents of a religious community. Subjective rather than objective standards of religious identification were tapped by the survey.

Id.

200. *See infra* fig.22.

201. Derived from KOSMIN ET AL., *supra* note 193, at 40–43; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, *supra* note 158 at 76 tbl.95.

202. *See supra* fig.5.

203. *See id.*

Figure 22: Abortion Rates and Catholic Self-Identification

One finds another surprise as to births to unmarried mothers. There is a positive correlation of 0.51 between the percentage of the population self-identifying as Baptists²⁰⁴ and the percentage of births that are to unmarried mothers.²⁰⁵ Figure 23 shows the correlation:

Figure 23: Unmarried Births and Baptist Self-Identification

Figures 22 and 23 are good illustrations that correlation does not show causation. That is, two characteristics can move together without one of them having caused the other. In this instance, it seems highly unlikely that a state has a higher abortion rate *because* a larger percentage of its population self-identifies as Catholic; nor does it seem likely that more people self-identify as Catholic because

204. See *supra* fig.17.

205. See *supra* fig.3.

of a higher abortion rate in that state. Likewise, it is counterintuitive to suppose that more women give birth outside of marriage *because* they self-identify as Baptists.²⁰⁶ Instead, it is likely that some other variable accounts for the correlation between Catholic self-identification and abortion rates.

One possible explanation is found by examining the correlation between abortion rates and political self-identification. Figure 24²⁰⁷ is a scatter-plot that correlates abortion rates to the percentage of votes cast for the Democratic nominee for President in 2000 and 2004.²⁰⁸ The correlation coefficient for these two variables is a strikingly high 0.77 (it is still .63 if one excludes the District of Columbia's high abortion rate as an outlier). Each point on the plot represents a given state and shows the state's abortion rate (abortions per 1000 women aged 15–44 in the year 2000) and the average percentage of votes cast for the Democratic nominee for President in 2000 and 2004.

206. One possible explanation for higher out-of-wedlock births in states with strong Baptist identification is the presence in those states of a lower abortion rate. But such a connection is not clear from the data. Figure 5 shows abortion rates by states. Several of the strongly Baptist states (North Carolina and Tennessee) are in the top half of the states ranked by abortion rate.

207. Derived from U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 243 tbl.389; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, *supra* note 158, at 76 tbl.95.

208. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, *supra* note 155, at 243 tbl.389. I have averaged the percent of votes cast for the Democratic nominee for the elections of 2000 and 2004.

Figure 25²⁰⁹ shows the converse: a negative correlation between the percentage of votes cast for the Republican nominee in 2000 and 2004 and the abortion rate. The correlation here is .76; it declines to .63 if one excludes the District of Columbia as an outlier.

Figure 25: Presidential Voting (% Rep.)
and Abortion Rate

One interpretation of these correlations is that political affiliation explains behavior more powerfully than does religious affiliation. That is, people as a whole will choose to follow their political beliefs over the doctrine of their religion when the two conflict. Another interpretation is that actual voting is a clearer marker of political affiliation than self-identification is of religious affiliation. Put differently, many will casually self-identify with a religion regardless of adherence to or agreement with that religion's tenets. Voting, in contrast, requires effort and is more likely to identify the voter's agreement with a political party's platform.

4. Characteristics of the population: age distribution, population growth, and immigration

States differ in the age of their population. Figure 26²¹⁰ compares the age distribution, in ten-year segments, of the United States as a whole with the age distributions of Utah, which has a relatively

209. Derived from *id.* and U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, *supra* note 158, at 76 tbl.95.

210. Derived from U.S. Census Bureau, *State Single Year of Age and Sex Population Estimates: April 1, 2000 to July 1, 2005*—Resident, http://www.census.gov/popest/states/asrh/files/SC_EST2005_AGESEX_RES.csv All data is based on the 2000 Census, not the later population estimates.

young population, and Florida and West Virginia, both of which have more of their population distributed toward the older segments. The United States as a whole has a fairly evenly distributed population in each segment up to age forty-nine, ranging from 13.63% (ages twenty to twenty-nine) to 15.36% (ages thirty to thirty-nine) of the total population. Utah, on the other hand, is in the midst of a growth spurt. Each age segment through twenty to twenty-nine constitutes over 18% of the population. In the aggregate, those under age thirty in Utah comprise roughly 54% of its population. For the United States as a whole, the same age groups represent only about 42% of the population. At the other end of the spectrum, about 27% of the United States' population is fifty years old or older. In Utah, individuals fifty years or older comprise only about 20% of the population.

Figure 26: Age Distribution, Selected States, 2000 Census
(percentage of total population)

Florida and West Virginia are skewed in the opposite direction. In both states, roughly one third of the population is age fifty or above. And the population under age forty in both states is around 38%, as compared to Utah's 54%. The two oldest segments (ages seventy and above), are only a little over 6% of Utah's population. The corresponding number in Florida is 13%. In West Virginia it is 11%.

How might these differences in age distribution affect these states? In states with older populations, health care, health insurance, pension protection, estate planning and taxation are paramount issues. In states with younger populations, job creation and education, particularly primary education, are at the forefront of public discourse. Again, because the states are different in fundamental ways, they will have fundamentally different priorities in their values and goals.

Before leaving population studies, two other dimensions of state differentiation, dealing with immigration, should be noted. First, states are growing in population at different rates. Different rates of growth are produced by differences in birth and death rates, state-to-state immigration and emigration, and international immigration. Second, wholly apart from population growth, some states absorb more international immigrants than others. The following figures address these issues. Figure 27²¹¹ ranks the states by percentage of population growth from the 1990 to the 2000.

Figure 27: State Population Growth, 1990–2000

State	Pop. 2000	% Growth from 1990	State	Pop. 2000	% Growth from 1990
Nev.	1,998,257	66.3	Ind.	6,080,485	9.7
Ariz.	5,130,632	40.0	Ky.	4,041,769	9.7
Colo.	4,301,261	30.6	Wis.	5,363,675	9.6
Utah	2,233,169	29.6	Mo.	5,595,211	9.3
Idaho	1,293,953	28.5	Haw.	1,211,537	9.3
Ga.	8,186,453	26.4	Wyo.	493,782	8.9

211. Derived from U.S. Census Bureau, *Ranking Tables for States: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-2)*, Table 3: States Ranked by Percent Population Change: 1990 to 2000, August 26, 2008, <http://www.census.gov/population/www/cen2000/phc-t2.html>.

Figure 27 continued

State	Pop. 2000	% Growth from 1990	State	Pop. 2000	% Growth from 1990
Fla.	15,982,378	23.5	N.J.	8,414,350	8.9
Tex.	20,851,820	22.8	Ill.	12,419,293	8.6
N.C.	8,049,313	21.4	Kan.	2,688,418	8.5
Wash.	5,894,121	21.1	S.D.	754,844	8.5
Or.	3,421,399	20.4	Neb.	1,711,263	8.4
N.M.	1,819,046	20.1	Vt.	608,827	8.2
Del.	783,600	17.6	Mich.	9,938,444	6.9
Tenn.	5,689,283	16.7	La.	4,468,976	5.9
S.C.	4,012,012	15.1	Mass.	6,349,097	5.5
Va.	7,078,515	14.4	N.Y.	18,976,457	5.5
Alaska	626,932	14.0	Iowa	2,926,324	5.4
Cal.	33,871,648	13.8	Ohio	11,353,140	4.7
Ark.	2,673,400	13.7	R.I.	1,048,319	4.5
Mont.	902,195	12.9	Me.	1,274,923	3.8
Minn.	4,919,479	12.4	Conn.	3,405,565	3.6
N.H.	1,235,786	11.4	Pa.	12,281,054	3.4
Md.	5,296,486	10.8	W. Va.	1,808,344	0.8
Miss.	2,844,658	10.5	N.D.	642,200	0.5
Ala.	4,447,100	10.1	D.C.	572,059	-5.7
Okla.	3,450,654	9.7	USA		13.2

Figure 27 reveals that states in the west and southwest in particular are growing very rapidly. Of the top twelve growth states (including New Mexico), nine are in the west or southwest. In contrast, some states' growth has been almost entirely static. The scale of the differences in state growth is best represented visually. Figure 28 plots the difference between each state's percentage growth of population from 1990 to 2000 and the percentage rate of growth of the United States. Thus, the highest growth occurred in Nevada, which grew at a 66.3% rate compared to the U.S. average of 13.2%.²¹²

212. *Id.*

Figure 28: State Percentage Growth versus
U.S. Percentage Growth, 1990-2000
(0.0 represents U.S. Growth rate (13.2%))

With respect to immigration growth, there are two different kinds of immigration: international and “internal” (from one state to another). Figure 29²¹³ shows the imbalanced impact of international immigration upon the states. From 2000 to 2006, California, New York, the District of Columbia, New Jersey, Nevada, Arizona, and Florida, each absorbed 40 or more international immigrants for each 1000 state residents as of 2000. In states like Mississippi, Maine, West Virginia, and Montana, in contrast, international immigration is negligible (less than 5 immigrants per 1000 residents).

Figure 29: Net International Migration from 2000 to 2006
(Rate per 1,000 of Population of 2000 Census)

State	Net Int'l Migration	Rate per 1,000 Pop.	State	Net Int'l Migration	Rate per 1,000 Pop.
Cal.	1,724,790	51	Mich.	151,435	15
N.Y.	820,388	43	Neb.	26,224	15
D.C.	24,795	43	Idaho	17,266	13
N.J.	357,111	42	Iowa	36,142	12
Nev.	80,482	40	Okla.	41,665	12

213. Derived from U.S. Census Bureau, *Cumulative Estimates of the Components of Population Change for the United States, Regions and States: April 1, 2000 to July 1, 2007* (NST-EST2007-04), Dec. 26, 2007, <http://www.census.gov/popest/states/NST-comp-chg.html>. Numbers for the 2000 Census were used to calculate the rate of immigration per 1,000 state residents as of 2000. For the state-by-state census totals, see U.S. Census Bureau, *Table 1, States Ranked by Population: 2000*, Aug. 26, 2008, <http://www.census.gov/population/www/cen2000/phc-t2.html>, tbl.1.

Figure 29 continued

State	Net Int'l Migration	Rate per 1,000 Pop.	State	Net Int'l Migration	Rate per 1,000 Pop.
Ariz.	204,661	40	Ind.	68,935	11
Fla.	642,188	40	Wis.	56,557	11
Tex.	801,576	38	N.H.	13,718	11
Ill.	402,257	32	Pa.	126,007	10
Mass.	200,155	32	Ark.	26,467	10
Colo.	133,930	31	Tenn.	59,385	10
Ga.	228,415	28	S.C.	40,168	10
Conn.	92,635	27	Vt.	5,295	9
Utah	60,944	27	Mo.	50,450	9
Wash.	157,950	27	Ohio	92,101	8
Haw.	31,092	26	Ky.	30,889	8
Or.	88,976	26	Alaska	4,654	7
Md.	129,730	24	Ala.	30,537	7
R.I.	23,086	22	N.D.	3,664	6
N.C.	180,986	22	S.D.	4,333	6
Va.	151,748	21	La.	22,244	5
Minn.	86,925	18	Wyo.	2,323	5
N.M.	32,967	18	Miss.	10,896	4
Kan.	44,847	17	Me.	5,616	4
Del.	13,394	17	W. Va.	4,419	2
			Mont.	2,092	2

Internal immigration is a measure of the extent to which a particular state is an importer or exporter of people. As to internal migration, Figure 30 shows the migration rate for each state.²¹⁴ Some large states, such as New York and California, export a high number of residents that other states absorb. At the other end of the spectrum are the western growth states, such as Nevada and Arizona, and also Florida, which attract retirees. The immigration numbers—both internal (Figure 30) and international (Figure 29)—illustrate why Nevada and Arizona lead the way in overall population growth (Figure 27). They lead the states in incoming immigration, both internal and international.

214. See sources cited *supra* note 213.

Figure 30: Net Internal Migration from 2000 to 2006
(Rate per 1,000 of Population of 2000 Census)

State	Net Internal Migration	Rate per 1,000 Population	State	Net Internal Migration	Rate per 1,000 Population
D.C.	-60,644	-106	Vt.	2,822	5
La.	-330,492	-74	W. Va.	12,772	7
N.Y.	-1,242,869	-65	Mo.	37,638	7
Mass.	-289,967	-46	Wyo.	4,611	9
Ill.	-473,713	-38	Ala.	42,641	10
N.J.	-277,900	-33	Ky.	44,188	11
N.D.	-21,149	-33	N.M.	22,887	13
Cal.	-950,592	-28	Va.	124,544	18
Mich.	-239,349	-24	Colo.	80,057	19
Kan.	-65,589	-24	Ark.	55,141	21
Ohio	-237,819	-21	Wash.	129,809	22
Neb.	-31,457	-18	Tex.	451,910	22
R.I.	-18,742	-18	Mont.	24,944	28
Conn.	-53,125	-16	Tenn.	160,166	28
Iowa	-41,489	-14	Me.	36,792	29
Miss.	-25,280	-9	Or.	108,748	32
Utah	-17,709	-8	N.H.	40,531	33
Haw.	-9,275	-8	S.C.	167,070	42
Minn.	-26,574	-5	Del.	33,419	43
Alaska	-3,436	-5	N.C.	347,005	43
Ind.	-17,818	-3	Ga.	378,258	46
Pa.	-27,718	-2	Idaho	83,870	65
Md.	-13,017	-2	Fla.	1,221,540	76
Okla.	-4,799	-1	Ariz.	541,283	106
S.D.	470	1	Nev.	318,182	159
Wis.	9,224	2			

5. *Wealth and education*

Some states are wealthier than others. One way to measure state wealth is personal income per capita. Figure 31²¹⁵ shows the range of wealth distributions between states.

Figure 31: Personal Income per Capita, 2003

State	2003	State	2003
D.C.	\$48,446	Fla.	\$30,098
Conn.	\$42,972	Mo.	\$29,464
N.J.	\$39,577	Kan.	\$29,438
Mass.	\$39,504	Me.	\$29,164
Md.	\$37,446	Tex.	\$29,074
N.Y.	\$36,112	Ga.	\$29,000
N.H.	\$35,140	N.D.	\$28,922
Colo.	\$34,561	S.D.	\$28,856
Del.	\$34,199	Ind.	\$28,838
Minn.	\$34,031	Or.	\$28,734
Va.	\$33,730	Tenn.	\$28,641
Cal.	\$33,415	Iowa	\$28,340
Wash.	\$33,254	N.C.	\$28,071
Alaska	\$33,213	Ariz.	\$27,232
Ill.	\$32,965	Okla.	\$26,719
Wyo.	\$32,433	Ky.	\$26,575
R.I.	\$32,038	Ala.	\$26,505
Pa.	\$31,911	La.	\$26,312
Nev.	\$31,910	S.C.	\$26,144
Mich.	\$31,178	Idaho	\$25,902
Vt.	\$30,888	Utah	\$25,407
Wis.	\$30,685	Mont.	\$25,406
Haw.	\$30,441	N.M.	\$24,995
Neb.	\$30,179	W. Va.	\$24,542
Ohio	\$30,129	Ark.	\$24,384
		Miss.	\$23,466

215. Derived from U.S. Census Bureau, *State and Metropolitan Area Data Book: 2006* at 58, tbl.A-43, available at <http://www.census.gov/compendia/smadb/TableA-43.pdf>.

Figure 32 better shows the degree of variance between the states. It plots the difference between the United States' personal income per capita (\$31,472) and that of each state. The result visually shows how far the highest income states vary from the lowest.²¹⁶

Figure 32: State Variance from
U.S. Personal Income per capita (2003)
(U.S. per capita = 0)

Levels of educational attainment also fluctuate widely. Figure 33²¹⁷ shows the percentage of residents in each state who have graduated from high school and the percentage of those who have obtained at least a bachelor's degree. The states are ranked in ascending order by the percentage with at least a bachelor's degree.

Figure 33: Educational Attainment by State:
Percent of Adults Attaining Degrees, 2005

State	High School Graduate or More	Bachelor's Degree or More	State	High School Graduate or More	Bachelor's Degree or More
W. Va.	82.4	15.1	Pa.	86.3	25.8
Ark.	81.4	17.5	Idaho	89.1	25.9
Ky.	78.9	19.0	Ga.	85.7	26.9
La.	80.2	19.7	N.M.	81.0	27.2

216. *Id.*
217. Derived from U.S. Census Bureau, *Statistical Abstract of the United States: 2007*, at 145, tbl.218 available at <http://www.census.gov/prod/2006pubs/07statab/educ.pdf>. The percentages are of the population 25 years and older.

Figure 33 continued

State	High School Graduate or More	Bachelor's Degree or More	State	High School Graduate or More	Bachelor's Degree or More
Ala.	80.9	19.8	N.D.	90.0	27.2
Tenn.	81.8	21.6	Ariz.	85.7	27.9
Miss.	79.9	21.9	Alaska	91.7	28.7
Wyo.	90.9	22.0	Or.	88.7	29.1
Ind.	87.2	22.5	R.I.	84.0	29.2
Ohio	87.9	22.9	Ill.	87.3	29.5
Nev.	86.6	23.5	Utah	92.7	29.8
Okla.	85.2	24.0	N.Y.	85.6	30.3
S.C.	83.0	24.2	Cal.	80.3	30.4
Me.	87.2	24.2	Kan.	91.4	30.4
Iowa	89.9	24.5	Haw.	87.3	30.6
Mich.	88.5	24.6	Va.	86.1	30.7
Mo.	85.4	24.9	Wash.	91.5	30.9
S.D.	88.5	25.1	N.H.	91.9	32.8
Neb.	89.7	25.1	Minn.	92.7	34.3
Wis.	90.5	25.1	Vt.	90.0	34.4
Tex.	78.2	25.4	Colo.	89.2	35.4
N.C.	84.0	25.4	Md.	87.0	36.3
Mont.	92.1	25.4	N.J.	87.0	36.3
Fla.	86.8	25.5	Mass.	87.5	36.8
Del.	86.8	25.6	Conn.	90.0	36.9
			D.C.	84.0	46.7

One somewhat surprising feature of Figure 33 is that a few states rank relatively low in high school graduation but quite high in the percentage having at least a bachelor's degree. In such states, there appears to be a greater have versus have-not effect: a relatively large number of residents have not finished high school, but another relatively large group has at least a bachelor's degree. California is perhaps the most striking example. It is the thirteenth highest in percentage of residents with bachelor's degrees (30.4%), but is a lowly forty-seventh in percentage having graduated from high school (80.3). Likewise, in the District of Columbia, a whopping 46.7% of its residents have at least a bachelor's degree (the highest rate in the nation), but only 84% (which makes it the thirty-eighth ranked nationally) have a high school diploma. Also falling into this group

are Maryland and New Jersey. Both states—their numbers are identical—rank twenty-sixth in high school graduation but fourth in percentage having a bachelor's degree or higher.

Other states are flatter in educational attainment. Many of the weaker states in educational attainment rank low in both high school and bachelor's degrees. Kentucky is fiftieth in high school graduation percentage and forty-ninth in bachelor's degree percentage. Louisiana ranks forty-eighth in both. Toward the middle of the rankings, Florida ranks twenty-eighth in both categories. Among those at the top, Oregon ranks seventeenth and nineteenth and the state of Washington ranks sixth and tenth.

6. *Intoxicants of choice*

States also differ in some of the social pathologies. Figure 34²¹⁸ shows the current users of illicit drugs as a percentage of the state population; it also shows the prevalence of binge drinking. The data is based on a survey.²¹⁹ One might object that data on drug and alcohol abuse that is dependent upon self-reporting is unreliable because some percentage of the population will lie about drug use, binge drinking, or both. But this is not so much an objection to the data as it is a question about what the data represents. Either all persons in all states have the same rate of false denial on the survey or the rate of false denials varies from state to state. Either possibility reveals something interesting. If the rate of false denial is uniform nationally, then the survey gives accurate information on the *relative* rate of drug usage and binge drinking among the states. If deception is not uniform nationally, then that reveals something about differences in the attitude towards drug usage and binge drinking from state to state. And so, a state with a higher reported prevalence of drug usage or binge drinking, either does in fact have a higher prevalence or the social stigma attached to such behavior in that state is lower.

218. *Id.* "Current users are those persons 12 years old and over who used drugs at least once within month prior to this study." *Id.* Illicit drugs are defined to include "marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants, or prescription-type psychotherapeutics used nonmedically." *Id.* at 129. Binge drinking "is defined as drinking five or more drinks on the same occasion (i.e., at the same time or within a couple of hours of each other) on at least 1 day in the past 30 days." *Id.*

219. *Id.*

Figure 34: Percentage of Population Using Illicit Drugs and Binge Drinking

State	Percent, Illicit Drugs	Alcohol Binge Drinking	State	Percent, Illicit Drugs	Alcohol Binge Drinking
Alaska	11.8	21.5	Wyo.	7.9	25.5
N.M.	11.2	23.0	Fla.	7.8	21.2
R.I.	10.8	27.7	Pa.	7.8	24.7
Vt.	10.4	23.7	Wis.	7.8	31.0
Colo.	10.2	24.7	La.	7.7	24.5
Mass.	10.2	28.4	Ill.	7.6	26.0
N.H.	9.9	25.4	S.C.	7.6	21.2
Mont.	9.7	27.7	Ark.	7.5	20.7
D.C.	9.6	24.9	N.D.	7.5	31.8
Or.	9.5	20.1	Ind.	7.4	21.7
Me.	9.3	21.5	Minn.	7.4	26.0
N.Y.	9.1	23.4	W. Va.	7.4	19.3
Mich.	9.0	24.5	N.C.	7.2	19.2
Cal.	8.9	20.6	Va.	7.2	22.2
Nev.	8.7	21.3	Md.	7.0	19.7
Del.	8.6	22.8	S.D.	7.0	28.6
Ky.	8.6	20.1	Tex.	7.0	23.6
Conn.	8.5	24.3	Ala.	6.9	19.1
Wash.	8.5	21.5	Idaho	6.9	21.3
Okla.	8.4	20.7	Neb.	6.9	26.5
Ariz.	8.3	24.1	N.J.	6.9	20.5
Mo.	8.1	25.1	Utah	6.9	15.0
Ga.	8.0	21.5	Tenn.	6.8	15.2
Haw.	8.0	22.8	Kan.	6.7	24.3
Ohio	7.9	23.6	Iowa	6.5	28.4
			Miss.	5.8	19.9

Interestingly, no obvious commonalities exist among those states grouped either near the top or near the bottom of the list. States with higher percentages of drug use are rich and poor,²²⁰ western and eastern, sparsely populated and thickly settled. Some states with

220. For the personal income per capita by state, see *supra* fig.31. Massachusetts is among the highest states in personal income per capita; New Mexico is among the lowest. Both are near the top in drug usage.

relatively high high-school graduation rates, such as Alaska and Vermont,²²¹ have among the highest drug usage rates. And some states with among the lowest high school graduation rates, such as Mississippi, Tennessee, and Texas,²²² have among the lowest rates of illicit drug use. Differences in drug laws between the states no doubt play a role. In Alaska, no criminal sanction applies to possession of one ounce or less of marijuana.²²³ Amounts up to four ounces are subject only to a misdemeanor punishable by ninety days incarceration and subject to a \$1000 fine.²²⁴ In Texas, which has a lower drug usage figure, possession of two ounces or less is punishable by 180 days incarceration and a \$2000 fine.²²⁵ Possession from two to four ounces increases the punishment to one year incarceration and a \$4000 fine.²²⁶ But stiffer or laxer drug laws do not fully explain the differences. Mississippi, whose drug laws more closely resemble Alaska than Texas, has the lowest rate of illicit drug use. In Mississippi, possession of thirty grams or less of marijuana draws no jail time and only a \$100 to \$250 fine.²²⁷

But even more fundamentally, even if differences in drug usage are driven by differences in state laws, one must ask *why* those drug laws are different. If we have a uniform shared national culture, one would not expect significant differentiation on such matters. But in fact there is a wide degree of variety among the states in drug usage and drug policy. The key point is that different states have chosen to treat drug usage differently. It is more popular in some states *de facto*. It is more tolerated in some states *de jure*. These differences among the states exemplify interstate pluralism.

The picture gets even more interesting when one compares the relative rankings in drug usage to alcohol binge drinking. Figure

221. See *supra* fig.33 for the percentages of the state population age 25 and above who have graduated from high school. In Alaska, 91.7% of the population age 25 and above are high schools graduates, ranking fifth among the states. In Vermont, the percentage is 90%, which puts Vermont in a tie for the tenth highest rate among the states. Those states rank first and fourth, respectively, in illicit drug use.

222. *Id.* Mississippi has a 79.9% high school graduation rate, ranking forty-ninth among the states. Tennessee ranks forty-third with 81.8%. Texas ranks last among the states with only 78.2% of its population having a high school diploma.

223. See NORML, *State By State Laws*, http://www.norml.org/index.cfm?Group_ID=4516 (collecting and summarizing state marijuana laws).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

35²²⁸ ranks the states in order of drug usage, from the state of highest usage (Alaska) to the lowest (Mississippi); it also shows each state's binge drinking rank. Comparing a state's drug usage ranking to its binge drinking ranking produces a matrix of state-to-state intoxication preferences.

Figure 35: Illicit Drug Usage vs. Binge Drinking

State	Illicit Drug Use Rank	Binge Drinking Rank	State	Illicit Drug Use Rank	Binge Drinking Rank
Alaska	1	31	Wyo.	26	11
N.M.	2	26	Pa.	27	16
R.I.	3	7	Wis.	28	2
Vt.	4	22	Fla.	29	38
Colo.	5	15	La.	30	17
Mass.	6	5	S.C.	31	37
N.H.	7	12	Ill.	32	10
Mont.	8	6	Ark.	33	40
D.C.	9	14	N.D.	34	1
Or.	10	44	Ind.	35	30
Me.	11	34	Minn.	36	9
N.Y.	12	25	W. Va.	37	47
Mich.	13	18	Va.	38	29
Cal.	14	41	N.C.	39	48
Nev.	15	35	Md.	40	46
Ky.	16	43	Tex.	41	24
Del.	17	28	S.D.	42	3
Conn.	18	20	Idaho	43	36
Wash.	19	32	Ala.	44	49
Okla.	20	39	Utah	45	51
Ariz.	21	21	N.J.	46	42
Mo.	22	13	Neb.	47	8
Ga.	23	33	Tenn.	48	50
Haw.	24	27	Kan.	49	19
Ohio	25	23	Iowa	50	4
			Miss.	51	45

228. Derived from U.S. Census Bureau, *Statistical Abstract of the United States: 2007*, at 129, tbl.195, available at <http://www.census.gov/prod/2006pubs/07statab/health.pdf>. For details on this data, see *supra* note 218.

Some states rank low in both drug usage and binge drinking, reflecting a disinclination to intoxication in any form. Tennessee, for example, ranks forty-eighth in drug usage and fiftieth in binge drinking. Similarly, Idaho ranks forty-third and thirty-sixth. At the other end of the spectrum, some states rank very high in both categories, reflecting a relatively stronger preference for intoxication regardless of form. Three states may be given as examples: Rhode Island, ranking third and seventh in drug usage and binge drinking; Massachusetts, ranking sixth and fifth; and Montana, ranking eighth and sixth. In contrast to states that have similar ranks for illicit drug use and binge drinking, data from other states reveal a tendency to favor one category of intoxicant over another. The data for Alaska and Oregon show a preference for illicit drugs over alcohol relative to other states.²²⁹ Alaska ranks at the top for illicit drug usage, but only thirty-first in binge drinking. Likewise Oregon ranks tenth in drug usage but forty-fourth in binge drinking. Other states, in converse, have a low ranking in drug usage and a high ranking in binge drinking. The states that jump out as saying no to drugs, but yes to alcohol are Wisconsin (twenty-eighth in drugs, but second in binge drinking), Iowa (fiftieth and fourth), and North and South Dakota (thirty-fourth and first; and forty-second and third, respectively).

We are now able to see a fairly sharp differentiation among the states. Some rank high in both drug usage and binge drinking. Some rank low in both. Some rank high in one category of intoxicant, but low in the other. The drug and alcohol laws in these states may play a role in shaping their usage patterns, but it is also true that those laws are *shaped by* social expectations and mores. The law is both a determinant and by-product of culture. Law and culture have a mutually causal relationship. A state may crack down on drugs, for example, and thereby reform its culture. But the “state” does not decide itself to do this. People within the state have input into the laws of the state, and so the decision to crack down—the law—is driven by the people of the state and their culture. But once enacted, the law then engages the coercive power of government to control behavior and shape society and culture.

229. The preference is relative. In every state, binge drinking is more prevalent than illicit drug use. Thus, in states such as Alaska and Oregon, which rank high on drug usage but low on binge drinking, the “drug preference” I refer to is only in relation to other states.

7. Follow the money: employment data and charitable giving

Using a number of measures, one can determine how people in different states choose to spend their disposable income. The Bureau of Labor Statistics tracks employment in thousands of job classifications.²³⁰ The following data is based on annual employee counts by industry and by state downloaded from the Bureau's Web site.²³¹ I have taken data from the years 2000 to 2005 for each state, averaged them, and computed the totals against that state's populations as of the 2000 Census to derive the number of people employed in certain industries on a per capita basis.

Individuals tend to spend their disposable income in a variety of ways depending on where they live. For example, residents of Vermont and North Dakota use their income to support more employees of diet centers (per capita) than do residents of Alaska or Washington, D.C. Figure 36²³² shows the number of employees in diet and weight reducing centers per 100,000 of population by state.

**Figure 36: Diet and Weight Reduction Center Employees
per 100,000 of Population**

State	Per 100,000 pop.	State	Per 100,000 pop.
Vt.	21.91	N.C.	10.64
N.D.	20.90	Nev.	10.60
N.H.	16.32	S.D.	10.60
Kan.	16.09	Mo.	10.58
Mich.	16.07	Wash.	10.54

230. The classification system is the North American Industry Classification System. For a listing of the industry sectors, see U.S. Census Bureau, *North American Industry Classification System 2007*, <http://www.census.gov/epcd/naics07/index.html>.

231. The data is available at <http://www.bls.gov/data/home.htm> as a flat file from the FTP server. The downloaded files were then loaded into a database for analysis.

232. For the source of this data, see *supra* note 231 and accompanying text. The North American Industry Classification System definition of this industry is as follows:

This U.S. industry comprises establishments primarily engaged in providing nonmedical services to assist clients in attaining or maintaining a desired weight. The sale of weight reduction products, such as food supplements, may be an integral component of the program. These services typically include individual or group counseling, menu and exercise planning, and weight and body measurement monitoring.

U.S. Census Bureau, 2002 NAICS Definitions, <http://www.census.gov/epcd/naics02/def/ND812191.HTM> (industry code 812191).

Figure 36 continued

State	Per 100,000 pop.	State	Per 100,000 pop.
Idaho	15.90	Ky.	10.43
Mont.	15.54	Conn.	10.42
W. Va.	15.14	S.C.	10.40
Neb.	15.07	Va.	9.94
Pa.	14.73	Ark.	9.69
Iowa	14.61	Cal.	8.52
N.J.	14.11	Ala.	8.28
Tenn.	13.77	N.M.	8.19
Utah	13.75	Miss.	8.06
Ohio	13.20	Tex.	7.90
Mass.	13.09	R.I.	7.67
Wis.	12.84	La.	7.06
Minn.	12.66	Okla.	6.93
Ind.	12.10	Ill.	6.73
N.Y.	11.97	Ga.	4.94
Or.	11.65	Del.	4.26
Colo.	11.47	Wyo.	3.36
Fla.	10.77	Alaska	2.97
Md.	10.72	D.C.	1.08
Ariz.	10.68		

By way of contrast, Figure 37²³³ shows the number of people employed in drinking establishments by state on a per capita basis.

233. For the source of this data, see *supra* note 231 and accompanying text. The North American Industry Classification System definition of this industry is as follows: "This industry comprises establishments known as bars, taverns, nightclubs, or drinking places primarily engaged in preparing and serving alcoholic beverages for immediate consumption. These establishments may also provide limited food services." U.S. Census Bureau, 2002 NAICS Definitions, <http://www.census.gov/epcd/naics02/def/ND722410.HTM> (industry code 722410).

Figure 37: Drinking Establishment Employees
per 100,000 of Population

State	Per 100,000 pop.	State	Per 100,000 pop.
Mont.	540.29	La.	142.36
S.D.	395.60	Tex.	135.57
Wis.	385.22	Mo.	135.06
Nev.	376.20	N.J.	133.80
N.D.	361.39	Ariz.	130.54
Minn.	354.18	Wash.	125.51
Wyo.	331.20	Utah	124.55
Neb.	317.15	W. Va.	122.61
Alaska	313.88	Md.	118.98
Iowa	271.43	Del.	107.48
R.I.	251.13	Fla.	104.68
N.M.	236.49	N.Y.	99.00
Mich.	229.27	S.C.	91.51
Colo.	204.66	Me.	78.33
D.C.	197.15	Conn.	77.35
Idaho	189.50	Cal.	74.74
Ohio	184.42	N.C.	69.29
Ill.	175.75	Ky.	65.45
Ind.	172.98	Ga.	57.74
Or.	167.82	Okla.	57.60
Pa.	166.74	Tenn.	45.03
Kan.	160.35	Ala.	39.94
Vt.	150.89	Ark.	38.91
Haw.	144.90	Miss.	26.28
Mass.	142.98	N.H.	16.17

Perhaps not surprisingly, these numbers correspond to the binge drinking rankings of each state. Setting aside Nevada as a tourist state, the top ten states of employment for drinking establishments are all, with the exception of Alaska, within the top eleven states for binge drinking.²³⁴

234. See *supra* fig.35.

Figure 38: Drinking Establishment & Binge Drinking Ranks

State	Drinking Establishment Rank	Binge Drinking Rank
Mont.	1	6
S.D.	2	3
Wis.	3	2
N.D.	4	1
Minn.	5	9
Wyo.	6	11
Ncb.	7	8
Alaska	8	31
Iowa	9	4
R.I.	10	7

Another differentiation detectable among the states is the way in which the elderly are cared for. The choices range from living at home independently, to living with their adult children or other relatives, to living in a residential care institution. These choices are reflective of different family attitudes and needs in different states. Figure 39 shows the number of employees per 100,000 of population engaged in residential elder care.²³⁵ These numbers are obviously closely connected to the relative age of the state

235. For the sources of this data, see *supra* note 231. I have combined the employment figures for two categories here. North American Industry Classification System definitions 623311 (Continuing Care Retirement Communities) and 623312 (Homes for the Elderly). They provide, respectively,

This U.S. industry comprises establishments primarily engaged in providing a range of residential and personal care services with on-site nursing care facilities for (1) the elderly and other persons who are unable to fully care for themselves and/or (2) the elderly and other persons who do not desire to live independently. Individuals live in a variety of residential settings with meals, housekeeping, social, leisure, and other services available to assist residents in daily living. Assisted-living facilities with on-site nursing care facilities are included in this industry.

This U.S. industry comprises establishments primarily engaged in providing residential and personal care services (i.e., without on-site nursing care facilities) for (1) the elderly or other persons who are unable to fully care for themselves and/or (2) the elderly or other persons who do not desire to live independently. The care typically includes room, board, supervision, and assistance in daily living, such as housekeeping services.

U.S. Census Bureau, 2002 NAICS Definitions, <http://www.census.gov/epcd/naics02/def/ND623311.HTM> (industry code 623311); U.S. Census Bureau, 2002 NAICS Definitions, <http://www.census.gov/epcd/naics02/def/ND623312.HTM> (industry code 623312).

population, but they also show residential housing patterns for the elderly.

**Figure 39: Residential Elder Care Employees
per 100,000 of Population**

State	Per 100,000 pop.	State	Per 100,000 pop.
Or.	407.96	N.H.	172.87
D.C.	373.77	Colo.	168.28
Del.	371.04	Conn.	166.40
Me.	366.32	Mont.	164.13
Iowa	347.48	Okla.	160.51
Wash.	345.93	Mo.	160.15
Pa.	339.60	R.I.	158.47
Neb.	337.92	W. Va.	154.37
Kan.	320.11	Tenn.	147.57
N.C.	320.06	Cal.	146.51
Wis.	306.74	Miss.	145.14
Va.	285.52	Ill.	142.17
Md.	259.94	Tex.	134.97
S.D.	259.33	La.	122.45
N.D.	259.17	Utah	122.11
Idaho	247.21	N.M.	121.42
Fla.	234.67	Ala.	112.67
Mich.	226.05	Ga.	109.10
Ohio	225.37	N.Y.	108.01
Ariz.	224.72	Nev.	96.34
S.C.	215.25	Haw.	90.84
Vt.	210.60	Ky.	83.08
Minn.	188.84	Ark.	72.85
Mass.	185.55	Alaska	63.23
Ind.	183.03	Wyo.	44.52
N.J.	181.16		

Figure 40 turns to an entirely different matter: How much do people spend on pets? It ranks the states by the number of people employed in pet and pet supply stores per 100,000 of population.²³⁶

236. See *supra* note 231.

**Figure 40: Pet and Pet Care Employees
per 100,000 of Population**

State	Per 100,000 pop.	State	Per 100,000 pop.
Ariz.	57.76	Mo.	26.18
N.H.	57.47	Me.	25.60
Md.	44.04	Mont.	25.03
Del.	43.35	Ga.	24.26
Colo.	42.43	Neb.	24.22
R.I.	36.15	Vt.	24.09
Minn.	36.01	S.D.	23.34
Ohio	35.69	Tex.	23.33
Conn.	34.53	N.Y.	22.94
Nev.	34.42	Idaho	22.53
Wash.	34.04	N.D.	22.11
Cal.	33.89	N.M.	21.09
Pa.	31.30	N.C.	20.75
Fla.	31.07	Haw.	19.85
Va.	30.96	Tenn.	19.37
Mass.	30.61	Iowa	19.23
Or.	30.42	S.C.	18.56
N.J.	30.16	Ky.	16.36
Mich.	29.48	La.	14.54
Alaska	29.11	Ala.	13.88
Ind.	28.45	Okla.	13.63
Wis.	27.67	W. Va.	13.27
Utah	27.20	Ark.	9.56
Kan.	27.16	Miss.	6.98
Ill.	26.61	Wyo.	6.85
		D.C.	5.10

The states near the top of this list are geographically dispersed. But those near the bottom are clustered in the south—South Carolina, Kentucky, Louisiana, Alabama, West Virginia, Arkansas, and Mississippi are all in the bottom ten. Again, this speaks to the level of disposable income in these states (they tend to be poorer) and also to the spending choices those people make. States with more pet care workers per capita reflect a higher incidence of either pet ownership or investment in pets. Assuming that state residents have finite resources, they then spend less on other priorities. This in turn

reflects on the nature of the culture of the state—animals as pets are more highly valued than in other states.

Finally, using data that the Internal Revenue Service collects, one can assess the relative level of charitable giving among the states. The data is less than perfect because the charitable contributions of those taxpayers who do not file an itemized return cannot be captured. The rates of filing itemized returns, moreover, vary from state to state. Because of this, a state with a lower rate of itemized returns may have an understated rate of charitable giving. Figure 41 presents the data. The states are ranked by the average contribution as a percentage of the average adjusted gross income.²³⁷ Expressing the contributions in relation to adjusted gross income has the effect of controlling for differences in personal income between the states.²³⁸

Figure 41: Charitable Contribution Estimates by State, 2004

State	% of Itemized Returns	Average Contribution as Percent of Average AGI	State	% of Itemized Returns	Average Contribution as Percent of Average AGI
Utah	40.14%	5.17%	Del.	36.40%	2.27%
D.C.	42.33%	3.72%	Mo.	31.02%	2.26%
Ga.	39.00%	3.24%	Ky.	30.53%	2.26%
Ala.	29.90%	3.08%	Ill.	36.20%	2.25%
Md.	49.45%	3.08%	Wash.	36.74%	2.23%
S.C.	32.44%	3.07%	Tex.	25.33%	2.21%
Okla.	29.49%	3.04%	Conn.	44.27%	2.21%
N.C.	36.03%	2.91%	Mont.	30.48%	2.11%

237. The formula is as follows: The total number of tax returns for each state is calculated. Total returns are then divided into the total charitable contribution dollars to produce an average charitable contribution per return. Total returns are also divided into total state adjusted gross income, which produces an average adjusted gross income per return. The average contribution per return is then divided by the average adjusted gross income per return to find the average charitable contribution as a percentage of average adjusted gross income. Thus, $(AGI/R) \div (C/R) = \text{Average Contribution as Percent of Average AGI}$, where AGI is the total adjusted gross income of the state, R is the total number of returns of the state, and C is the total dollars in charitable contributions of the state.

238. Derived from National Center for Charitable Statistics, *Profiles of Individual Charitable Contributions by State (2004)* at 3 (Table: Data on Individual Giving by State, 2004), available at http://nccsdataweb.urban.org/kbfiles/680/CharGiv_04.pdf. The National Center for Charitable Statistics bases its data on the Internal Revenue Service's Historical Table 2 in the Statistics of Income Bulletin. See <http://www.irs.gov/taxstats/article/0,,id=171535,00.html>.

Figure 41 continued

State	% of Itemized Returns	Average Contribution as Percent of Average AGI	State	% of Itemized Returns	Average Contribution as Percent of Average AGI
Idaho	34.89%	2.85%	N.J.	44.89%	2.09%
N.Y.	38.58%	2.84%	Ind.	30.22%	2.08%
Ark.	24.21%	2.76%	Mass.	41.05%	2.04%
Miss.	22.94%	2.69%	Pa.	31.75%	2.04%
Tenn.	25.21%	2.64%	Ohio	34.09%	2.03%
Wyo.	21.77%	2.62%	La.	21.46%	2.02%
Or.	41.50%	2.49%	Iowa	31.58%	2.00%
Cal.	39.59%	2.48%	Haw.	33.27%	2.00%
Minn.	41.66%	2.46%	Wis.	38.10%	1.93%
Va.	40.42%	2.43%	N.M.	26.73%	1.84%
Colo.	42.13%	2.43%	R.I.	37.50%	1.82%
Kan.	30.75%	2.41%	S.D.	18.40%	1.77%
Mich.	36.72%	2.41%	Alaska	24.63%	1.66%
Nev.	37.04%	2.38%	Me.	30.88%	1.60%
Neb.	30.45%	2.38%	N.H.	35.63%	1.56%
Ariz.	37.97%	2.33%	Vt.	29.88%	1.56%
Fla.	31.57%	2.28%	N.D.	18.40%	1.46%
			W. Va.	17.46%	1.37%

8. Assessing the empirical snapshot

This snapshot of the states shows what many would assume intuitively—in culture, conditions, and social values, the states are fundamentally different from one another. Some of the differences, such as abortion and suicide rates, correlate fairly well with legal policy differences in those states. Other differences, such as ethnicity, personal income, age distribution, international immigration rates, and religious identification, are harder to correlate with specific legal rules or policies. The range of such differences is such that it is all but impossible to imagine that they have no effect on the state's culture or its legal choices. It is safe to say that it is demonstrably not true that the states differ little, that they are united by a shared national culture, and that our differences amount to no more than

“the stuff of late-night TV jokes.”²³⁹ The sum of the variations between states—variations in ethnicity, religion, wealth, mental health, educational attainment, charitable giving, age distribution—operate to create within them different cultures and communities. Given the pluralism among the states, conflict of law problems should be addressed with sensitivity to protecting this variety.

By way of summary, I offer here some capsules—caricatures, really—of several states to summarize the degree and magnitude of some of the divergences.

If you live in Montana, your neighbors likely are white²⁴⁰ and are almost certainly not international immigrants.²⁴¹ Although they are more likely than in many states to be Lutherans, there is only a fourteen percent chance that they are.²⁴² They almost certainly have a high school degree,²⁴³ but are likely poorer than citizens of other states.²⁴⁴ They tend to go to bars,²⁴⁵ binge drink, take illicit drugs,²⁴⁶ go to diet centers,²⁴⁷ and then commit suicide.²⁴⁸

If you move to Mississippi, your neighbors are probably unmarried,²⁴⁹ but have children²⁵⁰ (the mother did not have an abortion).²⁵¹ Unlike Montanans, there is a good chance they are African-American,²⁵² Baptists,²⁵³ neither binge drink nor take illicit

239. See *supra* note 139 and accompanying text.

240. Montana has the seventh highest percentage of Whites in its population at 88.99%. See *supra* note 188 and accompanying text (fig.13).

241. Montana has the lowest rate of international immigration. See *supra* fig.29.

242. Montana has the seventh highest percentage of Lutherans, although they represent only 14% of the population. See *supra* fig.20.

243. Montana has the third highest percentage of its population with a high school degree (92.1%). See *supra* fig.33.

244. Montana ranks fifth from the bottom in personal income per capita. See *supra* fig.31.

245. Montana employs the highest number of workers, per capita, in drinking establishments. See *supra* fig.37.

246. Montana ranks sixth in binge drinking and eighth in use of illicit drugs. See *supra* fig.35.

247. Montana ranks seventh in employees per capita working in diet centers. See *supra* fig.36.

248. Montana ranks second in suicide rate. See *supra* fig.7.

249. Mississippi has the sixth lowest marriage rate in the nation. See *supra* fig.1.

250. Mississippi ranks fourth in births to unmarried mothers. See *supra* fig.3. It also has the seventeenth highest fertility rate. See *supra* fig.4.

251. The abortion rate in Mississippi is the fourth lowest nationally. See *supra* fig.5.

252. Mississippi ranks second to the District of Columbia in the percentage of African-Americans in its population. See *supra* fig.13.

drugs,²⁵⁴ and do not frequent bars.²⁵⁵ Their chances of being high school graduates are among the lowest in the nation,²⁵⁶ and they are likely poor.²⁵⁷ They likely give to charities,²⁵⁸ but spend little money on whatever pets they have.²⁵⁹

If you move to New York, the chance of your neighbor having had an abortion goes up dramatically²⁶⁰ and the chances of your neighbor having a live birth goes down.²⁶¹ Your neighbors are ethnically diverse,²⁶² but tend toward Catholicism.²⁶³ They may well be international immigrants²⁶⁴ and may soon move out of the state.²⁶⁵ They give about the same amount of their adjusted gross income to charities as do your former Mississippi neighbors,²⁶⁶ but because they are likely to have more personal income,²⁶⁷ they give more in dollar terms. Their grandmother is less likely to live in a nursing home in the state,²⁶⁸ and they most likely will not commit suicide.²⁶⁹

253. Baptists are 55% of the Mississippi population. *See supra* fig.17. This gives Mississippi the highest percentage of Baptists nationally. *See supra* fig.19.

254. Mississippi ranks fifty-first in illicit drug use and forty-fifth in binge drinking. *See supra* fig.35.

255. On a per capita basis, Mississippi ranks second from the lowest in employees of drinking establishments. *See supra* fig.37.

256. The percentage of the adult population having a high school degree is 79.9%, the third lowest nationally. *See supra* fig.33.

257. The personal income per capita in Mississippi is the lowest in the nation. *See supra* fig.31.

258. Despite the poverty in Mississippi, citizens of that state give the twelfth highest to charities, as measured by the amount given per return as a percentage of the adjusted gross income per return. *See supra* fig.41.

259. Mississippi ranks third from the lowest in employees in the pet care industry on a per capita basis. *See supra* fig.40.

260. New York has the second highest abortion rate in the nation. *See supra* fig.5.

261. New York has the eleventh lowest fertility rate. *See supra* fig.4.

262. The largest single ethnic group in New York, Whites, constitutes only 60.85% of the population, making it the eleventh most diverse state. *See supra* fig.13.

263. New York is the fourth most Catholic state (38%). *See supra* fig.18.

264. New York has the second highest rate of international immigration (per capita) among states. *See supra* fig.29.

265. New York in recent years experienced the third highest loss of population due to internal migration. *See supra* fig.30.

266. New York ranks tenth nationally at 2.84% of adjusted gross income. Mississippi gives at a rate of 2.69%. *See supra* fig.41.

267. Personal income per capita in New York ranks sixth highest. *See supra* fig.31.

268. Employees per capita in residential elder care in New York is the seventh lowest nationally. *See supra* fig.39.

269. New York's suicide rate is the lowest in the nation. *See supra* fig.7.

If you move to Utah, your neighbors are likely to be married,²⁷⁰ Mormon,²⁷¹ and have several kids²⁷²—none of which were born to them before marriage.²⁷³ In fact, there are many kids running around your neighborhood.²⁷⁴ Your neighbors give a significant amount to charity.²⁷⁵ Although almost everyone is a high school graduate,²⁷⁶ they do not necessarily have a lot of money.²⁷⁷ State agencies spend little on mental health,²⁷⁸ perhaps because the state needs to spend the money on primary education. One of your neighbor's parents may have committed suicide.²⁷⁹ You rarely see a drunk on the street.²⁸⁰

IV. CRAFTING CHOICE OF LAW FOR SAME-SEX MARRIAGE TO ACCOMMODATE INTERSTATE PLURALISM

Having identified interstate federalism as a policy, seen how it is deeply embedded in our legal structure, and observed its footprint in state demographics, it remains to be discussed how this policy intersects with same-sex marriage.

A. Interstate Pluralism and the Constitutional Right to Same-Sex Marriage

First, it should be obvious that, subject to one amplification, the argument for interstate pluralism applying to same-sex marriage survives only so long as there is not a recognized constitutional right

270. Utah has the sixth highest marriage rate. It is the fourth highest if one discounts Nevada and Hawaii as states with an unusual number of transient weddings. *See supra* fig.1.

271. Utah is the most homogenous state in religious identification. Fifty-seven percent of its population self-identifies as Mormon. *See supra* fig.17.

272. Utah has the nation's highest fertility rate. *See supra* fig.4.

273. Utah has the lowest rate of births to unmarried women. *See supra* fig.3.

274. Utah has the nation's youngest population. As of the 2000 census, 36.32% of its population was under age 20. *See supra* fig.26.

275. Utah is first in the nation in giving, as measured by the average contributions per return as a percentage of the average adjusted gross income. *See supra* fig.41.

276. Utah and Minnesota are tied for first in high school graduation rate at 92.7%. *See supra* fig.33.

277. Utah ranks sixth lowest in personal income per capita. This is no doubt partly a function of a high percentage of the population not having entered the workforce. *See supra* fig.31.

278. Utah is tied for the second to lowest in mental health expenditures per capita. *See supra* fig.10.

279. Utah's suicide rate is fourteenth highest. *See supra* fig.7.

280. Utah ranks lowest in binge drinking. *See supra* fig.35.

to same-sex marriage. This Article addresses a choice of law problem, and no choice of law problem exists when there is uniform law. The surest way to uniformity is to constitutionalize an area of the law. Finding that only one result is constitutionally permissible is the “nuclear bomb” of uniformity,²⁸¹ far more efficacious in lining up state law than any model act, uniform law, or even public opinion. More fundamentally, interstate pluralism necessarily fails when a state’s attempt to individualize itself violates the Constitution. A state may not seek to define its community in a manner that excludes based on race or religion, for example. In the case of such a discriminatory state law, no one—at least no responsible person—would rise to defend the state’s autonomy as a justification for excluding minorities. Therefore, if the Supreme Court determines that there is a right to same-sex marriage under the U.S. Constitution, the concerns raised here about interstate pluralism become irrelevant.

However, there remains an important amplification to this point. As noted above,²⁸² concern for protecting interstate pluralism has on occasion shaped the interpretation of the scope of underlying constitutional rights. The analysis put forth here has little to say about whether there should be a constitutional right to same-sex marriage. Nevertheless, a fair implication of the analysis is that the Supreme Court should consider the effect that recognizing the right would have on interstate pluralism. Similarly, the proposed federal marriage amendment, which would constitutionalize the legitimacy of only traditional marriages, is equally objectionable as a matter of federalism.²⁸³ As is the case with a Supreme Court decision requiring states to accept same-sex marriage, an amendment to the Constitution that forbade such marriages would impinge on the values of interstate pluralism and impoverish the choices available to individuals.

In the end, this issue resolves itself into whether the pluralism paradigm for same-sex marriage is house-to-house pluralism or state-

281. Cf. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (describing the dormant Commerce Clause as a potential nuclear bomb of state regulation of the internet) (internal quotation marks omitted).

282. See cases cited *supra* notes 105–12, 123–36 and accompanying text.

283. On the proposed federal marriage amendment, see generally Teresa Stanton Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, 2 U. ST. THOMAS L.J. 95 (2004); Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221 (2005).

to-state pluralism.²⁸⁴ Is it enough to protect the interests of same-sex couples that they are allowed to marry and be recognized as married in some states, or instead is it necessary that they be marriageable and recognized as wed in all? The former option preserves the role of the states to define and regulate marriage, while giving some options to same-sex couples in those states that either grant same-sex marriages or recognize those granted elsewhere. The main argument in this Article is that as a matter of choice of law—until such time as a constitutional right to same-sex marriage may be recognized—the better conception is community or state-to-state pluralism. Whether the concerns of interstate pluralism are weighty enough to also be decisive in the context of substantive due process or equal protection, I shall not assay.²⁸⁵

As to the choice of law problems of same-sex marriage, it is inadequate to dismiss arguments against recognition of sister-state same-sex marriages as reactionary and discriminatory. As things currently stand, there is no constitutional right to same-sex marriage and so it is incoherent to describe a state's application of its own valid law against out-of-state same-sex marriages as invidious. More practically, the choice of law problems of same-sex marriage now exist. They do not disappear by predicting—even if it is an accurate prediction—that one day there will be a *Loving v. Virginia*²⁸⁶ for same-sex marriage. Stating that one day everyone will have a right to same-sex marriage in every state neither solves the issue nor makes the present choice of law problems disappear.

An alternative exists to a top-down resolution of the same-sex marriage issue by the Supreme Court or Congress. The other pathway to uniformity and away from choice of law problems is voluntary coalescence of the states. That is, over time, each state may come to the same conclusion as to same-sex marriage and so both the constitutional and choice of law issues will disappear. In analyzing choice of law problems, it is often forgotten that there are

284. See *supra* notes 113–36 and accompanying text.

285. See generally, Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113 (2005) (arguing against recognizing a right to same-sex marriage because of “strong prudential reasons for federal courts to hesitate in the context of same-sex marriage, not least because the issue of same-sex marriage is under intense discussion at the local, state, and national levels”).

286. 388 U.S. 1 (1967) (holding that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on basis of racial classification violate equal protection and due process clauses of Fourteenth Amendment).

very few legal issues that permanently divide the states. Many issues at one time did, but over time there is a tendency toward coalescence and away from individualism. The robust interstate pluralism described in this Article should not be overstated. It has existed, it now exists, and it will continue to exist. But while the degree of differentiation among the states may be more or less constant, it does not follow that the subject matter of the differences is immutable. At one time, the states were divided on matters such as the rule of non-recovery by a gratuitous guest for his automotive host's negligent driving,²⁸⁷ whether a tort plaintiff's negligence resulted in a total bar to or a mere reduction of recovery,²⁸⁸ whether one could recover for emotional distress absent a physical intrusion upon one's person,²⁸⁹ and whether privity of contract was required for recovery against a manufacturer of consumer goods.²⁹⁰ These matters no longer concern us; the law is basically the same in all states. But new vectors of divergence have arisen to take their place. Same-sex marriage is merely the current rock that we are rolling, like Sisyphus, up the hill of federalism. The enterprise of choice of law is best understood not as an effort to solve intractable and permanent problems of difference, but instead as an interim solution to transient differences that seeks to accommodate the interests of the states and of the parties until such time as uniformity is achieved.

This process has played out previously in the context of marriage's legal sibling, divorce. In the 1950s, some states, such as Nevada, began loosening divorce laws. In *Williams v. North Carolina (Williams I)*,²⁹¹ the Supreme Court upheld Nevada's power to grant a divorce binding in other states to persons previously domiciled elsewhere so long as the party seeking the divorce had acquired a new domicile in Nevada.²⁹² In a subsequent case, *Williams v. North Carolina (Williams II)*,²⁹³ the Court clarified that the state of prior matrimonial domicile could re-examine the Nevada

287. See, e.g., *Tooker v. Lopez*, 294 N.E.2d 394 (N.Y. 1969).

288. See, e.g., *Sabell v. Pac. Intermountain Express Co.*, 536 P.2d 1160, 1163 (Colo. App. 1975).

289. See, e.g., *Bass v. Nooney Co.*, 646 S.W.2d 765, 768-73 (Mo. 1983).

290. See, e.g., *Chysky v. Drake Bros. Co.*, 139 N.E. 576 (N.Y. 1923).

291. 317 U.S. 287 (1942).

292. *Id.* at 298-99 ("[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.").

293. 325 U.S. 226 (1945).

finding of domicile and refuse to recognize the Nevada divorce if it found that true domicile had not been established in Nevada.²⁹⁴ The result was that a marriage lawfully rendered in one state could be undone by one of the marital partners' relocation to another state (*Williams I*).²⁹⁵ A second result was that a person could be legally divorced in Nevada but held to be legally wed in another state (*Williams II*).²⁹⁶

To those worried about the lack of interstate recognition of same-sex marriages, this should sound familiar. In fact, we survived the transition from fault to no-fault divorce, enduring the lack of uniformity and uncertainty it produced. Today, apart from Louisiana's covenant marriage system,²⁹⁷ we have relatively uniform divorce laws. It no longer makes sense to run off for a quickie Nevada divorce. But the process by which we arrived at this state of uniformity was voluntary coalescence toward a perceived superior scheme of no-fault divorce. And it is fortunate that this uniformity was voluntarily achieved rather than constitutionally compelled.²⁹⁸ Today, some question the wisdom of the no-fault divorce revolution.²⁹⁹ Should social policy re-shift away from no-fault divorce, states would be free to make that choice. Had the Supreme Court recognized a constitutional right to no-fault divorce, we would be stuck with that choice regardless of later rethinking of marital policy. The other advantage of voluntary coalescence over constitutionalization is that a voluntarily adopted law is more meaningful than a law that a state is required to adopt. To be sure, the legal force of a law is the same whether it is enacted freely or under compulsion. But the expressive purpose of law—its role in speaking the justice the community perceives—is lost when it is compelled.

294. *Id.* at 230 ("The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State.").

295. See 317 U.S. 287.

296. See 325 U.S. at 231.

297. See generally Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 LA. L. REV. 605 (2005).

298. The Court once flirted with but never recognized a constitutional right to divorce. See *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971) (holding that due process requires a state to entertain divorce actions by indigent petitioners); see generally Matthew J. Astle, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 FAM. L.Q. 733, 744 (2004).

299. See, e.g., Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL. RTS. J. 203, 225 (2006).

B. Same-Sex Marriage and Choice of Law

For the present we must live with the choice of law problems that same-sex marriage produces. How can we best accommodate this difference pending its resolution substantively? Fortunately, the best accommodation is reflected fairly well in existing law.

As noted above, conflict of laws problems involving judgments are traditionally treated very differently from choice of law problems.³⁰⁰ This dichotomy achieves the appropriate balance between the concerns of interstate pluralism and the interests of the parties to the marriage. Taking judgments first,³⁰¹ traditional law holds that a state must enforce a sister-state judgment regardless of its odiousness to local public policy.³⁰² This would presumably require a state to recognize a judgment that recognized a same-sex marriage formed in another state (for example, a judgment awarding loss of consortium damages to a same-sex spouse for injuries to his or her same-sex marriage partner). The Defense of Marriage Act³⁰³ would change that result, making recognition of the judgment optional, not mandatory. But from the standpoint of interstate pluralism, recognition of the judgment would not unduly intrude upon the forum state's ability to self-regulate and establish itself as a community.³⁰⁴ As noted above,³⁰⁵ judgments pose less of a threat to interstate pluralism because they require only a one-time (for the single particular case under consideration) yielding by the forum state to the law of another state. A judgment is required to be recognized largely because of the judicial investment in producing the judgment, not because of the superior interests of the rendering state. And because the claim for enforcement does not rest upon a balancing of substantive interests (but instead upon the procedural value of protecting investments in litigation) the enforcing state's claim for self-protection of its own interests is less relevant. To the extent interests of the states matter, a refusal to recognize a

300. See *supra* notes 27–31 and accompanying text.

301. It should be clear that a marriage is not a judgment. See Rensberger, *supra* note 11, at 421–24.

302. See *supra* notes 30–55 and accompanying text.

303. See *supra* notes 7–18 and accompanying text.

304. I have argued elsewhere that DOMA is not unconstitutional. See Rensberger, *supra* note 11. I still believe DOMA to be within Congress' powers. The point here, however, is that DOMA may be unwise, not invalid, as applied to judgments.

305. See *supra* notes 56–62 and accompanying text.

judgment based on a same-sex marriage holds the potential for intruding into the self-definition of the state that created the marriage, at least where the forum is not significantly connected with the parties. Finally, the concern about judgment debtors fleeing the jurisdiction in order to avoid liabilities applies to judgments involving same-sex marriages as much as to any other. Thus, all of the reasons that require recognition of sister-state judgments generally apply also to judgments that are predicated upon a same-sex marriage existing.

But as to simple choice of law, interstate pluralism argues for a broader application of forum law. The definition of marriage is one of the fundamental orderings of any society. A choice of law rule that requires the application of the law of the place of celebration of the marriage without exception would necessarily intrude upon the self-definition of the forum. This is most obviously the case when the parties to the marriage in question have significant contacts with the forum. If, for example, the parties were domiciled in the forum at the time of the marriage, allowing them to evade forum law by going temporarily to another state to wed would sanction blatant evasion of forum law.³⁰⁶ A somewhat harder case is presented when the parties' only connection to the forum arose after their marriage or where they have little connection at all to the forum.³⁰⁷ In this context, interstate pluralism pulls both ways. The forum will subordinate its own policy against same-sex marriage if it recognizes the marriage. But failing to recognize the marriage appears to undermine the self-definition of the state that created the same-sex marriage.

The usual approach to choice of law under modern methods is to solve the problem by looking for tangible outcomes that flow from the application of one or another legal rule. For same-sex marriages, this approach would identify the material consequences that would occur as a result of the forum recognizing a foreign same-sex marriage. Once the consequences are identified, one then asks in

306. This is the position of the Second Restatement of Conflicts. Section 283(2) provides that a marriage which is valid where celebrated will be "recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 (1971).

307. For the court to have jurisdiction, it necessarily will have some contacts with the parties (at least if one sets aside jurisdiction based on service of process within the borders of the state).

which of the two states will the consequences be felt. If a state is being asked to recognize a foreign same-sex marriage because an issue of intestate succession turns upon whether there was a marriage, one identifies the state of domicile of the parties and of others who gain or lose if heirship is found to exist in a same-sex putative spouse. If the underlying question is whether a same-sex marriage created a marital property interest in the other's property, one asks where are the benefited and burdened parties and where is the property.

But in the context of same-sex marriage, deciding applicable law by reference to only tangible outcomes and consequentialist reasoning is too narrow. The debate over same-sex marriage is, I believe, impoverished by focusing solely on the material benefits of marriage. To be sure, proponents of same-sex marriage make access to those benefits—insurance coverage, joint income tax filing, intestacy, and the like—a part of the case for same-sex marriage.³⁰⁸ But many of those concerns can be handled consensually (wills and contracts to will, for example, can take care of the intestacy problem). Benefits that cannot be created consensually (such as the ability to file joint tax returns) can be created through a civil union scheme. What marriage uniquely gives is an expression of state approval of a relationship.³⁰⁹ And this too has been a basis of arguing for same-sex marriages.³¹⁰ It would seem uncontroversial that states can rationally opt to create same-sex marriages in order to grant approval. It is uncontested that this is one of the bases for states creating marriages of any type.³¹¹ Disapproval should also be recognized—at least until the Supreme Court concludes that this is an impermissible sentiment—as a legitimate basis for not recognizing same-sex marriages. Unlike most legal arrangements, the symbolic may be more important in same-sex marriage than the material.

308. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003) (listing material benefits).

309. See Sunstein, *supra* note 285 (noting material benefits and expressive function as the two consequences of marriage).

310. See, e.g., Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1598 (2006) ("Arguably more important [than tangible benefits], however, is the symbolic significance of marriage for same-sex couples.").

311. See, e.g., Sunstein, *supra* note 285, at 2093 ("[T]he official institution of marriage entails a certain public legitimation and endorsement.").

Choice of law doctrine accounts for such conflicts over values under the heading of public policy. A state will not apply another state's law—even if the normal choice of law rule points in that direction—if the other state's law is contrary to its own public policy. This has long been the law generally and in particular for recognition of marriages.³¹² It should be noted that in a case in which the court invokes the public policy rule, the proper disposition is a dismissal, not a decision on the merits applying local law. That is, if the state lacks the local consequences that would call for the application of its law—the parties and things affected are not tied to the state—it applies neither its law, because it is simply inapplicable, nor the law of the other state, because it is repugnant. The parties are left to find another state that can entertain their action and in which the underlying law (same-sex marriage in this case) is not repugnant.³¹³

Employing this type of public policy analysis would allow states that find same-sex marriages repugnant to not entertain suits based upon them. This protects those states' interests in having their law serve expressive ends. At the same time, states that allow same-sex marriage would be utilized as forums to enforce rights based on the same-sex marriage. The parties to the same-sex marriage would find vindication,³¹⁴ but not at the expense of states that disfavor same-sex marriages. This accommodation serves the interests of same-sex marriage states, states that reject same-sex marriages, and parties to such marriages.

The scheme would be improved by one last step. Some incidents of marriage are mirrored in other private arrangements. Others are unique to marriage. For example, a surviving spouse's right to a forced share of his or her dead spouse's property is an arrangement that can be duplicated outside of marriage by the parties entering into a contract to will.³¹⁵ On the other hand, people cannot privately

312. See *supra* note 141 and accompanying text.

313. See Rensberger, *supra* note 11, at 441.

314. This assumes that the parties could find a state amenable to entertaining a same-sex marriage-based lawsuit that also has jurisdiction over the defendant. This should not usually be a problem. Same-sex marriages in which the celebrants long resided in the same-sex marriage state are the ones most deserving of protection. And the longer and more substantial the connections the same-sex married parties have to a same-sex marriage state, the more likely it is that the defendant will also have ties there and be subject to jurisdiction.

315. See Jason Thomas King, *Lifetime Remedies for Breach of a Contract to Make a Will*, 50 S.C. L. REV. 965 (1999); John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEV. L.J. 560, 563 (2003).

agree to have the right to file a joint income tax return. The more that the particular incident under litigation is unique to marriage, the greater the concern of a state opposed to same-sex marriage of endorsing and approving a same-sex marriage. On the other hand, when the incident has a counterpart that exists outside of marriage, the forum looks less as if it is treating a same-sex couple as married by recognizing the incident, since unmarried persons might also enjoy the same arrangement. Thus, the choice of law approach should be for a forum that has a strong policy against same-sex marriage to decline to apply foreign law when to do so treats the same-sex persons as if married in light of the particular incident of marriage that is under consideration.³¹⁶

Finally, recognizing that same-sex marriage is more about values and symbols of those values leads to the somewhat surprising conclusion that the interests underlying same-sex marriage may actually be advanced more significantly by a choice of law rule allowing each state to recognize or not recognize a same-sex marriage on the basis of its own policy—a general rule of reference to forum law. As suggested above, one of the pathways to individual fulfillment is participation in a community.³¹⁷ For this function to work, however, the community must be voluntarily self-defining. If a same-sex marriage is to be a meaningful expression of social approval and endorsement, recognition of the marriage cannot be forced upon the society. Compelling recognition of a same-sex marriage under the Full Faith and Credit Clause would certainly fail to fulfill the endorsing function. So too would a grudging acceptance under choice of law rules. The simple truth is that a same-sex marriage in Massachusetts is more meaningful than one begrudgingly accepted in, say, Utah. The fractionalization of marriage laws in the United States, under this view, is not a bad thing. It is simply another manifestation of our robust interstate pluralism.

316. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 107–08 (2006). Koppelman argues that when a particular incident of marriage can also be attained under a state's law by unmarried parties the state can have no legitimate ground in public policy against recognizing the incident in a same-sex couple who happen to be married under foreign law.

317. See *supra* notes 111–136 and accompanying text.

C. Conclusion: The Cautionary Tale of Slavery, Dred Scott, and the Civil War

The conflicts of law problems posed by same-sex marriage are profound precisely because the underlying issue concerns values. Few conflict of laws problems are similarly value-laden. There is a historical precedent, which shares several similarities to the problems created by same-sex marriage, but recalling it gives little comfort.

Imagine an arrangement that legally binds two people in a relationship that is intended to last potentially throughout one's life. The state creating the relationship believes it to be healthy, beneficial, and appropriate. Other states find this relationship to be offensive and against their strong public policy. This is an apt description of same-sex marriage. It is equally a description of slavery. The closeness of the analogy suggests that an analysis of interstate recognition of same-sex marriage could profit by consulting the history of interstate recognition of slavery.

I am not suggesting that same-sex marriage is a form of bondage that is the moral equivalent of slavery; I am suggesting that the conflict of laws problems raised by same-sex marriage are eerily familiar. A slave is taken from Missouri, a slave state, to Illinois, a free state, where he and his master sojourn for a time. When the master desires to return, is the slave emancipated under Illinois law or still a chattel under Missouri law? Illinois finds slavery odious. Missouri regards it as a legal relationship deserving of enduring protection. One's property rights should not cease, it is argued, as one crosses state lines. With a few strokes of the pen, this hypothetical is easily converted to a same-sex married couple traveling to another state that does not recognize same-sex marriages. The relationship is honored by one state and disfavored by another. The argument that rights with regards to another person should not change as one crosses state lines reappears.

I have suggested above that a lack of uniformity among the states is not troubling and is in fact beneficial. The example of slavery serves to remind that there are limitations to the benefits of interstate pluralism. In addressing Congress in 1862, Abraham Lincoln captured the conflict of laws problems created by slavery and geography. These problems are equally applicable to same-sex marriages:

A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. "One generation passeth away, and another cometh: but the earth abideth forever." It is of the first importance to duly consider and estimate this ever-enduring part. That portion of the earth's surface which is owned and inhabited by the people of the United States is well adapted to be the home of one national family, and is not well adapted for two or more. . . . Its vast extent and its variety of climate and production are of advantage in this age for one people, whatever they might have been in former ages. Steam, telegraphs, and intelligence have brought these to be an advantageous combination for one united people.

. . . . There is no line, straight or crooked, suitable for a national boundary upon which to divide. Trace through, from east to west, upon the line between the free and the slave country, and we shall find a little more than one-third of its length are rivers, easy to be crossed, and populated, or soon to be populated, thickly upon both sides: while nearly all its remaining length are merely surveyors' lines, over which people may walk back and forth without any consciousness of its presence.³¹⁸

It remains to be seen whether the usual process of coalescence by the states toward a uniform legal standard as to gender and marriage can be achieved. Coalescence is generally achieved; few areas are intractable. With slavery, the potential for a political solution and coalescence was undermined by *Dred Scott v. Sandford*.³¹⁹ Prior to the time of *Dred Scott*, the frequent result for the slave taken by his master to a free state for a time was emancipation; even slave states often reached this result.³²⁰ In the years leading to *Dred Scott*, southern courts began to retrench, denying emancipation to slaves that had sojourned.³²¹ Although within its power to give a federal

318. Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *reprinted in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897*, at 126, 133-34 (Government Printing Office 1897).

319. 60 U.S. 393 (1857).

320. In the cases of sojourning slaves, many state courts, north and south, relied on Lord Mansfield's opinion in *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.), that a slave acquires freedom by being brought voluntarily into a free state. See Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393, 414 (2007); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 114 (2007).

321. See Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1342-45 (1997).

answer to this question³²² under *Swift v. Tyson*,³²³ the Court declined to do so, holding that the question of emancipation was a matter of state law.³²⁴ Because of the retrenchment of the southern states, *Dred Scott* limited the emancipation of sojourning slaves. This, along with its holding that slavery could not be forbidden in federal territories³²⁵ (overturning the Missouri compromise), lead to the regional balkanization of politics that set the stage for the Civil War.

The *Dred Scott* of same-sex marriage would be a Supreme Court decision requiring non-same-sex-marriage states to recognize same-sex marriages granted in other states. Although a political rupture of the scale that preceded the Civil War is unlikely to result, the cautionary tale is there for us to read. We live in such times, and the course toward a conclusion to this debate is hard to discern. The analogy of slavery argues for moderation all around. Until such time as the issue of same-sex marriage is resolved socially and legally, it exists to divide us. But we need not fear differentiation. It is integral to our political structure and is in many ways beneficial. What must be avoided is the hyperbole of extremists—"fire-eaters," as they were called in the run up to the Civil War—on either side of the issue.

322. See Austin Allen, *Rethinking Dred Scott: New Context For an Old Case*, 82 CHL.-KENT L. REV. 141, 166–67 (2007).

323. 41 U.S. 1, 18 (1842).

324. See *Dred Scott*, 60 U.S. at 452.

325. See *id.*