

EXIT, VOICE, AND LOYALTY AS FEDERALISM STRATEGIES: LESSONS FROM THE SAME-SEX MARRIAGE DEBATE

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Do people really *care* about their states? Should federalism scholars care if they care? Much of the current literature assumes a negative answer to the first question. Edward Rubin's and Malcolm Feeley's influential works, for example, has long insisted that the states are basically lines on a map—they are not different from one another in ways that matter to constitutional law, and no one feels any particular attachment to them.¹ Similarly, Jessica Bulman-Pozen states a common view in noting that “[t]oday, individuals from Montana to Mississippi to Maine can eat at the same restaurant chains, shop at the same stores, read the same publications, and listen to the same music.”² The inference, again, is that because many Americans have similar experiences regardless of geography, states are just places where Americans happen to live.³

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1. See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: NATIONAL IDENTITY AND TRAGIC COMPROMISE* (2008); Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903 (1994).

2. Jessica Bulman-Pozen, *Partisan Federalism*, 127 *HARV. L. REV.* 1077, 1110 (2014).

3. See ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE*

The second question produces more disagreement. Dean Rubin and Professor Feeley would answer “yes”; for them, the death of meaningful state differentiation and identity is a compelling reason to abandon federalism altogether as a constitutional principle.⁴ Other scholars, like my dear friend Heather Gerken, would say “no.”⁵ The importance of the states, for this group, is that they slice the national electorate in different ways, so that in at least some jurisdictions, national minorities will find themselves in the majority. This gives minorities a chance to actually exercise power—to “dissent by deciding” from the majority view, giving life and institutional form to policy alternatives that, at the national level, they would have only the right to *talk* about.⁶ But it does not matter whether a state’s inhabitants feel any particular attachment to that state; the important thing is that the correlation of political forces in some states is different from that in others, so that different jurisdictions are electing different sorts of people.⁷

My own view is that the answer to the second question is, “Yes, it matters whether people care about their states.” (My answer to the first one is, “I hope so, but it’s really hard to prove.”⁸) This Essay explores whether state attachments

PROTECTION OF FUNDAMENTAL RIGHTS 16–30 (2009) (concluding that “the tectonic plates of culture are shifting . . . bringing the states closer together”); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 53–79 (2005) (rejecting notions of “romantic subnationalism”).

4. See FEELEY & RUBIN, *supra* note 1, at 150–53.

5. See, e.g., Heather K. Gerken, *Foreword, Federalism All the Way Down*, 124 HARV. L. REV. 4, 16–17 (2010).

6. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); see also Michael W. McConnell, *Federalism: Evaluating the Founder’s Design*, 54 U. CHI. L. REV. 1484 (1987) (book review) (observing that decentralized power can satisfy a larger proportion of citizens’ policy preferences, if the persons holding those preferences are unevenly distributed geographically).

7. See Bulman-Pozen, *supra* note 2, at 1116–22 (arguing that individuals identify with states only instrumentally, as a means of vindicating their national partisan commitments).

8. See generally Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* (Mar. 31, 2014 draft) (unpublished manuscript). One of my *Colorado Law Review* editors helpfully reports that she strongly identifies with Colorado “and couldn’t imagine living in, say, Arizona or Utah”—but more systematic survey evidence is hard to come by. This research is not impossible to perform. Considerable survey data exists, for instance, on whether Europeans identify primarily with their Member

matter through the lens of Albert Hirschman's seminal work, "Exit, Voice, and Loyalty."⁹ Professor Hirschman argued that people, in their roles as both consumers and citizens, can respond to conditions they do not like in at least three different ways. They can *exit*, by switching to another product or moving to another jurisdiction; they can exercise *voice*, by complaining about the product's quality or the government's policy and perhaps offering constructive suggestions; or they can display *loyalty*, sticking with the product or their home jurisdiction despite their discontent.¹⁰ Both Hirschman and the extensive literature based on his work have a lot to say about exit and voice, but give relatively little attention to loyalty. This Essay aims to take a small step toward filling that gap.

The continuing national controversy over same-sex marriage provides a valuable case study. That controversy has played out in a particularly federalist fashion. The gay-rights movement's critical victories have come at the state level, where a considerable number of jurisdictions have adopted specific anti-discrimination provisions and have recognized same-sex marriages.¹¹ At the same time, many jurisdictions have explicitly rejected same-sex unions.¹² The movement's signature *national* win, the Supreme Court's invalidation of Section 3 of the federal Defense of Marriage Act (DOMA)¹³ in *United States v. Windsor* in 2013,¹⁴ removed a federal *constraint* on state decisions to recognize same-sex marriage; the decision itself did not create any federal marriage rights.¹⁵

States or with the European Union as a whole. See, e.g., THOMAS RISSE, A COMMUNITY OF EUROPEANS? TRANSNATIONAL IDENTITIES AND PUBLIC SPHERES (2010) (collecting extensive survey evidence).

9. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

10. See *id.* at 36–38.

11. See *infra* notes 26–28 and accompanying text.

12. See *infra* note 30.

13. Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2014)).

14. 133 S. Ct. 2675 (2013). The movement's other national success, of course, was the elimination of the "don't ask, don't tell" policy in the military. See *Obama Certifies End of Military's Gay Ban*, NBCNEWS.COM (July 22, 2011), http://www.nbcnews.com/id/43859711/ns/us_news-life/#.U1CwmPldVmc. That victory occurred in a context in which the states effectively do not exist, except in their secondary role with respect to the reserves.

15. It may be that, in *Windsor's* wake, the federal government will affirmatively recognize same-sex unions in contexts where state law would not so require. But the Court's actual holding in *Windsor* does not mandate that step.

And, as I discuss further below, Justice Kennedy's majority opinion in *Windsor* eschewed a rationale based on stand-alone federal rights of equal protection or due process in favor of a theory grounded fundamentally in the relevant *state's* decision to recognize Edith Windsor's marriage.¹⁶

I am less focused here on *Windsor's* legal rationale than on the structural dynamics of our federal system as they bear on same-sex marriage.¹⁷ Obviously, gay couples can and do exit particular jurisdictions that are not congenial to recognizing and protecting their rights. Same-sex marriage advocates may also exercise voice, by pushing for marriage equality in their home jurisdictions and, where they find themselves in the local majority, enacting laws recognizing same-sex marriage. I argue here that the *combination* of exit and voice has been particularly important in the same-sex marriage debate. It seems likely that, for many heterosexuals, particularly those of a traditionalist bent, same-sex marriage has to be seen to be believed in—that is, people who find the abstract concept of same-sex marriage unfamiliar and off-putting may be more likely to change their mind when they see same-sex couples practicing a domestic life that, well, looks just like a family. The potential for exit in our system—more importantly, the mere fact that different jurisdictions can adopt different policies—is what generates those real-world examples. And those examples, in turn, render same-sex marriage advocates' voice even more powerful in those jurisdictions that are still on the fence.

I am particularly interested, however, in Professor Hirschman's neglected third concept: loyalty. We need to ask at least three questions about loyalty. First, what precisely does it entail? Second, where does it come from and why does it arise?

See generally 133 S. Ct. at 2675.

16. *See id.* at 2692 (“The State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.”).

17. For a doctrinal account, *see* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2013 CATO SUP. CT. REV. 117 (2013), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5845&context=faculty_scholarship (identifying the multiple ways in which Justice Kennedy relied upon federalism in *Windsor*).

And third, how does it interact with the other two options, exit and voice? My hope is that this exploration of loyalty can shed some light on the question with which I began: Does it matter whether people care about—i.e., feel loyalty to—their states? Loyalty, after all, is the only one of Hirschman's categories that is not captured by the "different electoral slice" theories of Professor Gerken and others. If loyalty turns out to be intimately bound up with exit and voice, as I believe it is, then scholars will need to pay closer attention to the cultural underpinnings of federalism. States matter for more than simply how they divide up the political map.

Part I of this Essay discusses exit and voice as they bear on the same-sex marriage controversy. Part II turns to loyalty. A brief conclusion follows.

I. EXIT AND VOICE IN THE SAME-SEX MARRIAGE DEBATE

Individual states began to talk about legalizing same-sex marriage in the 1990s. The initial moves came through state supreme court interpretations of state constitutions. In 1993, Hawaii's supreme court signaled that it was ready to recognize same-sex couples' right to marry under the state's equal protection clause,¹⁸ prompting reactions in both the state legislature and in Congress. Citing the Hawaii decision, Congress enacted DOMA three years later.¹⁹ DOMA did two things. Section 2 clarified that no state would be required to recognize same-sex marriages performed in other states.²⁰ Section 3 amended the Dictionary Act—the portion of Title I of the U.S. Code that defines the meaning of terms that occur in acts of Congress and other federal legal materials.²¹ Section 3

18. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that the state's refusal to issue marriage licenses to same-sex couples was subject to strict scrutiny under the state's Equal Protection Clause and remanding to the trial court for application of that standard).

19. H.R. REP. NO. 104-664, at 4–11 (1996), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf>.

20. 28 U.S.C. § 1738C (2014) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

21. *See id.* §§ 1–8.

provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.²²

In so providing, DOMA amended more than one thousand federal statutes that include the words “marriage” or “spouse,” and it altered the administration of innumerable federal regulations and programs.²³ Prior to DOMA, federal law had—absent specific exceptions tied to specific regulatory circumstances—simply taken couples to be married if they were married under state law.²⁴

Initial responses to same-sex unions at the state level were equally negative. By 2000, nearly forty states (including Hawaii) banned same-sex marriage by statute or state constitutional amendment, although a number of them conferred some degree of legal recognition on same-sex unions.²⁵ But beginning in 2003, state supreme courts in Massachusetts, California, Connecticut, Iowa, New Jersey, and New Mexico recognized a state constitutional right to marry for same-sex couples.²⁶ Vermont was the first state to recognize same-sex marriage by legislative enactment in 2009; by 2014, Vermont would be followed by New Hampshire, the District of Columbia, New York, Delaware, Minnesota, Rhode Island, Hawaii, and Illinois.²⁷ Popular referendums in Maryland,

22. *Id.* § 7.

23. See *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013).

24. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 580–81 (1956).

25. *17 States with Legal Gay Marriage and 33 States with Same-Sex Marriage Bans*, PROCON.ORG (Jan. 6, 2014, 10:33 AM), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857#>.

26. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 43 Cal. 4th 757 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Lewis v. Harris*, 188 N.J. 415, 458 (2006) (holding that restriction of same sex marriage violates the New Jersey state constitution); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

27. 13 DEL. CODE § 101 (2013); D.C. CODE § 46-401 (2014); HAW. REV. STAT. §

Maine, and Washington legalized same-sex marriage in 2012 and 2013.²⁸ At present, same-sex marriage is legal in seventeen states and prohibited in thirty-three states.²⁹ Notwithstanding the considerable number of states that have affirmatively rejected same-sex marriage (many of them recently),³⁰ public opinion analysis strongly suggests that the trend toward legalization will continue.³¹ But, as many wise people have pointed out, it's tough to make predictions—especially about the future.³²

The important point for present purposes is that we currently see both (a) a classic federalist patchwork of laws on

572-1.8 (2013); 750 ILL. COMP. STAT. 80/10 (2014); N.H. REV. STAT. ANN. § 457:1-a (2014); N.Y. DOM. REL. LAW § 13 (2014); MINN. STAT. § 517.08 (2014); R.I. GEN. LAWS § 15-1-1 (2013); 15 VT. STAT. ANN. § 8 (2013). Legislation also followed in some states that had initially recognized same-sex marriage rights by judicial decision. *See, e.g.*, CONN. GEN. STAT. § 46b-35b (2014).

28. *See* ME. REV. STAT., tit. 19-A § 650-A (2014); MD. CODE ANN., FAM. LAW § 2-201 (2014); WASH. REV. CODE § 26.04.010 (2014).

29. PROCON.ORG, *supra* note 25.

30. ALA. CONST. art. I, § 36.03; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4; IDAHO CONST. art. III, § 28; KAN CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. article I, § 29; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXII, § 9; TEX. CONST. art. I, § 32; TENN. CONST. art. XI, § 18; VA. CONST. art. I, § 15-A; IND. CODE § 31-11-1-1 (2014); W. VA. CODE § 48-2-101 (2014).

31. *See, e.g.*, Robin Fretwell Wilson, *A Marriage of Necessity: Religious Liberty Protections in Same-Sex Marriage Laws*, 64 CASE W. RES. L. REV. (forthcoming 2014) (collecting data). Ace pollster Nate Silver concludes:

[E]ven if one prudently assumes that support for same-sex marriage is increasing at a linear rather than accelerated pace, and that same-sex marriage will not perform quite as well at the ballot booth as in national polls of all adults, the steady increase in support is soon likely to outweigh all other factors. In fact, even if the Supreme Court decision or some other contingency freezes opinion among current voters, support for same-sex marriage would continue to increase based on generational turnover, probably enough that it would narrowly win a national ballot referendum by 2016.

Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What It Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0.

32. The line is attributed to an impressive array of people, including Yogi Berra, Neils Bohr, and Mark Twain. *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), <http://quoteinvestigator.com/2013/10/20/no-predict/>.

same-sex marriage and (b) an ongoing public debate on the subject across the whole country. Several recent decisions by lower federal courts suggest a possible nationwide resolution under the Equal Protection Clause,³³ but there are no guarantees. At first glance, the exit and voice dynamics in the same-sex marriage debate seem obvious and straightforward. As long as the recognition of same-sex marriage is a question to be resolved state-by-state, same-sex couples can exit a jurisdiction that refuses them recognition and seek a more hospitable one. Similarly, opponents of same-sex marriage whose states have moved beyond the traditional heterosexual paradigm may depart for a jurisdiction more congenial to their views. On the voice side, both proponents and opponents who choose to stay in a state that has policies contrary to their preferences can work within that political system to bring about a different result, similar to how the proponents of California's Proposition 8 successfully overturned the California Supreme Court's recognition of same-sex unions under the state constitution.³⁴

There are, however, more complex dynamics at work. As Professor Gerken's work suggests, federalism allows groups making up a minority at the national level to not only advocate their viewpoint but to implement it, whenever they compose a majority at the state level.³⁵ On one level, of course, actually legislating one's views is not simply voice—it is *power*. But in the midst of the current ferment, each state's decision to recognize same-sex marriage has a dual aspect. The state legislates for its own citizens, but each new enactment or court decision that accepts or rejects same-sex marriage is also an entry in a larger national debate.³⁶ This is one reason Gerken

33. *De Leon v. Perry*, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014) (holding that Texas's same-sex marriage ban violated the Equal Protection Clause); *Bishop v. United States ex rel. Holder*, 2014 U.S. Dist. LEXIS 4374, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (striking down Oklahoma's same-sex marriage ban on equal protection grounds); *Kitchen v. Herbert*, 2013 U.S. Dist. LEXIS 179331, at 28 (D. Utah Dec. 20, 2013) (holding that Utah restriction on same sex marriage violates the Equal Protection Clause).

34. See generally *Perry v. Schwarzenegger*, 744 F. Supp. 2d 921, 927–28 (N.D. Cal. 2010) (discussing the history of California's Proposition 8).

35. Gerken, *Dissenting by Deciding*, *supra* note 6, at 1754–55. See also Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1351 (2013) (embracing federalism's potential in this regard more fully).

36. See Bulman-Pozen, *supra* note 2, at 1100–05.

characterizes the power of a national minority to legislate in a jurisdiction where it forms a majority as a form of “dissent”—that is, from the prevailing view at the national level.³⁷

This exercise of power at the state level by national minorities is, of course, what makes exit possible: you cannot exit if there is no place to go. Moreover, the mere existence of states like Vermont, which recognize same-sex marriage, may affect the debate in a nearby state like Pennsylvania, which is on the fence. The recognition of same-sex unions in Vermont and several other states makes the *threat* of exit by same-sex couples in Pennsylvania more credible,³⁸ which may influence Pennsylvania’s policy to the extent that it fears out-migration of productive citizens and taxpayers.

Equally important, Vermont’s example may affect debates about same-sex marriage in other states. There is a huge difference between an abstract proposal (which any nut can make) and a policy enacted by the legislature of a sister state.³⁹ Another state government’s adoption of same-sex marriage thus has a legitimizing effect, adding gravitas to the voices of same-sex marriage advocates in Pennsylvania and elsewhere. By the same token, it is less easy to dismiss opponents of same-sex marriage as bigots when dozens of states have adopted their views as state policy. Americans know that while any extremist can grab a microphone, convincing a large governmental unit to adopt a position generally requires the support of many centrists.

Adoption of a policy by one jurisdiction also has an important demonstrative effect. Hence, advocates of same-sex marriage can point to Vermont for an example of what a world with same-sex marriage would look like. Some evidence suggests support for gay rights is closely linked to familiarity

37. See, e.g., Gerken, *Foreword*, *supra* note 5, at 61–63.

38. See HIRSCHMAN, *supra* note 9, at 5 (observing that “if voice is to be at its most effective, the threat of exit must be credible”).

39. Even acts of pure protest, such as the resolutions by the Virginia and Kentucky legislatures condemning the Alien and Sedition Acts in the early Republic, are likely to have more power when adopted through a state government’s deliberative processes than when promulgated by private entities. See, e.g., Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1324–27 (2000) (describing the expressive powers of state governments).

with gay individuals.⁴⁰ While that research assesses the impact of person-to-person interactions, it seems plausible that a more diffuse form of familiarity effect might exist as well. Americans know that the sky has not fallen in Vermont since the state recognized same-sex marriages in 2009, and no one has turned into a pillar of salt. When almost 40 percent of the United States population lives in a jurisdiction that recognizes same-sex marriages, it becomes more difficult to portray those marriages as weird or un-American.⁴¹ To the extent that any of this is true, Vermont's decision enhances the voice of same-sex marriage advocates in Pennsylvania and other states.

Exit options may enhance voice in other ways, too. They may reduce the potential costs of voice by allowing dissenters to leave the jurisdiction if their advocacy causes a backlash. This may be particularly important on issues like same-sex marriage, where the moral stakes and the temperature of public debate are high.

There is also what we might call “mundane exit”—that is, movement from one state to another not as a permanent response to dissatisfaction but simply as part of the reality of life in an integrated federal republic. The ordinary relocation of same-sex couples from one jurisdiction on account of career opportunities, the pull of extended families, or desire for a place in the sun creates legal friction as different jurisdictions must figure out how to treat relationships entered into under a different legal regime. This friction may create pressure for jurisdictions to moderate their policy, as states likely will want to minimize the extent to which their marriage laws deter potential immigrants from moving to the state. At the very least, mundane exit seems likely to ensure that the issue of same-sex marriage will remain alive until we more or less

40. See, e.g., Shawn Neidorf & Rich Morin, *Four-in-Ten Americans Have Close Friends or Relatives Who are Gay*, PEW RES. CTR. (May 22, 2007), <http://www.pewresearch.org/2007/05/22/fourint-en-americans-have-close-friends-or-relatives-who-are-gay> (reporting poll findings that “[p]eople who have a close gay friend or family member are more likely to support gay marriage and they are also significantly less likely to favor allowing schools to fire gay teachers than are those with little or no personal contact with gays”).

41. Eliana Dockterman, *These are the Next Gay-Marriage Battlegrounds*, TIME, Nov. 10, 2013, <http://nation.time.com/2013/11/10/these-are-the-next-gay-marriage-battlegrounds> (“With Illinois, we have 37% of American people living in a freedom-to-marry state . . .”) (quoting Alan Wolfson of Freedom to Marry).

reach some sort of national consensus. No matter how settled the issue may seem in any particular jurisdiction, that resolution may continually be disrupted by people moving in and out for other reasons (and bringing their views on same-sex marriage with them).

Finally, part of the same-sex marriage debate concerns “internal exit”—that is, the possibility that some objectors (particularly religious ones) might be allowed to opt out of the state’s recognition of same-sex marriage. Disputes are already arising concerning whether photographers or bakers, for example, may refuse to provide services for same-sex marriages based on their personal moral objections.⁴² Allowing such opt-outs may reduce opposition to recognizing same-sex marriage by enhancing the voice of proponents while preserving the rights of opponents to “dissent by deciding” within the scope of their own affairs.⁴³ Similar opt-outs exist, for example, in the federal housing discrimination laws, which exempt owner-occupant landlords with less than four units.⁴⁴ At some point, of course, such opt-outs undermine the force of the law that the community wishes to adopt, and that sacrifice may well be unacceptable for laws that embody a strong moral imperative.⁴⁵ But for communities that have not yet reached consensus on an issue, internal exit options may present a means to soften the blow of defeat for local minorities.

42. See, e.g., Liz Halloran, *No Cake for You: Saying ‘I Don’t’ to Same-Sex Marriage*, NPR (Dec. 11, 2013), <http://www.npr.org/2013/12/10/250098572/no-cake-for-you-saying-i-dont-to-same-sex-marriage>; Kari Bray, *Gresham Bakery that Refused to Bake Same-Sex Wedding Cake Closes Shop*, OREGONLIVE (Sept. 1, 2013), http://www.oregonlive.com/gresham/index.ssf/2013/09/gresham_bakery_that_refused_to.html. These disputes have arisen even in jurisdictions that do not officially recognize same-sex marriage. In the leading litigated dispute, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013), the New Mexico Supreme Court held that a photographer violated the state’s public accommodations statute, which forbids discrimination based on sexual orientation. The dispute arose in 2006, seven years before the New Mexico Supreme Court held that it was unconstitutional, under the state constitution, not to permit same-sex couples to marry. See also *Griego v. Oliver*, 2013 N.M. LEXIS 414, at *10 (N.M. Dec. 19, 2013).

43. See, e.g., Wilson, *supra* note 31.

44. 42 U.S.C. § 3603(b)(2) (2014) (the famous “Mrs. Murphy” exemption). See also Scott M. Badami, *The FHA’s “Mrs. Murphy” Exemption—A 50 State Guide*, MONDAQ.COM (Apr. 23, 2013), <http://www.mondaq.com/unitedstates/x/235406/real+estate/The+FHAs+Mrs+Murphy+Exemption+A+50+State+Guide>.

45. In some instances, moreover, “individual exit” may create serious free-rider problems.

DOMA had a dual impact on these dynamics of exit and voice. On the one hand, Section 2 removed a potentially complicating factor—the possible obligation, under the Full Faith and Credit Clause,⁴⁶ of one state to recognize same-sex marriages entered into in another state. Even without DOMA, contemporary interpretations of the states' full faith and credit obligations likely would not have required states prohibiting same-sex marriage to recognize such marriages solemnized by other states.⁴⁷ But the Clause also empowers Congress “by general laws” to “prescribe . . . the effect” of state “acts,” and Congress invoked this power to make sure that each state could decide, on its own, whether same-sex marriages would be recognized within its jurisdiction. By doing so, Congress substantially reduced pressure to nationalize the issue. If Vermont's decision to issue marriage licenses to same-sex couples, for example, meant that Texas or Kansas would have to recognize those marriages, then the substantial majority of states opposing same-sex marriage would have had powerful incentives to seek a categorical federal ban.⁴⁸

Although DOMA gave the states some autonomy with one hand, it took back that autonomy with the other. Section 3 prohibited recognition of same-sex marriages for all federal purposes.⁴⁹ This meant that, for all aspects of their lives

46. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”).

47. See generally William Baude, *What About Full Faith and Credit?*, THE VOLOKH CONSPIRACY (Dec. 14, 2011, 11:53 PM), <http://www.volokh.com/2011/12/14/what-about-full-faith-and-credit/>. Basically, the Full Faith and Credit Clause requires strict adherence to another state's *judgments* but not to its *laws*. See, e.g., *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998). Hence, a state may invoke its own public policy in refusing to recognize marriages entered into in another state. See, e.g., Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that DOMA § 2 was not necessary under current law, but urging that current law should be rejected).

48. Cf. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117–28 (2001) (describing how coalitions of states use Congress as an instrument to impose their preferences on other states). It is not obvious that Congress would have had the enumerated power to enact such a ban, but at least since *Wickard v. Filburn*, 317 U.S. 111 (1942), one would be unwise to count on anything being found outside the scope of the commerce power.

49. 1 U.S.C. § 7 (2014).

governed by federal law, same-sex couples could not exit without leaving the country entirely. Likewise, any exercise of voice with respect to those aspects would have to be directed to the national community as a whole, which remained—until very recently indeed—profoundly hostile to same-sex marriage.⁵⁰ More subtly, DOMA imposed countless administrative complications on states wishing to recognize same-sex marriage. Those states could no longer piggyback their state income taxes on the federal definition of “income” for same-sex married couples, for example, and state officials administering interlocking state and federal benefit schemes would have to work out difficult conflicts in the respective definitions of family.⁵¹ As Justice Kennedy observed in *Windsor*, DOMA’s purpose was “to discourage enactment of state same-sex marriage laws The congressional goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.’”⁵²

The Supreme Court’s decision in *Windsor* thus removed an important impediment to the ordinary dynamics of exit and voice. *Windsor* involved a same-sex couple who had lived together in New York and whose marriage had been recognized under the laws of that state.⁵³ The Court stressed the central role of New York law, noting that “[t]he State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”⁵⁴ Until the Court revisits the issue and considers whether the federal constitution *mandates* recognition of same-sex marriages,

50. See, e.g., *Changing Attitudes on Gay Marriage*, PEW RESEARCH (Mar. 2014), available at <http://features.pewforum.org/same-sex-marriage-attitudes/> (stating that “in 2001, Americans opposed same-sex marriage by a 57% to 35% margin”). The first year in which Pew found a majority of Americans supporting same-sex marriage was 2011. See *id.*

51. See generally Brief of Federalism Scholars as Amici Curiae Supporting Respondent at 32–38, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

52. See *Windsor*, 133 S. Ct. at 2693 (quoting *Massachusetts v. U.S. Dep’t of Health & Human Serv.*, 682 F.3d 1, 12–13 (1st Cir. 2012)).

53. See *id.* at 2683.

54. *Id.* at 2692. This is not the place to debate the extent to which *Windsor* relied on federalism principles. Compare, e.g., Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, __ J. LEGAL ANALYSIS (forthcoming 2014), available at http://scholarship.law.duke.edu/faculty_scholarship/3233 (expressing skepticism that it did), with Young & Blondel, *supra* note 17, at 133–44 (arguing that federalism was critical).

individual state jurisdictions will make their own decisions without DOMA's "thumb on the scales." Exit and voice will continue to play critical roles in those debates.

II. LOYALTY

What about loyalty? For Professor Hirschman, loyalty is simply the decision *not* to exit. Brand loyalty, for consumers, means sticking with a product despite dissatisfaction. Similarly, citizen loyalty means simply not packing up and leaving every time your community does something you do not like.⁵⁵ We might aspire to a somewhat thicker definition, however. For George Fletcher, "loyalty is the beginning of political life, a life in which interaction with others becomes the primary means of solving problems."⁵⁶ This suggests not merely staying put but also a commitment to membership in a community with others—presumably despite the occasional disagreement with fellow members. We might think political loyalty has an internal dimension as well—a sense of identity with the community that does not depend on complete congruence between the community's policies and one's own preferences.

Many reasons that people do not exit when jurisdictions adopt policies contrary to their preferences will not fit well within this thicker definition. Although Americans think of themselves as a mobile society, the truth is that we are not anywhere near mobile enough to move in response to every policy disagreement with our home jurisdiction.⁵⁷ Moving is expensive, time-consuming, and disruptive. The 2010 Census found that 58.8 percent of all people in the United States were residing in their state (or district) of birth.⁵⁸ These numbers do

55. See HIRSCHMAN, *supra* note 9, at 38.

56. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 5 (1993). See also MORTON GRODZINS, *THE LOYAL AND THE DISLOYAL* 5–6 (1956) ("[S]ocial structure of every sort . . . rests upon loyalties: upon attitudes and actions directed at supporting groups, ideas, and institutions. . . . Loyalties provide [the individual] with a portion of the framework upon which he organizes his existence.").

57. See, e.g., Douglas A. Wolf & Charles F. Longino, Jr., *Our "Increasingly Mobile Society"? The Curious Persistence of a False Belief*, 45 *THE GERONTOLOGIST* 5 (2005) (demonstrating that contemporary Americans are less mobile than they think).

58. Ping Ren, *Lifetime Mobility in the United States: 2010, U.S. CENSUS*

not capture the number of times people have moved, but it seems safe to say that most Americans move only infrequently, if at all.⁵⁹ Certainly they do not move in response to every, or even most, of the government decisions that they disagree with.⁶⁰

Even if moving were easy, it is an all-or-nothing response to a jurisdiction that inevitably offers an array of policies on a wide variety of issues. Same-sex couples that long for marriage rights in North Carolina (which approved a ban in 2012)⁶¹ may remain because they like the business-friendly regulatory climate or the quality of the public schools. And only some of the factors that influence decisions about relocation are within the control of governments. Our North Carolina couple may stick around because they like four moderate seasons, great college basketball, or even because they harbor an inexplicable preference for *pork* barbecue. There may be some issues on which people are prepared to be single-issue movers, and for at least some people, same-sex marriage may be one of them. But I suspect that most people, on most questions, will not exercise their exit rights simply because the overall policy mix on offer in a state remains congenial to them.

Unlike the sheer difficulty of moving, satisfaction with the overall policy mix in a state may begin to push people toward a thicker notion of loyalty—that is, they may buy in to the

BUREAU, Nov. 2011, at 2, available at <http://www.census.gov/prod/2011pubs/acsbr10-07.pdf>. The same census found that 27 percent were born in another state and the remaining 14 percent were born abroad or in a United States territory. *Id.* Professor Bulman-Pozen interprets similar statistics to show that Americans are very mobile. See Bulman-Pozen, *supra* note 2, at 1110–11. To some extent, this is a glass half-full versus half-empty judgment. I do think it supports the point in text, which is simply that exit is not a likely response to any particular dissatisfaction for most people, most of the time.

59. See, e.g., Wolf & Longino, *supra* note 57, at 6 (analyzing multiple measures, including annual mobility statistics, to conclude that overall mobility is declining); Gregg Kaplan & Sam Schulhofer-Wohl, Understanding the Long-Run Decline in Interstate Migration, Federal Reserve Bank of Minneapolis Working Paper 697, at 1 (Dec. 2013), available at <http://www.minneapolisfed.org/research/wp/wp697.pdf> (stating that in the 1990s, only “about 3 percent of Americans moved between states each year,” and that “[t]oday, that rate has fallen by half”).

60. See generally Naomi Schoenbaum, *Mobility Measures*, 2012 B.Y.U. L. REV. 1169 (emphasizing the significant costs of moving); Phyllis Korkki, *How Portable Is Your Life?*, N.Y. TIMES, Nov. 6, 2010, http://www.nytimes.com/2010/11/07/jobs/07search.html?_r=0 (discussing the personal costs and benefits of moving).

61. See N.C. CONST. art. XIV, § 6.

general project of state governance on some version of the “in for a penny, in for a pound” principle. Exit and voice options may enhance this dynamic. To the extent that people *can* move, they are more likely to view the legal obligations imposed by the home jurisdiction as freely chosen. And to the extent they have a voice—a meaningful role in shaping those obligations—they may be more likely to accept the outcome of state democratic processes even when their side loses.

At the end of the day, even those who remain in a particular jurisdiction simply because of resource constraints, family obligations, or sheer inertia may nonetheless develop a deeper attachment to the state out of familiarity and habit. Many of our most compelling personal loyalties—to family, for instance, or home-town sports teams⁶²—are not freely chosen.⁶³ One way to define loyalty is as the persistent attitude that a particular jurisdiction’s policies have a legitimate claim on the citizen irrespective of that citizen’s preferences,⁶⁴ as well as a presumption that that jurisdiction remains the relevant unit to which efforts at reform should be addressed. Or, we could use something akin to William Mackenzie’s elegant formulation of “political identity” as an answer to the question, “in what context do ‘I’ properly use the word ‘we’?”⁶⁵ Either way, habit is likely to play an important role.⁶⁶

For Professor Hirschman, the primary role of loyalty was to “activate voice.”⁶⁷ Simply by retarding exit, loyalty makes it more likely that individuals will stay in a jurisdiction and press for change within rather than seek a more congenial regime elsewhere. But loyalty may enhance voice in other ways, too.⁶⁸

62. Does anyone deliberately *choose* to be Cubs fan? See, e.g., *Why am I a Chicago Cubs Fan?*, CHICITYSPORTS.COM (Mar. 25, 2011), <http://www.chicitysports.com/2011/03/25/why-am-i-a-chicago-cubs-fan/> (“I grew up with them, watching or listening to the Cubs on WGN with my brothers and my dad.”).

63. See, e.g., Michael J. Sandel, *Justice and the Good*, in MICHAEL SANDEL, ED., *LIBERALISM AND ITS CRITICS* 172 (1984).

64. See, e.g., GRODZINS, *supra* note 56, at 21 (“When citizens say or think ‘we’ in referring to the actions of government, even the most abominable acts are difficult to condemn. Condemnation under the circumstances is self-damnation; and to avoid this kind of injury to self, prodigious mental feats may be performed.”).

65. WILLIAM JAMES MILLAR MACKENZIE, *POLITICAL IDENTITY* 12 (1978).

66. See GRODZINS, *supra* note 56, at 35.

67. See HIRSCHMAN, *supra* note 9, at 78.

68. If I can be forgiven a technical Federal Courts point, members of a community also are more likely to be directly affected by the community’s policies;

To the extent that dissenters are longstanding members of the community, their record of loyalty may have brought them power and prestige that make them more effective advocates for change. Moreover, loyalty means that dissenters are committed to membership in the same community as the majority, and that commitment is likely to reflect a certain set of shared values and principles. If dissenters formulate their arguments for reform in terms of those shared values and principles, their arguments are likely to be far more powerful than more abstract appeals to justice. It is no coincidence that the Civil Rights Movement's most compelling arguments were grounded in the Declaration of Independence and the Bible.⁶⁹

Loyalty may also enhance the value of the victory when and if dissenters ultimately prevail. In the same-sex marriage context, for example, the ultimate goal is surely not simply legal recognition of same-sex unions but the full acceptance of gay married couples as equal members of the community. The positive laws reach only so far, and this ultimate acceptance cannot be mandated by a legislature or a court. Acceptance seems likely to come more readily, however, if it is the decision of a community to which the opponent is himself loyal. If opponents are committed to membership in a state that ultimately adopts same-sex marriage, that feeling of membership may press them to embrace that decision as "theirs," even though they found themselves on the losing end.⁷⁰ This may be more likely if the decision is reached through democratic processes rather than judicial fiat, but to the extent that state constitutional provisions are perceived to

thus, they will have legal *standing* to challenge that policy in a way that opponents living elsewhere will not. *See, e.g.,* *Allen v. Wright*, 468 U.S. 737, 759 (1984) (insisting that plaintiffs be inhabitants of the communities in which the impact of the challenged policies were felt).

69. *See, e.g.,* Martin Luther King, Jr., *Letter from Birmingham Jail* (1963), available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (appealing to a common religious tradition shared with white supporters of segregation). *See generally* ANDREW M. MANIS, *SOUTHERN CIVIL RELIGIONS IN CONFLICT: BLACK AND WHITE BAPTISTS AND CIVIL RIGHTS, 1947–1957* (1987) (documenting Civil Rights Movement appeals to common civil religion based on the Declaration and other founding principles).

70. Consider every faculty appointments candidate you have ever voted against, but then welcomed into the law school community with open arms. Why? Because once the faculty votes, loyal members of the community accept that decision as their own even if they disagreed.

reflect a state's political character,⁷¹ opponents may feel some sense of ownership even when marriage equality occurs by judicial decision.

What I have said about loyalty so far should suggest a way of resolving my disagreement with Professor Gerken. Recall that the basic theories of exit and voice rely primarily on the role of states in slicing the electorate in diverse ways, so that national minorities will sometimes find themselves in the local majority and, more generally, different correlations of political forces exist in each jurisdiction. The question is whether we should care whether states are anything *more* than that—whether they represent meaningful and distinctive communities to which people form some sort of attachment. Ultimately, that question is about whether states are objects of loyalty.

States need not be communities of value, of course, in order to retard exit; the sheer pain-in-the-neck aspect of moving does that in many instances. In order to choose between the “different electoral slice” view and the “communities of value” view, we need to know not only how important loyalty is but how thick we need it to be. As I have suggested, loyalty will play its role most effectively where it embodies not only a reluctance to move but also a feeling of membership in a common community and a commitment to, even a sense of ownership of, that community's decisions. That sort of loyalty will exist only where states become more than lines on a map. After all, congressional districts also slice the electorate in different ways, but I feel nowhere near the same sense of membership and attachment about the Fourth Congressional District that I feel toward North Carolina (or even the lovely city of Durham).

I prefer a thicker loyalty for a second reason as well. Anna Stilz's recent work, “Liberal Loyalty,” assesses whether someone starting from liberal premises might nonetheless be justified in feeling particular obligations to a specific political community, rather than to all mankind. She concludes that one should, because particular communities play a crucial role in

71. See generally JAMES T. MCHUGH, *EX UNO PLURA: STATE CONSTITUTIONS AND THEIR POLITICAL CULTURES* (2003) (arguing that state constitutions do reflect the distinctive political cultures of particular states); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998) (same).

defining vital principles of equal freedom that would otherwise remain abstract and indeterminate.⁷² Professor Stiliz might resist the comparison, but her view seems to resonate with the more Burkean notion that natural rights can be given meaning only within specific historical communities.⁷³ I would further submit that this process of community definition of rights is particularly important with respect to an issue like same-sex marriage, which depends on the interpretation of customary values about family and marital commitment.⁷⁴

Finally, thicker loyalties are essential to maintaining a community's commitment to its principles, once those principles are defined. Martha Nussbaum's recent work has insisted that even a liberal society cannot maintain itself without drawing on emotion as well as reason.⁷⁵ Such emotions are necessary, she writes, "to engender and sustain strong commitment to worthy projects that require effort and sacrifice—such as social redistribution, the full inclusion of previously excluded or marginalized groups, the protection of the environment, foreign aid, and the national defense."⁷⁶ "Most people," she recognizes, "tend toward narrowness of sympathy"; hence, "all decent societies need to guard against division and hierarchy by cultivating appropriate sentiments of sympathy and love."⁷⁷ From this perspective, it seems likely that people who would deny the right of same-sex couples to marry as an abstract moral matter may be more likely to accept and respect those marriages if they see same-sex couples as members of a community to whom they are united by

72. See ANNA STILIZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE 40, 57–60 (2009).

73. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 51 (Frank M. Turner ed., 2003) (1790) (recognizing that "[g]overnment is not made in virtue of natural rights, which may and do exist in total independence of it. . . . But as the liberties and the restrictions vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule . . ."); see also Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642–59 (1994) (exploring this aspect of Burke's thought).

74. See generally Ernest A. Young, Custom, Constitutional Rights, and Geography (unpublished draft) (on file with author).

75. See MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE (2013).

76. *Id.* at 3.

77. *Id.*

common bonds of communal sympathy.⁷⁸

From this perspective, a key virtue of state loyalties is that they cut across other commitments, such as party or religion.⁷⁹ That is not to minimize the importance of those other commitments. Indeed, as Professor Bulman-Pozen has shown, partisan loyalties may often strengthen state attachments because the state becomes an institutional vehicle to vindicate partisan views.⁸⁰ But those state attachments, regardless of the reason they form in the first place, can also offer common ground once the state takes a position on a particular issue. Loyalty thus plays a crucial role in undergirding the dynamics of exit and voice.

CONCLUSION

None of this is to say that the diversity of electoral slices created by federalism does not matter—of course it does. The fact that the correlation of political forces differs from state to state drives much of the dynamic of exit and voice that I discussed in Part I. It is worth remembering that this diversity is both an effect as well as a cause of the significant and persistent differences in life in particular state jurisdictions—that is, the different proportions of Republicans and Democrats, conservatives and liberals in different states is not simply a product of random distribution but also responds to the differing geography, economic base, migration patterns, and historical experience of each state. In other words, the diverse electoral compositions of the states may be more intrinsic to each state than many analysts recognize.

That leaves the question whether a healthy federal system needs *more* than diversity. I have suggested that we do, but it

78. Professor Nussbaum's argument, of course, replicates from a liberal perspective an argument about the importance of emotional commitments that has long been a staple of conservative thought. See BURKE, *supra* note 73, at 29–30 (observing that the English “have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchers, and our altars”).

79. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2220–23 (1998).

80. See Bulman-Pozen, *supra* note 2, at 1116–22.

is important to acknowledge that I have not *proven* anything about whether the kind of thick loyalty to state political communities I am looking for actually exists. A number of commentators have asserted that it does not,⁸¹ but that is an empirical question and none of the state-identity skeptics has been able to marshal much in the way of evidence that state loyalties in this country have died out. Developing affirmative evidence that meaningful state loyalties survive in twenty-first century America is a much bigger project, which I cannot undertake here.⁸² I do hope to have shown that the question matters, and that it deserves more attention from federalism scholars than it has heretofore received. Loyalty is more than just being stuck someplace, and we will not realize the full power of Professor Hirschman's categories until we explore what else it might mean.

81. See, e.g., FEELEY & RUBIN, *supra* note 1, at 115–23; SCHAPIRO, *supra* note 3, at 1–6; Bulman-Pozen, *supra* note 2, at 1109–13.

82. See Young, *supra* note 8.

