Same-Sex Unions
Across the United States
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# Contents

Acknowledgments xi

Introduction xii

Chapter 1 • State Constitutional Amendments 3
   A. State Marriage Amendments Vary Greatly in Text 3
   B. The Opportunity Costs Associated with the Passage of the Different Amendments 4
   C. Varying Breadths of the Amendments 7
   D. Amendments Regulating the “Incidents of Marriage” 8
      a. The Meaning of “Incidents of Marriage” May Change over Time 8
      b. Broader Interpretations of the “Incidents of Marriage” Language 10
      c. Parental Rights at Risk? 12
   E. The Surprisingly Broad Reach of Some Amendments 15
   F. The Role of Intent When Interpreting Amendments 24
   G. A Veiled Attack on the American Law Institute? 27
   H. Conclusion 31

Chapter 2 • The Traditional Rules Regarding the Interstate Recognition of Marriage 33
   A. The Restatements’ Position 35
   B. Exceptions to the Rule 45
   C. Comity 53
   D. Expansion of the Power to Refuse to Recognize Marriages Validly Celebrated in the Domicile 56
   E. Conclusion 58
Chapter 3 • The Federal Defense of Marriage Act  61
   A. Why Was the Defense of Marriage Act Passed?  62
   B. The Full Faith and Credit Provision  63
   C. Is the Full Faith and Credit Provision Constitutional?  69
   D. Defining Marriage for Federal Purposes  74
   E. The Challenges to the Federal Definition of Marriage Provision  77
   F. Repeal of the Federal Definition of Marriage Provision  79
   G. Repeal of the Full Faith and Credit Provision  83
   H. Conclusion  85

Chapter 4 • Full Faith and Credit and Parental Rights  87
   A. Full Faith and Credit and Supreme Court Jurisprudence  88
   B. Limitations on Who Can Be a Parent  91
   C. Adult Adoptions  97
      a. Why Adopt Another Adult?  98
      b. Inheritance Rights of an Adopted Child  100
   D. Jurisdiction to Make Custody and Visitation Decisions  102
   E. Conclusion  112

Chapter 5 • The Right to Privacy  115
   A. Privacy Rights  116
   B. The Right to Marry  120
   C. Regulation of Sexual Activity  125
   D. State Court Treatment of Same-Sex Marriage Bans  128
      a. Arizona  128
      b. Massachusetts  132
      c. Indiana  133
      d. New York  135
      e. Washington  136
      f. New Jersey  138
      g. Maryland  138
      h. California  143
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>ix</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Connecticut</td>
<td>144</td>
</tr>
<tr>
<td>j. Iowa</td>
<td>144</td>
</tr>
<tr>
<td>E. Conclusion</td>
<td>145</td>
</tr>
</tbody>
</table>

**Chapter 6 • Equal Protection**

| A. The Tiers of Scrutiny | 148 |
| B. The Indicia of Suspect Status | 149 |
| C. Threshold Levels | 151 |
| D. Orientation as a Protected Classification under State Constitutions | 154 |
| E. Classifications on the Basis of Sex | 157 |
| a. Hawaii | 157 |
| b. Vermont | 160 |
| c. New York | 164 |
| d. Washington | 167 |
| e. California | 168 |
| F. Conclusion | 173 |

**Chapter 7 • The Right to Travel**

| A. Interstate Recognition Where Burdens Had Been Imposed on the Right to Marry | 176 |
| B. Interstate Recognition of Interracial Marriages | 182 |
| C. Federal Right to Travel Jurisprudence | 186 |
| D. The State’s Interests in Refusing to Recognize a Same-Sex Marriage Validly Celebrated in a Different Domicile | 193 |
| E. The Limited Nature of This Thesis | 194 |
| F. Conclusion | 197 |

**Chapter 8 • Same-Sex Marriage and Matters of Conscience**

| A. The Limitations of Conscience | 202 |
| B. Creating an Exemption for Those with Religious Objections to Same-Sex Marriage | 208 |
| C. The Expansion of Exemptions | 212 |
| D. The Expansion of the Classes against Whom the Exemption Might Be Employed | 215 |
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I have discussed these subjects in various law reviews:


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Introduction

Public opinion polls indicate a greater acceptance of members of the lesbian, gay, bisexual, and transgender (LGBT) community, and an increasing number of states offer some sort of legal recognition of same-sex couples and their families. Nonetheless, many states have constitutional amendments prohibiting the recognition of same-sex marriage, which means that one state may recognize same-sex marriage while a neighboring state prohibits the recognition of such unions under any circumstances. Further, the Federal Defense of Marriage Act (DOMA), which defines marriage for federal purposes and which permits states not to recognize marriages validly celebrated elsewhere, is still the law of the land, although the Federal DOMA has not yet been authoritatively construed so some of its effects are still unclear.

To make matters even more complicated, our society is extremely mobile, whether because individuals are crossing state lines to go on vacation or in search of employment. The great mobility of the population increases the importance of establishing the conditions, if any, under which one state may or must recognize a family relationship that was formed in another state.

Whether one state will recognize a family relationship established elsewhere will depend upon a number of factors, including the interpretations of various state and federal statutes and constitutional provisions. For example, were the United States Supreme Court to hold that the fundamental right to marry protected by the United States Constitution includes the right to marry a same-sex partner or were the Court to hold that equal protection guarantees preclude the states from denying same-sex couples access to marriage, the analysis would be pretty straightforward with respect
to whether certain families would be recognized, because no state could refuse to recognize same-sex marriages. However, the Court has not given any indication that it is willing to take such a step, and this book offers an account of the legal landscape in the United States that is not predicated upon the Court’s finding that equal protection or privacy guarantees protect the right to marry a same-sex partner.

Several state supreme courts have found that their respective state constitutions protect the right to marry someone of the same sex. However, those analyses are not binding on other states, because both the language of and the case law interpreting the respective state constitutional provisions may differ. It thus should not be surprising that different state supreme courts have reached differing conclusions about the protections included within their respective foundational documents for LGBT families, although some of the differences in the state supreme court decisions regarding constitutional protection of the right to marry a same-sex partner cannot be accounted for by appealing to subtle differences in text or interpretation.

Historically, there have been many cases in which states had to decide whether to recognize marriages validly celebrated in other jurisdictions even if those marriages could not be celebrated locally, and those cases provide guidance with respect to how same-sex marriages should be treated. A separate issue is whether the United States Constitution requires each state to recognize a marriage validly celebrated in a sister state domicile. Thus, even if the United States Constitution does not require each state to permit its own citizens to marry someone of the same-sex, that would not preclude the Constitution from requiring states to recognize same-sex marriages validly celebrated elsewhere under certain conditions.

Many couples, whether composed of adults of the same sex or of different sexes, have children to raise, and it is a matter of great importance for all concerned whether the rights and obligations of parenthood will be recognized across the states. As a matter of constitutional obligation, states must recognize certain parent-child relationships established in other states, even if the former states are not required to recognize adult relationships that have been estab-
lished elsewhere. However, precisely because only certain parent-child relationships must be recognized throughout the United States, other parent-child relationships are legally more tenuous. Some parents who have been awarded child custody or visitation and are considering whether to change their domiciles may need to take a variety of factors into account before making such a move.

This book attempts to clarify a number of issues regarding LGBT partners and their families. For example, while two chapters discuss federal equal protection and privacy guarantees and argue that the United States Constitution, properly understood, requires all states to recognize same-sex marriage, the rest of the book assumes that those guarantees do not impose such a requirement. One chapter discusses the Federal DOMA, offering different constructions of it and discussing the implications of that Act’s being struck down or repealed. Even were the Federal DOMA repealed, the state DOMAs would remain and would require interpretation. It seems likely that while some of the state DOMAs would be affected by a repeal of the Federal DOMA, others would not.

The last chapter discusses an issue that will likely gain greater prominence as more states recognize same-sex relationships, namely, the kinds of exemptions that should be built into law for those public officials who have religious objections to dealing with LGBT families. While religious beliefs should be respected, this chapter argues that neither public officials nor those businesses open to the general public should be afforded an exemption entitling them to refuse to deal with LGBT families. Such an exemption would implicate constitutional concerns if targeting LGBT families in particular and would lead to increased balkanization in this country if written more generally, a result that would be detrimental not only to the individuals affected but to society as a whole.
Same-Sex Unions
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Chapter 1

State Constitutional Amendments

Over the past two decades, several states have amended their respective constitutions to limit marriage to a union between one man and one woman, and more states may consider similar amendments in coming years. While all of these amendments remove possible protections in the state constitutions for same-sex marriages, they differ in important ways. Some of the amendments have the potential to cause far-reaching and unforeseen effects, because their language is open to such a broad interpretation that a variety of groups and their families may be put at risk in ways that fairness and good public policy cannot justify. Courts should construe these amendments narrowly to mitigate the harm that they will cause. Not only would a broad construction conflict with the principles of fairness, statutory construction, and good public policy, but it would also make the amendment more vulnerable to constitutional attack.

A. State Marriage Amendments Vary Greatly in Text

The language of the various marriage amendments varies in important ways. While the effect of these amendments is difficult to predict until they have been authoritatively construed by the state courts, it is plausible to believe that some will have ramifications that were neither foreseen nor intended when the amendments were adopted.

All of the amendments remove the possibility of state constitutional protection for same-sex marriages, and almost all go a step
further by precluding state legislatures from recognizing same-sex marriage. Where the amendments differ significantly from one another is in the additional limitations they impose on unmarried individuals seeking to secure any of the benefits associated with marriage.

Hawaii is the only state with a marriage amendment that gives the state legislature the power to determine whether same-sex marriages will be recognized. Several state marriage amendments only permit the recognition of marriages composed of one man and one woman, and some ban recognition of other kinds of relationships substantially similar to marriage. Still other amendments impose further limitations, depending upon how they are construed. One complicating factor when categorizing these amendments is that an amendment may have far-reaching effects because construed quite broadly, notwithstanding that it facially only precludes the recognition of same-sex marriages or civil unions.

**B. The Opportunity Costs Associated with the Passage of the Different Amendments**

There are a number of ways to analyze the degree to which these amendments impose burdens on same-sex and different-sex non-marital couples. One method involves identifying the range of benefits that may no longer be awarded by the state legislature to unmarried individuals or couples. Another method focuses on whether or to what extent those affected by the amendments may nonetheless secure in other ways some of the benefits that the amendments make harder to secure. A third is to examine which symbolic or tangible benefits would have been afforded but for the amendment. The degree to which the various amendments are viewed as burdensome will vary greatly depending upon which of these is employed as the method of the analysis.

In many but not all states, opponents of the amendments argued that same-sex marriage was already precluded by law, so the
constitutional amendment was unnecessary. Such an argument assumed that: (1) the amendment did not add anything to the existing law, and (2) an existing same-sex marriage ban would neither be repealed by the legislature nor struck down on state constitutional grounds by the courts.

In some states, the argument that the amendment added nothing to existing law was inaccurate, because the text of the amendment was broader than existing law. For example, the law might have precluded same-sex marriage, whereas the amendment might have precluded recognition of same-sex marriage and any substantially similar status for same-sex couples. Ironically, some courts have pointed to prior statutes precluding same-sex marriage as a reason to interpret the state marriage amendment more broadly, arguing that any other interpretation would make the amendment superfluous.

Yet, a constitutional amendment precluding same-sex marriage would not be superfluous even if it merely mirrored the statutory language, because the statute might otherwise have been vulnerable on state constitutional grounds. Consider, for example, the context in which Hawaii’s marriage amendment was adopted. The Hawaii Supreme Court had recently held that the state would have to bear a heavy burden to establish the constitutionality of that state’s same-sex marriage ban.\(^1\) Had the amendment not been adopted, the Hawaii Supreme Court would likely have struck down the state’s same-sex marriage ban, and it is at least plausible to argue that Hawaii would have recognized same-sex marriage but for the constitutional amendment.

When Alaska adopted its constitutional amendment, a lower court had already suggested that the state had to show which compelling state interests were promoted by the state’s same-sex marriage ban.\(^2\) Of course, there is no guarantee that the Alaska Supreme

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Court would have agreed with the lower court—while that supreme court has sometimes been supportive of rights for same-sex couples, for example, holding that the state’s refusal to accord certain employee benefits to same-sex partners of state employees was unconstitutional, it is difficult to say with confidence that the court would have held that the state constitution protected the right to marry a same-sex partner.

Suppose that the state supreme courts of Alaska and Hawaii would indeed have held that their respective state constitutions protected the right to marry someone of the same sex. In that event, the adoption of those constitutional amendments might be thought to have imposed a heavy burden on same-sex couples, since those couples would thereby have been denied all of the symbolic and tangible benefits that otherwise could have been accrued through marriage.

Contrast the above hypothesized state of affairs where the state constitutions would have been held to protect same-sex marriage with a different, hypothesized state of affairs where the constitution of a particular state, say, Mississippi, would never have been held to protect same-sex marriage and, further, where the state legislature would never have enacted legislation permitting same-sex couples to marry. As a practical matter, the amendment to the Mississippi Constitution might not have imposed as much of an opportunity cost as was imposed by the amendments to the constitutions of Alaska and Hawaii. Thus, ex hypothesi, because same-sex marriage would have been recognized in Hawaii or Alaska but for the amendments to those state constitutions but would not have been recognized in Mississippi whether or not that refusal was incorporated with the state constitution, the opportunity costs imposed by the adoption of marriage amendments in Hawaii and Alaska might be thought to have been much greater than those imposed by the adoption of the constitutional amendment in Mississippi.

Of course, the opportunity-cost analysis should not end there. The Hawaii amendment removes constitutional protection for same-sex marriage but does not incorporate a ban within the state constitution—the Hawaii Legislature has the power to recognize same-sex marriage and conceivably might decide to do so. In contrast, in both Alaska and Mississippi, the amendments not only removed possible state constitutional protections for same-sex marriage but precluded the legislatures from recognizing such unions. Basically, absent a change in federal law, the state constitutions in both Alaska and Mississippi, but not in Hawaii, will have to be amended if same-sex marriages are to be recognized in those states.

C. Varying breadths of the Amendments

The amendments to the constitutions of Mississippi and Alaska, like the amendments to some other state constitutions, preclude recognition of same-sex marriages, but do not facially ban the recognition of other same-sex relationships, e.g., civil unions or domestic partnerships. Nevada, for example, precludes same-sex couples from marrying but recognizes domestic partnerships.

Other states’ amendments not only preclude the recognition of same-sex marriage but also any other kind of relationship that approximates marriage. Such amendments prevent the recognition of civil unions and, perhaps, some kinds of domestic partnerships. However, even a state constitution precluding the recognition of relationships that approximate marriage might not preclude the state from according specific benefits to same-sex couples. It can hardly be said that a state extending health insurance benefits to the domestic partner of a state employee is equivalent to the state according that couple the full benefits of marriage. Thus, because civil unions include all of the rights and obligations of marriage, a state being constitutionally precluded from recognizing civil unions would not necessarily preclude the state from according particular benefits to unmarried individuals or couples. Similarly, an amendment specifying that relationships substantially similar to marriage cannot be recognized would not thereby preclude awarding a few
benefits to non-marital couples, since relationships accorded a few benefits can hardly be characterized as substantially similar to marriage.

D. Amendments Regulating the “Incidents of Marriage”

Some amendments not only preclude the recognition of same-sex marriages and other marriage-like relationships, but also preclude the extension of benefits or incidents of marriage to unmarried individuals or couples. These amendments appear to have the broadest reach. Nonetheless, the breadth of these amendments greatly depends upon how they are interpreted, and it is unclear which specific benefits are addressed when one discusses the benefits or incidents of marriage or even the rights or obligations that flow from marriage.

a. The Meaning of “Incidents of Marriage” May Change over Time

On one interpretation, the incidents or benefits of marriage are those that are exclusively reserved for married couples, and a benefit accorded both to married and unmarried individuals cannot be classified as an “incident of marriage.” Because the benefits exclusively reserved for married couples change over time, however, what might qualify as an “incident of marriage” in 1960 might not qualify as an “incident of marriage” in 2000. It is thus important to know whether an amendment precluding unmarried individuals from being awarded any of the incidents of marriage includes a reference date, either implicitly or explicitly.

It would have been easy for the drafters to have included language in the amendment itself specifying that the incidents of marriage involve those benefits exclusively reserved for married couples at the time of the amendment’s adoption. Their failure to do so may indicate that they did not intend to define the incidents of
marriage in reference to a particular date but, instead, to reflect the practices in effect at the time the issue concerning the incidents of marriage is litigated. For example, a particular benefit might have been considered an incident of marriage solely reserved for married individuals in the year 2006, but that same benefit would no longer be considered an incident of marriage in the year 2010 if the legislature had passed a law in 2008 extending that benefit to unmarried individuals as well.

Using this understanding of such an amendment, the term “incidents of marriage” refers to the benefits the legislature has exclusively reserved for married couples. Any benefit the legislature awards to both married and unmarried individuals is not an incident of marriage, because it is not exclusively reserved for married individuals. Basically, such an amendment might be understood to serve as a check on the courts. In a state with such an amendment, the state constitution would preclude the courts from holding that the state constitution requires non-marital couples to be eligible for benefits normally reserved for married couples, because the state constitution itself would immunize from state constitutional attack the state’s reserving such benefits for married couples. Nonetheless, such an amendment would not preclude a legislature from extending a particular benefit to non-marital couples, thereby removing that benefit from the “incidents of marriage” category. Once the legislature had removed a benefit from that category, the legislature’s deciding to accord that benefit to some, but not other, unmarried individuals might appropriately be subjected to constitutional analysis. In short, the amendment would preclude a court from saying that the equal protection guarantees of the state constitution require that non-marital couples be accorded the incidents of marriage, but would not preclude a court from saying that the equal protection guarantees of the state constitution prohibit the state from awarding certain benefits to some, but not other, unmarried individuals if there was no rational way to distinguish between those unmarried individuals receiving the benefit and those who were not.

When offering his understanding of Louisiana’s marriage amendment, Chief Justice Pascal Calogero noted that nothing “would pro-
hibit an unmarried couple from contracting to be co-owners of property, from designating each other agents authorized to make critical end of life decisions, or from leaving property to each other through wills.” He suggested that the amendment “does not disturb or impair the fundamental contract and property rights possessed by all individuals, be they homosexual or heterosexual, married or unmarried.” Ironically, the Louisiana amendment when so construed is narrower than the Nebraska amendment, even though the Louisiana amendment expressly precludes conferring the incidents of marriage on unmarried individuals and the Nebraska amendment does not even refer to the incidents of marriage.

b. Broader Interpretations of the “Incidents of Marriage” Language

Other interpretations of the “incidents of marriage” language might be much more encompassing than the one offered by Chief Justice Calogero. A different jurist might suggest that whatever benefit accrues by virtue of getting or being married is an incident of marriage, and thus that any benefit one receives by virtue of marrying, however mundane, cannot be accorded to unmarried individuals. For example, suppose that John and June are members of a state-run health club. They each pay $400 in dues annually. Suppose that they marry and can now continue their memberships by each paying $250 annually. Arguably, their ability to pay less in annual dues is a benefit of their marriage, which the club cannot offer to unmarried individuals who are living in the same household, because that would involve extending a marital benefit to unmarried individuals. Under this interpretation, any benefit accorded

5. Id.
to an individual by virtue of his or her marrying cannot be accorded to an unmarried individual.

Consider a widower who, by virtue of having been married to the deceased, had the right to inherit when his spouse died intestate. A marriage amendment might be thought to preclude a legislature from passing a statute permitting a longtime non-marital partner to be among those inheriting when an individual dies intestate, because that would extend an incident of marriage to a non-marital partner. However, such a broad interpretation might also mean that no one other than an individual’s spouse is permitted to inherit when an individual dies intestate, not even other family members, on the theory that permitting a non-spouse to inherit would involve according a marital benefit to an unmarried individual. While it is of course true that states have traditionally permitted individuals related by blood to inherit when a family member dies without leaving a will, the question at hand would be whether the marriage amendment would preclude the state from continuing to distribute property that way on the theory that a non-spouse was receiving benefits that fall within the “incidents of marriage” category.

Another interpretation of the “incidents” language suggests that there are certain benefits that are traditionally viewed as marital benefits, and that a marriage amendment prohibiting the extension of such benefits to unmarried individuals prevents the state from according any of these benefits to an unmarried individual or couple. According to this interpretation, the legislature has the ability to say that certain but not other benefits reserved for married individuals may be extended to unmarried individuals. For example, a state legislature could make insurance benefits available to non-marital partners but could not extend the right to elect against a will to a non-marital partner. However, because the marriage amendments themselves offer no guidance regarding which benefits could be extended and which could not, courts would undoubtedly vary with respect to their interpretations of the limitations imposed by the amendment. Such a system builds uncertainty into the law because relevantly similar individuals would be treated dissimilarly—one court might suggest that a particular
benefit could be extended to a non-marital partner, while a different one would reach a different conclusion. Such uncertainty makes planning particularly difficult for anyone seeking to provide protection for loved ones.

c. Parental Rights at Risk?

To see the great difficulties that may occur when courts are given no direction with respect to the limitations imposed by an amendment, consider the following discussion of the Ohio marriage amendment:

Legal rights and obligations exclusive to marriage like parental rights, medical benefits, and support obligations have traditionally belonged to married couples exclusively. Therefore, if the state of Ohio recognized or created a legal status for unmarried couples that gave them parental rights, medical benefits, support obligations, or any other legal right or obligation traditionally granted exclusively to married couples, a serious question as to the constitutionality of such grants under Art. XV, § 11 would arise.\(^7\)

The Ohio amendment does not refer to the incidents of marriage or to those rights and obligations that have traditionally belonged to married couples.\(^8\) But even had that language been included, the court’s analysis would still have been surprising, because parental rights, medical benefits, and support obligations do not belong to married couples exclusively.

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8. See Ohio Const. art. XV, § 11
   Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.
Parental rights and obligations as well as child support obligations have long been recognized outside of the marital context. The paradigmatic paternity suit involves a woman claiming that a man to whom she is not married fathered her child. Were such an individual established as the child’s father through a DNA test, he might well be ordered to pay support. Parenthood and parental rights and obligations have long been associated with both married and unmarried individuals and thus cannot be considered exclusive to marriage.

Traditionally, certain rights associated with parenting have been reserved for marital partners. For example, presumed parentage is an incident of marriage in that a husband will be presumed to be the father of the child born to his wife. A marriage amendment might be interpreted to preclude a state from according a presumption of parenthood to a non-spouse.

There is another right associated with marriage and parenting. In some states, a stepparent is the only person who can adopt a child without his or her partner being required to surrender his or her own parental rights. Thus, suppose that a widower with children remarries, and his new wife wishes to adopt his children. She can do so without his having to surrender his parental rights, assuming that the adoption will promote the best interests of the children and he approves of his wife’s adopting them. However, if the couple had not been married, he would have been required to surrender his own parental rights in order for her to adopt the children.

A state law requiring an individual to surrender his parental rights before his long-term partner could adopt his children would seem ludicrous on its face. After all, the two adults will be raising the children together. Furthermore, the stability and security of both the children and the adults are promoted when the relationships between the children and each parent are legally recognized.

Yet, such a law requiring the termination of parental rights before a non-spouse can adopt is easier to understand after a little background is offered. At one time, a typical adoption involved placing a child with new parents in a new home, where that child would cease to have any connection to her biological parents. The biological parents would surrender their parental rights so that the
child would be part of a new nuclear family. On some level, it might make sense to require the biological parents to surrender their parental rights in that kind of situation if only to clarify who has the ultimate decision-making authority. The situation involving a stepparent adopting a spouse’s child was viewed as an exception to the paradigmatic adoption, and some states have been reluctant to extend that exception to include households in which the would-be adoptive parent was a cohabiting, non-marital partner of a parent.

Yet, even before the marriage amendments were adopted, some states were already permitting non-marital partners to adopt their partner’s children without forcing the latter parent to surrender his or her parental rights. Thus, even if June was cohabiting with but not married to widower John, she might be allowed to adopt his children without John being forced to surrender parental rights.

Most states permit single individuals to adopt. Given that parent-child relationships can be established outside of the marriage context, it is not at all clear that custody and adoption are interests that qualify as incidents of marriage.

Just as times have changed with respect to whether unmarried individuals can adopt, they also have changed with respect to who may be covered under insurance plans. A large number of Fortune 500 companies now extend benefits to non-marital partners. This willingness to award insurance benefits beyond the traditional family is of fairly recent vintage, further underscoring the importance of determining whether those supporting the marriage amendments are seeking to return to a bygone era, are seeking to limit which of the benefits currently reserved for married individuals might be extended by the courts to unmarried individuals, or have other purposes in mind. Some individuals supporting a marriage amendment containing “incidents of marriage” language might have particular benefits in mind regardless of who has access to them currently, whereas other supporters might merely wish to prevent benefits that are currently exclusively reserved for married individuals to be extended to unmarried individuals. The difference between these two positions is potentially quite large, and courts attempting to interpret their amendments and their respec-
tive constitutions would be helped greatly were they to know what was intended.

The interpretation of amendments that contain “incidents of marriage” language will keep the courts busy for the foreseeable future. One factor complicating the analysis is that voters who approved marriage amendments protecting the incidents of marriage did so without knowing which benefits would be affected, because the amendments did not include enough information for anyone to know which benefits were covered. But that means that some amendment supporters might have voted to preclude non-marital couples from having access to benefits to which these voters, if asked, would have said that non-marital couples should have access. Further, not only did some voters not appreciate which benefits were at issue, but it also seems clear that many voted for the marriage amendments without considering or understanding whom these amendments would affect.

E. The Surprisingly Broad Reach of Some Amendments

All of the amendments target same-sex couples in that all preclude the recognition of same-sex marriages in particular or same-sex relationships in general. That said, some amendments are written more broadly than others, and are more likely to affect a whole range of individuals, including different-sex couples and their children, because most of the state marriage amendments precluding the recognition of marriage-like relationships do not differentiate between same-sex and different-sex relationships. This means that whatever limitations are placed on the recognition of non-marital relationships apply with equal force, regardless of whether those relationships involve individuals of the same sex or of different sexes.

This point about the breadth of application of the various amendments is not merely of theoretical interest. For example, both same-sex and different-sex couples can become domestic partners under California’s statute. At least facially, constitutional amendments
precluding a state from recognizing quasi-marital relationships apply whether the couples are composed of members of the same sex or of different sexes. Domestic partners who move to or travel through a state with such an amendment risk non-recognition of their relationship. Were such a couple in a traffic accident while vacationing in a state with such a law, it might be important to establish the relationship for purposes of medical decision-making or tort, and a state marriage amendment might preclude the state from recognizing the non-marital relationship.

That these amendments apply to same-sex and different-sex relationships is also important for a somewhat subtler reason, namely, it has induced courts to interpret their state marriage amendment even more broadly than they otherwise would have in an attempt to accommodate the apparent intention to impact both same- and different-sex non-marital couples. Thus, some courts have recognized that their state constitutional amendment is sex-neutral, but have failed to appreciate that some of the marriage-like relationships such as domestic partnerships are also open to different-sex couples. These courts then reasoned that because the amendment was not limited to same-sex couples, it must have been designed to do more than merely preclude the recognition of marriage-like relationships, which the courts mistakenly believed were reserved solely for same-sex couples. For example, in *State v. Steineman*, an Ohio court noted that the Ohio amendment “can apply to unmarried individuals of the same gender, or unmarried individuals of the opposite gender.” Because the amendment was not solely intended to prevent same-sex couples from marrying or entering into civil unions, the court concluded that the amendment must be understood to have a broad scope that precluded application of the state’s domestic violence statute to individuals who were cohabiting but unmarried.

The *Steineman* court was not alone in holding that domestic violence protections could not be applied to cohabiting, non-mari-

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tal couples. Courts throughout Ohio were divided about whether the amendment precluded application of the domestic violence statute in such a context. Several courts concluded that the second sentence of the amendment precluded the state from extending to non-marital, cohabiting partners the protections that would be extended to a spouse, while others concluded that the amendment does not preclude the extension of such benefits. Ultimately, the Ohio Supreme Court held that the state’s marriage amendment does not preclude applying domestic violence protections to non-marital partners.10

Some of the amendments precluding the recognition of quasi-marital relationships are more clearly written than others. For example, the Kentucky Constitution states that a “status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized,”11 and the North Dakota Constitution specifies, “No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”12 Some of the amendments, however, are less clear. For example, the purpose behind the Ohio amendment was presumably to preclude the recognition of quasi-marital status for same-sex and different-sex couples. However, at least in part because the amendment was not particularly well drafted, confident predictions about how it will be authoritatively construed are difficult to make.

The Ohio amendment reads:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

11. Ky. Const. § 233A.
When interpreting this amendment, one might want to consider what some of the other state amendments say. Not only do some states’ amendments reserve marriage for different-sex couples, but they also make clear that no other status identical or substantially similar to marriage will be recognized. Presumably, such amendments intend to cover civil unions, which are identical to marriage, and domestic partnerships, which are substantially similar but not identical to marriage.

Ohio chose to constitutionally preclude recognition of same-sex marriages, which are performed in several states, as well as those unions that “approximate” marriage, such as domestic partnerships affording almost all of the rights and benefits of marriage. Yet, if Ohio’s usage of “approximate” performs the same function as Kentucky’s “substantially similar,” then Ohio’s amendment would not preclude the recognition of civil unions, which were not merely intended to approximate marriage, but instead to replicate it. Thus, a state that creates a separate legal status for same-sex couples is neither recognizing same-sex marriage nor recognizing a status for same-sex couples that merely approximates marriage.

When interpreting the amendment, Ohio courts have not focused on the possible ambiguity created by Ohio’s failure to preclude recognition of unions that are intended to mirror marriage. That lack of focus is unsurprising, because the amendment’s intent (if not wording) was to preclude the recognition of civil unions. What is surprising, however, is that some courts have offered a reading that seems to ignore the plain meaning of the amendment.

The Ohio amendment precludes recognition of any legal status that “intends to approximate the design, qualities, significance or effect of marriage.” Regrettably, many courts have failed to appreciate that this focus on the design, qualities, significance, or effect of marriage presumably means the sum total of the consequences of marriage. If it were said, for example, that the effect of marriage is to give an individual the legal power not to be forced to testify against her spouse, then other consequences, such as the right to elect against a will, would not count as the effect of marriage. While each can be an effect of marriage, both cannot be the effect of marriage. By the same token, if one believes that the significance of marriage
is that it allows one to inherit when one’s spouse dies intestate, then one cannot also believe that the significance of marriage is that it allows one to consent to the withdrawal or withholding of treatment, where (1) there is no guardian and (2) one’s spouse is in a terminal condition and no longer able to make informed decisions regarding her own medical care. One simply cannot plausibly maintain that the (rather than a) design, quality, or significance of marriage is to make an individual subject to a domestic violence charge or that the (rather than an) effect of marriage is to make an individual subject to a domestic violence charge.

When considering whether the amendment precludes applying the domestic violence statute in cases involving a non-marital partner, some Ohio courts have sought to determine whether that statute treats a non-marital partner as a spouse in a particular respect, as if the amendment had precluded recognizing a legal status that approximated the design, qualities, significance, or effect of marriage in any respect. Indeed, one court suggested that the amendment precludes statutes’ incorporation of the phrase “as a spouse.” This analysis is incorrect for two distinct reasons.

First, the amendment does not preclude treating an unmarried person like a spouse in any respect but, instead, precludes the states from recognizing a status that approximates marriage. Second, if the amendment precluded the state from treating an unmarried individual as a spouse in any respect, then merely using a different term, e.g., lifelong romantic partner, or some functional definition would not avoid the amendment’s prohibition. The state would then be according a benefit of marriage, even if not using a term like “spouse,” and would run afoul of the amendment.

Some Ohio courts have suggested that the amendment precludes permitting non-marital couples from enjoying certain benefits traditionally associated with marriage. For example, one court suggested that the amendment prohibits two individuals from changing their

13. See State v. Peterson, 2005 WL 1940114, at *2 (Ohio Ct. Com. Pl. 2005) (“If it is the intention of the legislature to cover individuals living together who are not formally married, then language other than ‘person living as a spouse’ needs to be crafted in order to cover that circumstance.”).
last names so that they might have the same last name. This analysis is also incorrect. Just as the amendment does not preclude the state from treating an unmarried person like a spouse in any respect, the amendment does not preclude the state from treating an unmarried person like a spouse in any particular respect, e.g., from enjoying any one of the benefits traditionally associated with marriage.

An additional reason to reject the “benefits traditionally associated with marriage” interpretation of the Ohio amendment is that the Ohio Supreme Court had already interpreted the state law regarding name changes fairly broadly. Indeed, in a case in which two women wanted to change their last names to a common last name, the Ohio Supreme Court recognized that the appellants wanted “to demonstrate their level of commitment to each other and to the children that they planned to have.”\footnote{See \textit{In re Bicknell}, 771 N.E.2d 846, 849 (Ohio 2002).} The court allowed the name change because the appellants had no criminal or fraudulent purposes. There was never any indication that the amendment was adopted to legislatively overrule the Ohio Supreme Court.

Some Ohio courts seem to have recognized that the amendment is merely trying to prohibit relationships that approximate marriage. For example, in \textit{State v. McIntosh}, an Ohio court recognized that the “issue is whether the legal status recognized or created by the statute approximates marriage, not whether the factual relationship of the covered persons approximates marriage.”\footnote{\textit{McIntosh}, 2005 WL 1940099, at *2.} However, that same court suggested that if the legislature awarded any “legal right or obligation traditionally granted exclusively to married couples, a serious question as to the constitutionality of such grants under Art. XV, § 11 would arise.”\footnote{\textit{Id.} at *3.} Yet, the legislature could award one of the legal rights traditionally associated with marriage without creating a status that even remotely approximated marriage.

Some courts have suggested that the Ohio amendment constitutionally inhibits the state from recognizing common-law marriage. This is incorrect for a few reasons. The first sentence of the
amendment does not prohibit the recognition of common-law marriage, assuming that the individuals are not of the same sex. Furthermore, the amendment’s second sentence also does not preclude common-law marriage, because common-law marriage is neither an approximation of marriage nor a separate status that mirrors marriage. Rather, common-law marriage describes a different way by which one might become married. Whether one has a common-law marriage or a ceremonial marriage, the rights and responsibilities are the same, and the only way to dissolve such a union is through legal proceedings or the death of one of the parties.

Ohio no longer permits the creation of common-law marriages in the state. However, the state will recognize a common-law marriage if it came into being within the state before October 10, 1991, or was created after that date in a state recognizing common-law marriages. While the amendment might have avoided any possible confusion on this issue by expressly stating that common-law marriages validly celebrated elsewhere would still be recognized, the point nonetheless remains that neither of the sentences of the amendment even speaks to common-law marriage.

Clearly, the Ohio courts do not wholly understand the implications of interpreting the amendment broadly. Consider, for example, the view that the Ohio amendment precludes treating an unmarried individual “as a spouse.” This would enshrine within the constitution a provision authorizing discrimination on the basis of marital status, existing laws to the contrary notwithstanding. While one could bring about such a change via constitutional amendment, one would expect at the very least clearer language indicating that this was the desired result.

Currently, there are a variety of laws designed to prevent conflicts of interest, for example, precluding an individual from sitting on a board if that board contracts with a business owned by a member of the individual’s family. The amendment might preclude treating a longtime, non-marital companion as a spouse for these purposes, notwithstanding that the purpose behind such conflict-of-interest laws would also be served were these same safeguards in place so that an individual could not steer contracts to a business owned by a longtime companion.
In cases involving bystander negligent infliction of emotional distress, Ohio considers the following factors:

(1) whether the plaintiff was located close to the scene of the accident;

(2) whether any of the ensuing shock was the result of the plaintiff observing the accident first hand as opposed to being informed that the accident occurred; and

(3) whether the plaintiff was closely related to the victim.

When discussing the third factor, the Supreme Court of Ohio has clearly stated that “a strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required.” 17 Elaborating on this point, the court suggested that “a plaintiff who is affianced with the victim could very well be described as a close relation,” 18 thereby making clear that an individual who is neither a blood nor legal relation to the victim could still satisfy the third criterion. However, a broad interpretation of the Ohio amendment might preclude a fiancée or a long-term, non-marital partner from meeting the third criterion.

In Ohio, divorce agreements may include a provision stipulating that an ex-spouse will receive spousal support payments only until that individual remarries or cohabits with someone else. By permitting the termination of spousal support in the event of remarriage or cohabitation, the state removes the incentive for a support-receiving individual to move in with a paramour instead of marrying him or her. Ironically, a broad reading of the Ohio marriage amendment has the potential to negate the enforcement of such a provision and, in effect, create a disincentive to marriage in certain circumstances.

When the Ohio Supreme Court defined cohabitation as involving (1) the sharing of family and financial responsibilities, and (2) consortium, it did so in the context of explaining the state’s domestic violence statute. The court noted that the legislature “believed that an assault involving a family or household member deserves further protection than an assault on a stranger,” 19 in part

18. Id. at 767.
because in “contrast to ‘stranger’ violence, domestic violence arises out of the relationship between the perpetrator and the victim.” Courts striking the domestic violence statute in light of the state marriage amendment seemed to believe that “the legislature intended to bestow upon unmarried couples living together a status that paralleled marriage so those unmarried individuals would be recognized under the ambit of Ohio Revised Code Section 2919.25(A).” Yet, if such an interpretation renders the domestic violence statute unconstitutional, it also renders the enforcement of the cohabitation clause in divorce agreements unconstitutional, especially because the factors used to determine “cohabitation” for purposes of the domestic violence statute are the same factors used to determine when the cohabitation clause in divorce agreements is triggered.

The clear intent behind a divorce agreement provision that permits cessation of spousal support upon subsequent cohabitation is to treat the cohabitation as an equivalent of marriage for certain purposes, e.g., determining if the support-receiving ex-spouse is still in need of support. If the domestic violence statute elevates the status of the term “cohabitant”—thus violating the marriage amendment—then divorce agreements that treat “cohabitation” and “remarriage” as being equivalent are unenforceable, because they improperly elevate the status of “cohabitation.” Yet, it would be most surprising if proponents of the marriage amendment intended a provision designed to remove a disincentive to marriage to be rendered unconstitutional by the marriage amendment itself. Even if the goal of the amendment’s proponents was to “discourage cohabitation in any form—homosexual, heterosexual or otherwise,” this amendment would not have been the way to achieve that goal.

The Ohio amendment does not facially preclude the extension of any particular benefit, and it should be permissible for the state

20. Id. at 1128.
to award insurance benefits, parenting benefits, or domestic abuse protections. A separate question—one which must be worked out at a later date in the courts— involves the point at which the collection of benefits awarded is large enough to approximate the benefits of marriage and thus is precluded. However, that difficult question is not implicated when there is only one benefit or, perhaps, a few benefits at issue. The fact that courts tend to be divided over a seemingly easy-to-answer, textual question does not bode well for interpretations or applications of the Ohio amendment in particular or marriage amendments in general.

F. The Role of Intent When Interpreting Amendments

When looking at any law that is not clear on its face, a court has the difficult task of trying to discern the intent behind it. That task is even more difficult when a court seeks to determine the intent behind an amendment adopted by referendum.

First, it is not clear whose intent is dispositive—that of the framers or that of those voting for it. Even if one decides whose intent is dispositive, it will be difficult to determine the content of that intent.

Ohio courts struggled with this issue. For example, one court noted the following:

In the official exit poll on election night, 27 percent of the voters said they supported full marriage rights [for same-sex couples], 35 percent supported civil unions, and only 27 percent opposed any legal rights for same-sex couples. In other words, the voters approved a measure opposed substantively by 62 percent of the very same voters.23

The court noted that CNN exit polling nationally revealed similarly conflicting results. However, rather than use that information to help inform the interpretation of the amendment offered by the court, for example, by suggesting that the amendment must be construed very narrowly, the court simply suggested that many did not fully understand the amendment’s content.

That same court quoted some of the campaign materials suggesting that the amendment “does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.” 24 Of course, were this an accurate characterization of the amendment, the government could grant a variety of benefits to individuals in non-marital relationships as long as it was doing so for some reason other than that the relationship was marriage-like. For example, the government could offer domestic partner benefits if it felt that doing so was important when competing to hire and retain the most talented people. Parental rights for non-marital partners could be recognized, because that could promote the interests of children in a variety of tangible and non-tangible ways. Indeed, even recognizing a duty of support for a non-marital partner or requiring an equal division of property acquired during a non-marital relationship might be justified by appealing to the protection of the public fisc that might thereby occur.

Both the polling and the campaign literature of those supporting the amendment counseled in favor of a narrow construction of the amendment. Of course, if one were to emphasize some of the material opposing the amendment, then one might construe it broadly, because opponents wanted to emphasize how destructive the amendment might be if given a robust interpretation. Indeed, some courts noted that the voters supported the amendment after having been warned that it was ambiguous and capable of a broad interpretation, as if those voters had thereby assumed the risk of

24. Id. at *4.
an expansive interpretation. But the assumption of risk model seems inapt for a few reasons. First, it is not only those voting for the amendment who bear the brunt of such an interpretation. Second, those who had been warned about the amendment’s possibly broad scope might also have been assured by others that the proper interpretation of the amendment was fairly narrow, so those warned about the broad construction might have heavily discounted the possibility that the amendment would be so construed. Third, many others would not have been aware of the implications of the amendment being interpreted broadly rather than narrowly. Rather, they would have been directed to focus on the purpose of the amendment, namely, to prevent same-sex couples from marrying or from having their marriages recognized if validly celebrated elsewhere.

While it is unsurprising that the Ohio amendment is thought ambiguous and requiring interpretation, it seems that some of the more clearly stated marriage amendments are also viewed as unclear and ambiguous. The Kentucky amendment, which reads a “status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized,” has been interpreted to preclude the legislature from according hospital visitation rights to non-marital partners. Further, consider the Nebraska amendment, which reads:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

This has been interpreted to preclude the legislature from according a non-marital partner the right to dispose of a deceased partner’s remains. If the lack of clarity in these amendments permits such broad interpretations, then almost any of the amendments can be construed in a very broad manner.

To make matters even more confusing, courts have very different understandings of the relevant factual background in light of which these amendments should be interpreted. Some courts emphasize that the Supreme Judicial Court of Massachusetts had recently decided *Goodridge v. Department of Public Health*, in which that court had held that the Massachusetts Constitution precluded that state from banning same-sex marriage. Focusing on the *Goodridge* decision might lead a court to interpret a state marriage amendment as precluding the recognition of same-sex marriage but not, say, precluding a domestic partner from being covered under an insurance policy. Other courts emphasize the emergence of a national movement to strengthen marriage, and then conclude that the amendment’s purpose is to discourage all forms of non-marital cohabitation.

The marriage amendments have created an intolerable situation, both because of the utter uncertainty regarding their reach and because of the fundamental nature of the rights that hang in the balance. Both plain meaning and public policy are being ignored in order to offer broad constructions. While courts may eventually limit the damage caused by these amendments, the harm potentially caused to innocent individuals in the meantime simply cannot be justified.

### G. A Veiled Attack on the American Law Institute?

It is quite clear that many of the marriage amendments, whether broadly or narrowly construed, preclude the recognition of same-sex marriages or civil unions. What is not sufficiently appreciated, however, is that a broad construction of these amendments may preclude legislatures from adopting many of the recommendations of the American Law Institute’s *Principles of the Law of Family Dissolution: Analysis and Recommendations*. Indeed, such a reading may impede states from adopting or enforcing their own version of *Marvin v. Marvin*. 
In *Marvin*, the California Supreme Court explained:

Adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property... So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.26

Basically, the California Supreme Court suggested that non-marital partners can agree as a matter of contract to divide property or provide partner support if their relationship dissolves. As long as the agreement is not based upon meretricious considerations such as the provision of sexual services, the agreement is enforceable even if made outside of the context of marriage. Some states have followed California’s lead. However, a broad construction of a state’s marriage amendment might preclude enforcement of *Marvin* agreements.

The claim that the enforceability of *Marvin* agreements is put into jeopardy by the marriage amendments might seem surprising. After all, *Marvin* was decided over thirty years ago and is not likely viewed as a new threat requiring the passage of a state constitutional amendment to prevent its implementation. Nonetheless, a more recent proposal by the American Law Institute (ALI), which goes beyond *Marvin* palimony suits in several respects, might well have motivated some to press for marriage amendments. Fur-

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ther, if the amendments are interpreted to preclude adoption of the ALI proposal, they might also be interpreted to preclude the enforcement of *Marvin* agreements.

The ALI suggests that individuals who are domestic partners be treated as having many of the same rights and obligations as marital partners. For example, the ALI recommends that assets should be distributed upon dissolution of a domestic partnership in the same way that they would have been distributed had the partners been married, although there are certain exceptions. While domestic partners can opt out of these obligations, they have significant rights and obligations with respect to each other if they do not opt out. That said, the ALI is not offering a new version of common-law marriage under another name. As the ALI explains:

> Where recognized, common-law marriage is fully equivalent to duly licensed ceremonial marriage. In terms of legal incidents, there is no distinction between a lawful common-law marriage and a lawful ceremonial marriage. By contrast, although American law has recognized inter se claims of domestic partners, it has generally declined to establish rights with respect to third parties and the state. Similarly, these Principles, by their limited scope, are confined to the inter se claims of domestic partners. Thus, the recognition of inter se claims of domestic partners in these Principles does not revive the doctrine of common-law marriage in jurisdictions that have abolished it.\(^\text{27}\)

Thus, the ALI distinguishes domestic partnership from common-law marriage by noting that domestic partners have rights and obligations vis-à-vis each other, but that domestic partnership status—unlike common-law marriage—has no implications for third parties such as employers or the state. While an employer might decide to extend benefits to domestic partners as a matter

\(^{27}\) *Principles*, at § 6.01, cmt a.
of equity or as a way of attracting or keeping good employees, there is no legal obligation to do so.

The ALI proposal has a variety of attractive features. It is designed to bring about a fairer distribution of goods acquired during a qualifying relationship, and may even help society avoid shouldering certain burdens in the event that a domestic partnership relationship ends and one of the parties has no assets or means of support. However, the point here is not to discuss whether particular state legislatures should adopt the ALI recommendations in whole or in part, but merely to suggest that a broad reading of the marriage amendment might preclude a state legislature from adopting these recommendations, even if the legislature believes that doing so is good public policy. If a marriage amendment precludes a non-marital partner from receiving insurance benefits or having the ability to determine the disposition of a non-marital loved one’s remains, then the amendment would likely also be interpreted to preclude a court from ordering domestic partner support or the distribution of domestic partnership property. By the same token, the amendment might well be interpreted to preclude a court’s enforcing a Marvin arrangement if at the time of the dissolution of a non-marital relationship, one of the partners seeks support or a property division that would mirror what the court would have ordered had the couple been married. However, if the marriage amendment is read narrowly, then it might not preclude adoption of the ALI recommendations or enforcement of Marvin agreements, since there are a whole host of third party benefits that are associated with marriage but are not associated with Marvin agreements or ALI domestic partnerships.

Most, if not all, of the state marriage amendments cannot plausibly be construed as limiting the power of the state legislature to incorporate either Marvin agreements or the ALI domestic partners proposal into local law. None of the amendments includes any language that refers to or even alludes to Marvin agreements or the ALI domestic partners proposal, and none of the amendments should be broadly construed to preclude the state from effectuating policies which will benefit both the state and many non-traditional families.
H. Conclusion

Several states have passed marriage amendments, and more may be passed in the future. As a general matter, these amendments are designed to preclude same-sex couples from marrying. However, the amendments vary greatly with respect to what they do in addition to that. Thus far, the courts have had great difficulty in figuring out how to interpret these amendments. Regrettably, some courts have gone far beyond the language of the amendments themselves to make them much more burdensome. This can neither be justified in terms of the canons of amendment construction nor good public policy.

Suppose that someday in the future the United States Supreme Court were to hold that same-sex marriage is protected by federal constitutional guarantees. Such a holding would make unenforceable all of the state constitutional amendments precluding same-sex couples from marrying. Yet, it is unclear how some of the provisions restricting non-marital benefits would be construed. Those amendments that preclude non-marital couples from receiving benefits might be construed as applying to same-sex and different-sex non-marital couples alike and, further, might be thought rationally related to the promotion of marriage. It might well be that such amendments when so construed would be upheld, which might require individuals to expend time and money to amend their state constitutions so that non-marital couples and their children could receive the kinds of benefits that married couples and their children receive. It is plausible to believe that many of the amendment supporters would regret their votes if they precluded non-marital couples from receiving benefits that same-sex and different-sex married couples enjoy.

Courts considering how to interpret their own state’s marriage amendment have ample reason to construe them narrowly, including the canon of interpretation which requires courts, where possible, to offer interpretations of statutes and amendments that make them in accord with constitutional requirements. In most cases, a broad interpretation of the state’s marriage amendment
will not account for the intentions of those passing it, the language of the amendment itself, good public policy, or principles of fairness. Judges must do their utmost to reduce the harm imposed by these amendments, for the sake of society as a whole and the affected individuals themselves. To do otherwise would not only involve adding insult to injury, but also shirking their judicial responsibilities.
Chapter 2

The Traditional Rules Regarding the Interstate Recognition of Marriage

Several states recognize same-sex marriage, and same-sex married couples might want to know whether their relationships will be recognized in other states should they decide to travel through or move to those states. If the state of destination also recognizes same-sex marriage, then the couples should have no difficulty in having their relationship afforded legal recognition. However, if the target state does not recognize same-sex marriage, then the analysis is more complicated. To understand how express state and federal law affect the conditions under which one state will recognize a marriage validly celebrated in another, it is helpful to understand the traditional approach embraced by most states with respect to when a marriage that could not be celebrated within the jurisdiction will nonetheless be recognized.

All states specify which individuals are permitted to marry, and there is a great deal of overlap with respect to the marriages that will not be permitted. For example, no state permits a parent to marry his or her child, and no state permits an individual to be married to more than one individual at the same time. Nonetheless, there is variation among the states, for example, with respect to whether same-sex couples may marry or whether first cousins may marry or whether sixteen-year-olds may marry. Prior to 1967, when the United States Supreme Court decided *Loving v. Virginia* in which the Court struck down Virginia’s anti-miscegenation statute, states would also differ with respect to whether individuals of different races could marry.
There are a variety of possible scenarios in which the validity of a marriage celebrated in accord with local law might nonetheless later be challenged. Consider Virginia, a state that precluded interracial couples from marrying until that state’s statutory scheme was struck down as a violation of federal constitutional guarantees. An interracial couple domiciled in the state might have taken a weekend trip to the District of Columbia where such marriages were permitted, married there, and then come back home hoping that the marriage would be recognized. A different interracial couple might have married in the District of Columbia while domiciled there, but then moved to Virginia where the marriage was precluded by law. Both of these couples might be contrasted with another interracial couple domiciled in the District of Columbia who marries in accord with local law and continues to live there. However, when visiting Virginia, the validity of the marital union somehow became important to establish, for example, because of a need to be able to authorize required medical treatment.

These different scenarios are distinguished, because a court deciding the validity of a marriage that could not be celebrated locally would consider the conditions under which the marriage was contracted as one of the important factors to be weighed in its legal analysis. The domicile at the time of the marriage is the state viewed as having the most discretion to refuse to recognize a marriage that had been validly celebrated elsewhere, whereas the state where one makes a temporary stopover is viewed as having the least discretion in refusing to recognize a marriage.

There are additional points to consider when analyzing whether a state should recognize a marriage that could not be celebrated locally. On the one hand, the general rule was that states would recognize marriages validly celebrated elsewhere that could not be celebrated locally, because of the confusion and disruption that might be caused by having marriages go in and out of existence depending upon where one happened to be. On the other hand, there is a narrow range of marriages that need not be recognized by any state, notwithstanding that the marriage was validly celebrated in the domicile. That narrow exception is generally understood not to be expandable at the instance of a particular state
merely because a marriage validly celebrated elsewhere is not in accord with local policy.

To make matters even more complicated, states have not been uniform with respect to the conditions under which they would recognize a marriage that could not be celebrated within the jurisdiction. While there are some generally accepted practices, it is usually possible to find some state court rejecting the established rule. To flesh out how these matters are often resolved, it will be helpful to examine the position of the Restatements on when marriages should be recognized.

A. The Restatements’ Position

The Restatements of the Law are highly influential compendia of the law of different states that are meant to be both descriptive and aspirational. They capture existing law by reflecting the decisional law in various states but are also aspirational because, where there is a conflict among the states, a Restatement may choose a particular position that reflects the law of some states but not of others in an attempt to lead states to adopt a particular approach. While the Restatements are not binding upon any state until adopted by that state, they nonetheless are often viewed by courts and legislatures as persuasive with respect to the position that a state should adopt or, perhaps, has already implicitly adopted. Thus, the supreme court of a state might interpret an ambiguous statute to incorporate a position advocated in a Restatement even though that position has not been expressly adopted. Or, a legislature might adopt a particular position advocated in a Restatement, thereby making that policy the law of the state.

The Restatement (First) of the Conflicts of Law provides that “[e]xcept as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.”

1. Restatement (First) of Conflict of Laws, § 121 (1934).
131 applies to individuals who have been barred from remarrying, whereas Section 132 discusses the conditions under which a marriage that violates the domicile’s law will not be valid anywhere.

To understand the position advocated by the First Restatement, it is helpful to distinguish between two states: the state where the marriage takes place (the state of celebration) and the state where the couple lives (the domicile). In some cases, the state of celebration is the domicile, for example, because the couple lives in the same state as do many of their friends and family and so celebrating the marriage in that state would be convenient for everyone. In other cases, however, the states of celebration and domicile are not identical.

There are many reasons that couples might decide to celebrate their marriages in states other than their domiciles, ranging from location of family and friends to weather to special travel packages. For many of these couples, there would have been no legal difficulty posed by their having married locally, but they nonetheless decided for other reasons that marrying elsewhere was preferable. When these couples return home after their honeymoons, their marriages will be recognized by their domiciles and they will have all of the rights and obligations of marriage that they would have had if they had chosen to contract their marriages within their domiciles.

Consider, however, couples who are barred from marrying locally and who decide to go to neighboring states where there is no bar to their marrying. While they may marry in those states, a separate question is whether their marriages will be recognized in their domiciles.

The First Restatement suggests:

A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases: (a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicile, (c) marriage between persons of different races where such marriages are at the domicile regarded as odious, (d) marriage of
a domiciliary which a statute at the domicile makes void even though celebrated in another state.²

Here, the First Restatement, which was written decades before the Loving Court struck down state anti-miscegenation laws, specified certain marriages that would not be valid even if in accord with the law of the state of celebration: polygamous marriages, certain incestuous marriages, interracial marriages, and marriages declared void by the domicile. The exceptions to the “valid everywhere if valid where celebrated” rule can be summed up rather easily—basically, the position espoused in the First Restatement is that a marriage should be recognized everywhere unless it violates an important public policy of the domicile at the time of the marriage. Thus, marriages that are void are generally understood to violate an important public policy of the state, and the same might be said of marriages that are odious or that violate a “strong public policy.” Because states as a general matter make polygamous marriages void, those marriages also fall into the category of marriages violating an important public policy.

While not advocating blanket recognition of any marriage that has been validly celebrated somewhere, the Restatement is recommending that a variety of factors be considered when a state is deciding whether to recognize a marriage validly celebrated elsewhere. Presumably, all marriages prohibited by state statute violate some public policy; else, they would not be prohibited. The Restatement is nonetheless suggesting that states should do more than simply consult their own marriage laws when deciding whether to recognize a marriage that had been validly celebrated in another jurisdiction.

When discussing public policy, one should distinguish among some of the types of interests that might be offered to justify a particular statute. Some state interests that are asserted to justify a marriage prohibition are not even legitimate and should not prevent individuals from marrying either within or outside the domicile. However, the Restatement is not focusing on illegitimate justifications that should not prevent anyone from marrying; instead, the focus is on

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² Id. at §132.
legitimate but not important justifications for preventing a marriage. These may appropriately prevent individuals from marrying within a state, but should not cause a state to refuse to recognize a marriage validly celebrated elsewhere.

By suggesting that some marriages should be recognized in the domicile as long as they are legally celebrated elsewhere, the First Restatement is underscoring the independent weight that is given to a marriage that has been celebrated in accord with the law where the marriage was contracted. Thus, when balancing the competing factors in an effort to decide whether to recognize a marriage validly celebrated elsewhere, a court might place the legitimate interests in prohibiting the marriage on one side on the balance. On the other side, the court should include the state’s interests in promoting and preserving existing marriages and, further, the individuals’ interests implicated in having the relationship recognized. The Restatement is suggesting that these latter interests outweigh a (merely) legitimate state interest justifying a particular prohibition. Basically, only very important state interests (those that justify making a marriage void) outweigh the state and individual interests that militate in favor of recognizing a marriage that has been legally celebrated elsewhere.

Some of the state and individual interests that should be considered before a marriage is invalidated include the following:

1. there might be children raised by the couple who would be adversely affected were the marriage not recognized, and both the state and the individual family members have important interests implicated in promoting the interests of these children.

2. property interests of the members of the couple and of other family members might be affected by a state’s refusal to recognize a marriage, and both the state and individual family members have an interest in assuring clear title to property. For example, suppose that the home in which the couple lives is marital property. In that event, each of the parties has a legally protected interest in that home. However, suppose further that the state treats the marriage of the parties as void so that the marriage never existed in
the eyes of the law. In that event, the property would not be treated as marital (there was no marriage), and instead might be viewed as belonging to the person in whose name it was titled. Depending upon the particular facts of the case, the state might say that the non-titled party had an equitable interest in the property, although the state might instead say that the non-titled person simply had no legally protected interest in the property. Further, it is not as if the parties would marry in one state and come back to the domicile where the validity of the marriage would immediately be contested. Rather, what is much more likely is that the marriage would be contested at a later date, for example, if one of the parties filed for divorce or if one of the parties died. In that event, a finding by the state that the marriage was void might mean that one of the parties would be left destitute without any means of support.

(3) even something so basic as whether an individual was covered by an insurance policy might depend upon legal recognition of a relationship, and both individuals and the state can be harmed if medical treatment or procedures that had been thought to be covered by insurance are suddenly discovered not to be covered.

The degree to which the Restatement favors the recognition of marriages valid where celebrated is made even clearer when one considers that recognition is recommended even when the parties to the marriage may have purposely evaded local law by going to a different jurisdiction where they could legally marry. Arguably, such individuals are seeking to defraud the jurisdiction where they live, and are less deserving of the state’s sympathy or generosity. Nonetheless, out of consideration of the interests of other innocent parties such as children, and out of consideration of various state interests such as the interest in promoting marriage more generally, preserving clear title to property, and avoiding the destabilization of a variety of relationships, the state should look past the undermining of the (merely) legitimate state interests supporting the particular prohibition at issue and recognize the relationship.
A different aspect of the *First Restatement* position might not be appreciated. When suggesting that a marriage valid in the state of celebration should be recognized everywhere unless that union violates an important public policy of the domicile at the time of the marriage, the *Restatement* is making an important policy statement to any state that is not the couple’s domicile at the time of the marriage. Basically, the *Restatement* is suggesting that a marriage valid in the domicile at the time of the marriage should be recognized both in states through which the married couple might be traveling and in states that might become the couple’s domicile years later.

Consider a state that is not the domicile at the time of the marriage but, instead, becomes the domicile of the couple five years into the marriage. Comment a to section 134 notes that “[i]f the question is that of giving effect to a marriage in a state where neither party was domiciled at the time of the marriage, the case does not fall under §§ 131 or 132 but is within the rule stated in this Section,” that is to say, the marriage should be recognized. But this means that unless the marriage falls into a narrow exception, the marriage should be recognized, even if it is treated as void under the law of the subsequent domicile. The *Restatement* is not suggesting that a marriage should be refused recognition whenever the marriage is treated as void under the forum state’s law. Instead, non-recognition is recommended only when the marriage is void according to the law of the domicile at the time of the marriage.

It might seem surprising that a marriage void in the domicile at the time of the marriage should be thought subject to non-recognition, but that a marriage void in a subsequent domicile should not be thought appropriately subject to similar treatment. Yet, this is not at all surprising if one considers the individual interests and justified expectations in the two different kinds of scenarios. Consider the couple who marries in accord with the law of the domicile where they plan to remain. They have the reasonable and justified expectation that their marriage will continue until one of them dies or, perhaps, until at least one of them wishes to leave the marriage. If individuals who evade the domicile’s law by marrying in a different state should nonetheless have their marriage recognized by all of the states as long as the union does not violate an important pub-
lic policy of the domicile at the time of the marriage, then certainly individuals who play by the rules and marry in accord with their domicile’s law should have their marriages respected by all of the other states. But included within those latter states are those states that might years later become the domicile of the couple. Basically, part of the justification for leaving this decision up to the domicile at the time of the marriage involves a respect for that state’s authority and power as a sovereign. A different part of the justification involves weighing the individual interests somewhat less heavily, because they should know at the time of the marriage if its legality and recognition are open to question. But respect for the domicile at the time of the marriage undercuts rather than supports permitting other states to treat the marriage as if it had never existed, and the individual interests in the marriage should be weighed more heavily when those individuals have no reason to suspect that the marriage will cease to exist by operation of law.

The Restatement (Second) of the Conflicts of Law offers a position similar to that of the First Restatement. Section 283(1) states that “[t]he validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.” Section 6 reads as follows:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Many of the factors in section 6(2) support using the law of the domicile at the time of the marriage to determine the validity of a
marriage. Certainly, systemic needs would support such a policy, because the validity of the marriage would not then depend upon where the individuals happened to be making their domicile. By the same token, uniformity and predictability would all be promoted by making the law of the domicile at the time of the marriage determine validity, and both the justified expectations of the parties as well as the relevant policies of other interested states would all best be served by using the law of the domicile at the time of the marriage.

Making use of the law of a subsequently acquired domicile would create a host of possible difficulties, including possible frustration of the reasonable and justified expectations of the parties as well as incentivizing behaviors that simply should not be encouraged. Suppose, for example, that the law of a subsequently acquired domicile might also be used to determine the validity of a marriage. This would mean that couples who had been married for decades might suddenly find their marriages treated as non-existent simply because those couples had decided to retire in a state that did not recognize their marriages. While there are any number of considerations that couples might include in their calculations when deciding where to spend their twilight years, most couples would not expect that they would have to consult an attorney to determine whether their marriages would be recognized in a state which, after all, is part of the same country.

Certainly, it could be argued that such couples could have protected themselves by doing some research before they moved. According to this view, couples considering where to retire might consider weather, the proximity of family and friends, the cost of housing and food, recreational facilities, and, in addition, whether their new domicile will recognize their marriages. Such a view requires a kind of legal sophistication not normally required of retirees (or non-retirees), and is objectionable for that very reason.

To some extent, there is an obvious rejoinder to the justified expectations argument, namely, one would have a justified expecta-

3. A separate question, discussed in a later chapter, is whether a state would be violating constitutional guarantees by requiring individuals to give up their marriages in order to become domiciled in the state.
tion that one’s marriage would be recognized in a different jurisdiction only if there were no good reasons to think otherwise. However, if it were generally known that each domicile could independently decide whether to recognize a marriage validly celebrated in a different domicile, then the reasonable expectations argument would be significantly undermined. Further, if this information were generally available, the legal sophistication worry would also be undermined. For example, if a state were to make sure that the public knew which marriages would be recognized in the state, it would not be necessary to consult an attorney to figure out which marriages would be recognized. Of course, there are some very good reasons that there will be no such understanding, some constitutional and some very practical. Such a policy would deter the migration of some couples and would encourage migration by those wanting to game the system.

Suppose that a state were to make known to the public that it would not recognize certain marriages. It would be reasonable to expect that married couples who valued their marriages would be deterred from going to that state. Yet, it should not be thought that the only effect of such advertising would be to deter migration. On the contrary, some individuals might move to such a state precisely because of its marriage policies. Consider a savvy individual who wanted to avoid the obligations imposed upon her by virtue of the marriage that she had validly celebrated in a different state. A good way to avoid paying spousal support or dividing up marital property might involve moving to a state that had made quite clear that her marriage would not be recognized.

When section 283(1) suggests that a marriage’s validity is “determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses of the marriage,” the section does not specify which states might be thought candidates for the title of “state with most significant contacts.” However, comment c on subsection (1) explains that the candidates are the state of celebration and the “state where the spouses were domiciled before the marriage and where they make their home immediately thereafter.” But this means that section 283(1) is not designed to allow some domicile in the distant future to de-
termine the validity of a marriage but, instead, is limiting its focus to the states of celebration and domicile around the time of the marriage.

The position of the Second Restatement is even clearer in light of section 283(2), which states that 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.” It would make no sense for section 283(1) to suggest that the law of the state with the most significant contacts at any time during the marriage would determine the union’s validity and also that a marriage will be valid unless it violates the strong public policy of the state with the most significant relationship to the marriage and the parties at the time of the marriage. Rather, the only plausible interpretation is that the “most significant relationship” test will pick out one of the following potential candidates: (1) the domicile of either party at the time of the marriage, (2) the state of celebration, and (3) the state where the couple plans to live right after the marriage. It simply is not reasonable to interpret the Second Restatement as allowing subsequent domiciliary states to undermine the validity of a marriage that the states of celebration and domicile at the time of the marriage had recognized.

As might be inferred, deciding which state’s law to apply can be complicated, even if all the interested states can be determined at the time of the marriage. The state where the members of the couple are domiciled before the marriage has an interest in having its marriage laws respected. Yet, it is of course possible that the members of the couple do not live in the same state, which might mean that there are two states that qualify as the domicile of at least one member of the couple at the time of the marriage. The state of celebration might but need not be one of the states where one member of the couple was domiciled at the time of the marriage. That means that there might be three states whose laws would be of interest. Further, the couple might plan on residing in still another state after the marriage. Thus, there might be a number of states whose marriage laws were applicable when determining the valid-
ity of the marriage. That said, it would be possible to establish the marriage’s validity at the time of the marriage by making sure that the marriage was in accord with the laws of the state of celebration and of the states where the couple was/would be domiciled before and immediately after the marriage. Using the system suggested by either the First or the Second Restatement, a marriage would not suddenly be treated as if it had never existed simply because one or both members of the marital couple moved to another state years after the marriage had been celebrated.

B. Exceptions to the Rule

One additional wrinkle should be added to the system described above. As a general matter, domiciles acquired years after a marriage was celebrated would recognize a marriage valid in the domicile at the time of the marriage, as long as that marriage did not fall into a very narrow exception. Polygamous marriages and certain types of incestuous marriages need not be recognized even if valid in the domicile at the time of the marriage’s celebration, which is one of the reasons that such marriages were expressly mentioned in the First Restatement. Basically, such marriages are viewed as not recognized by “civilized” nations and hence did not need to be recognized.

Precisely because no state recognizes polygamous marriages, there are no cases in which the validity of a polygamous marriage validly celebrated in one state was challenged in another. Instead, the issue arose if a polygamous marriage validly celebrated in a different country were challenged in one of the states or if a polygamous marriage celebrated by a Native American were challenged in state courts. It is underappreciated both that certain Native American tribes permitted polygamous unions and that such unions were sometimes recognized in state courts when certain conditions had been met.

The point here is not to discuss whether a polygamous marriage valid in the domicile should be recognized, but merely to explain that traditionally there were very few marriages that subsequently acquired domiciles were thought free to refuse to recognize. However, it is important to understand the sense in which it was claimed that a state should recognize a marriage validly celebrated in another domicile.

A state is not permitted to refuse to recognize a marriage that is protected by state or federal constitutional guarantees. Further, if a state or federal law requires the recognition of certain marriages, then that state would not be free to treat such marriages as if they had never existed. However, the focus of discussion here involves marriages not protected by state or federal law that should nonetheless be recognized by a state, even though the parties could not have celebrated the marriage within that state. Even when there is no applicable state or federal law expressly requiring recognition, there nonetheless is a sense in which a state should recognize a marriage that could not be celebrated locally. The sense in which such recognition should be accorded is illustrated by the following two cases. Each involves whether a subsequently acquired domicile should recognize an interracial marriage validly celebrated in the domicile at the time of the marriage, even though such a marriage could not be celebrated in the forum.

In State v. Ross, the Supreme Court of North Carolina was asked to decide whether the state should recognize an interracial marriage validly celebrated in South Carolina. The court found that there had been no intention to evade the law of North Carolina, because there had been no intention to return to the state after the marriage, and further found that an interracial marriage valid in the states of celebration and domicile at the time of the marriage had to be recognized by the subsequent domicile. The Ross court made clear that its ruling would not protect an interracial couple who had purposely tried to evade North Carolina law with the intent of living in that state after having married elsewhere and, indeed, the

5. 76 N.C. 242 (1877).
same court held void an interracial marriage that had been celebrated by North Carolina domiciliaries in a state where such marriages were legal.

One of the Ross defendants had been domiciled in North Carolina, but then had left the state and married in South Carolina. The trier of fact had to determine whether the defendant had abandoned North Carolina with the intention of making South Carolina her domicile or, instead, had remained a North Carolina domiciliary. The validity of her marriage depended upon her having been domiciled in South Carolina rather than in North Carolina at the time of the marriage.

Once the North Carolina Supreme Court found that the defendant had been domiciled in South Carolina, the court had to address whether North Carolina could refuse to recognize a marriage recognized by the states of celebration and domicile at the time of the marriage. The North Carolina Attorney General argued that just as incestuous and polygamous marriages, although valid where celebrated, need not be recognized as valid in a subsequent domicile, interracial marriages also need not be recognized in a subsequent domicile, even if valid in the states of celebration and domicile at the time of the marriage.

While that argument was rejected, it is nonetheless important to understand why the Attorney General analogized interracial marriages to polygamous or incestuous unions. The latter are considered to be contrary to the law of civilized nations and need not be recognized in a subsequent domicile, even if they are celebrated in a country that recognizes such unions. Because of the general understanding of the exception permitting non-recognition of polygamous and certain incestuous marriages even if valid where celebrated, the Attorney General’s argument would have had much persuasive force if interracial marriages were appropriately analogized to polygamous or incestuous unions.

The rhetorical force of the Attorney General’s analogy diminished significantly upon closer examination. The Attorney General likened an interracial marriage to an incestuous one, but failed to mention the obvious ways in which the two kinds of marriages were disanalogous. For example, at the time, no state recognized
polygamous marriages, while several states recognized interracial marriages. There was already a generally accepted rule of non-recognition with respect to polygamous marriages, but no generally accepted rule with respect to the non-recognition of interracial marriages. Further, the Attorney General failed to mention that not all incestuous marriages are thought to violate the law of civilized nations and, thus, subject to non-recognition by subsequent domiciles—only marriages between those “in the direct lineal line of consanguinity … [or] those contracted between brothers and sisters”\(^6\) need not be recognized even if validly celebrated in another domicile. Indeed, in *Sutton v. Warren*, the Supreme Judicial Court of Massachusetts recognized a marriage between an aunt and nephew that had been validly celebrated in a different domicile, notwithstanding its impermissibility in Massachusetts, precisely because the parties to the marriage were not in the direct line of consanguinity.

The distinction between different kinds of incestuous relationships is important, although not because it provides a universal standard defining incest. Indeed, there is no such universal standard and, for example, some states define first cousin marriages as incestuous while others do not. Rather, the distinction is important, at least in part, because it illustrates the narrowness of the exception permitting subsequent domiciles to refuse to recognize marriages valid in the domicile at the time of the marriage.

The Attorney General argued that interracial marriages were analogous to polygamous or incestuous unions and thus could be treated as void by that state. But a much closer “analogy” to incest is another example of incest. Yet, as the Supreme Judicial Court of Massachusetts made clear in *Sutton*, even another example of incest is not included within the rule that permits subsequent domiciles to refuse to extend recognition to a marriage by individuals domiciled elsewhere.

The law of nations exception does not provide a loophole whereby subsequent domiciles can refuse to recognize a marriage whenever that union is too offensive to local taste but, instead, is narrowly cined. If the law of nations test were instead simply construed as

providing a standard by which to measure the degree to which a marriage must be offensive in order for it to be refused recognition, there would be important and far-reaching implications. A subsequent domicile could claim that any prohibited marriage was as offensive to public policy as was an incestuous union and thus did not have to be recognized. But that is not the rule; rather, the exception is narrowly drawn and provides a bright-line rule about the kinds of marriages subject to this kind of treatment.

A Louisiana appellate court explained that Louisiana law prohibited marriage “between brother and sister, whether of the whole or the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins.”

Basically, the law treated all such marriages as null and void. However, merely because such marriages were comparable and all treated as null and void for purposes of deciding whether a particular couple could marry within Louisiana did not establish that they were comparable for purposes of deciding whether to recognize a marriage that had been validly celebrated in a different jurisdiction. Indeed, when upholding the marriage between first cousins that had been validly celebrated in a different domicile, the court noted that first cousin marriages did not involve a marriage either between a sister and brother or between those in a direct line of consanguinity.

The claim here is not that a state is precluded from defining what constitutes incest but, rather, that a couple domiciled and married in a different state should not be subjected to the local laws regarding their incapacity to marry if they later move to that state unless they meet the very narrow exception already generally recognized. Both the states and the individuals themselves have too much to lose when marriages can simply disappear, and states should not expand the category of marriages subject to nullification.

In *State v. Bell*, the Tennessee Supreme Court considered whether Tennessee had to recognize the marriage of an interracial couple that had been celebrated in accord with Mississippi law. The opin-

8. 66 Tenn. (7 Baxt.) 9 (1872).
ion is noteworthy for its terseness because, for example, the court did not specify whether the interracial couple had been domiciled in Tennessee and had attempted to evade local law by going elsewhere to marry or, instead, had been domiciled in Mississippi, had married there, and had then moved to the state of Tennessee. It was only in an opinion issued years later that the Tennessee Supreme Court made clear that the parties to the marriage in *Bell* had been domiciled in Mississippi at the time of celebration.\(^9\)

The *Bell* court suggested that merely because a marriage was validly celebrated in a different domiciliary state would not establish that the marriage was in accord with local public policy and, thus, would not establish that Tennessee should recognize the union. The court was correct that a marriage's being in accord with the public policy of a different state would not establish that such a union was in accord with local public policy and, further, was correct that a marriage being valid in a different state would not establish that the union must be recognized locally. For example, a marriage between a brother and sister validly celebrated in a different state would not have to be recognized locally. That said, the difficulty with the view articulated by the court was in what it implied rather than in what it stated— one would have inferred that the court believed that the validity of any marriage celebrated elsewhere should be determined in light of whether such a marriage could be celebrated locally. However, unless suitably modified, such a position would have unpalatable results, since any marriage contrary to local policy would simply not be recognized, even if it had been validly celebrated in the neighboring domiciliary state twenty years earlier and even if there were various children of the marriage who would be adversely affected were the union declared invalid.

The Tennessee Supreme Court understood that a state's reserving for itself the right to refuse to recognize any marriage validly celebrated elsewhere merely because that union was not in accord with local requirements would have unacceptable results. In a later opinion, *Pennegar v. State*, the court explained, “It will not do to say

that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property. ”

Nonetheless, the court basically suggested that the decision about whether to recognize a marriage validly celebrated in another domiciliary state must be left up to each state. “Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the jus gentium of ‘valid where solemnized, valid everywhere.’”

Refusing to distinguish between individuals who had been domiciliaries attempting to evade local law and individuals who had married in good faith in their own domicile, the Bell court apparently took a position that would be later articulated by the Alabama Supreme Court. “The Legislature is fully competent to declare what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statute.”

Two different issues might be addressed. When arguing that a legislature is competent to enact particular legislation, a court may merely be pointing out that it is not beyond the constitutional power of the legislature to enact the statute under discussion. If this is all that is meant, then at least as a general matter both the Alabama and Tennessee courts were correct—the legislatures could enact the legislation at issue without fear that the state (or federal) courts would strike down the statutes as unconstitutional.

10. Pennegar, 10 S.W. at 306.
11. Id.
13. This assumes of course that no other constitutional guarantees are implicated, e.g., equal protection, due process, or the right to travel.
Even if it was not beyond the power of the legislature to pass such legislation, a separate question was whether the legislature’s doing so would be in accord with the states’ common understanding with respect to which marriages that could not be celebrated locally would nonetheless be recognized. A state’s refusing to recognize a marriage validly celebrated elsewhere merely because that marriage could not be celebrated locally would undermine the power of the domicile at the time of the marriage to determine the conditions under which its own domiciliaries might be wed (and remain married even if leaving the state temporarily or permanently). Further, such a policy ignores the various public policy considerations that have been articulated to craft a very narrow exception involving polygamy and certain incestuous relations, which does not put other marriages at risk as long as they were validly celebrated in the marital domicile. Rather than respect the power traditionally given to the domiciliary state at the time of the marriage and rather than respect the traditional, very limited international exception involving incestuous or polygamous marriages, the *Bell* court was willing to allow each state to decide for itself which marriages would be recognized. But such a policy might undermine the justified expectations of couples who may have married years earlier and the interests of children associated with legitimacy, as well as cloud property rights, notwithstanding the acknowledged importance of all of these considerations.

The *Bell* court reasoned that if the Mississippi marriage were recognized, “We might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy.” Yet, the court’s reasoning was disingenuous if only because the court’s examples involved marriages that historically did not have to be rec-

14. At the time, the law imposed special burdens on illegitimate children.
ognized elsewhere even if valid in the domicile at the time of the marriage. Both polygamous marriages and the incestuous marriages named were exactly those that Tennessee would not have to recognize even if recognizing the interracial marriage at issue before the court.

Ironically, the Bell court’s reluctance to offer the factual background involved in the Bell case may have undercut the persuasiveness of the decision. Suppose, for example, that the members of the couple had married in Mississippi and had then immediately left for Tennessee, where they had hoped to make new lives for themselves. In that event, the court would have been correct to apply the law of the domicile acquired immediately after the marriage. The court could have refused to recognize the marriage without putting at risk countless marriages validly celebrated in sister domiciliary states.

C. Comity

When criticizing the Bell opinion, one might argue that it reflected a bad policy choice or, instead, a failure to recognize that the state should recognize those marriages valid in the states of celebration and domicile at the time of the marriage. The former would simply be questioning the wisdom of a decision, while the latter would be making a much more damning criticism. The determination of which kind of criticism is appropriate in this type of case depends on the force of the claim that a state as a matter of comity should recognize the marriages performed in other state domiciles.

In Hilton v. Guyot, the United States Supreme Court explained, “‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”16 Instead, the Court described comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own

citizens or of other persons who are under the protection of its laws.” 17 Here, the Court is attempting to explain what is meant when one nation “should” give effect to an act from another state—the failure to do so would not somehow put the country at risk legally, although the country might appropriately be subject to harsher criticism than it would have received for having merely failed to act in a particular way out of courtesy.

The kind of comity at issue when one state is deciding whether to recognize a marriage celebrated in a sister domiciliary state, however, is the comity that should exist between states rather than between nations. Certainly, the states are themselves separate sovereignties in our dual-sovereignty system. Yet, it is also true that if the United States is to be more than a loose federation of independent sovereignties, then states cannot be understood to stand in the same relation to each other as nations do to other nations. There must be and is a closer tie between the states, and some things that might be appropriately left to considerations of comity for nations should not be left to considerations of comity for states within the same country.

Traditionally, even when the principles of comity for nations are providing the basis upon which one domicile will decide whether to recognize a marriage validly celebrated in a different domicile, the only marriages subject to non-recognition were either polygamous or incestuous. Thus, even if the tie between states were no closer than the tie between nations, there would still be reason to think that there should only be a narrow category of marriages valid in the domicile at the time of the marriage that should be subject to non-recognition in a subsequent domicile, and that a state refusing to follow such a rule might appropriately be criticized by other states. Yet, an additional point here is that the states should be even more respectful of marriages validly celebrated in a sister domiciliary state, and thus states should not expand the traditional exception especially when a marriage in a sister domiciliary state is at issue.

17. Id. at 164.
At this time, no state recognizes a union that would qualify for non-recognition under the standard involving marriages that no “civilized” country would recognize. Indeed, given that what is being discussed here is a marriage that would be recognized in a sister domiciliary state, it would be difficult for one state to plausibly assert of another that the latter did not count as “civilized.”

The United States Supreme Court has discussed an alteration in “the status of the several states as independent foreign sovereignties,” whereby they became “integral parts of a single nation.” 18 Precisely because the states are not separate but instead form one nation, there is less of a need to resort to the flexibility offered by comity and more of a need to have the uniformity and consistency that would facilitate interstate travel and migration. Indeed, one of the reasons that the Full Faith and Credit Clause was included in the United States Constitution was to alter “the status of the States as independent sovereigns.” 19 The Court has suggested both that “the Framers intended … to help weld the independent states into a nation” 20 and that comity may be “too fluid [and] ill-defined” a concept for domestic relations purposes insofar as the marital status conferred by another state is at issue. 21 Thus, it may be that a refusal to recognize a marriage valid in a sister domicile would be subject not only to justified criticism but also to being reversed.

Special concerns are implicated when the formal recognition of families is at issue. The Court has specifically warned that “if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union … a rule would be fostered which could not help but bring considerable disaster to innocent persons and bastardize children hitherto supposed to be the offspring of lawful marriage.” 22 Here, the Court was implying that these nega-

tive effects might be sufficiently weighty to have a constitutional dimension that would prevent Congress from subjecting families to such uncertainty. As Justice Jackson has noted, “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.” 23 If a marriage can be retroactively invalidated by having one or both members of a couple move across state lines, then individuals will not be secure in their knowledge concerning their marital status. Indeed, precisely because individuals travel so frequently among states, it is important as a matter of public policy to establish that a marriage is valid anywhere in the United States if valid in the states of celebration and domicile at the time of the marriage.

D. Expansion of the Power to Refuse to Recognize Marriages Validly Celebrated in the Domicile

Recently, some states have announced that they will refuse to recognize same-sex marriages even if those unions are valid in the domicile at the time of the marriage. While it might be argued that Congress has authorized the states to do this, 24 it should be noted that some states are claiming to have the power to refuse to recognize marriages valid in the marital domicile even if those marriages do not involve same-sex couples. For example, there is case law in Arizona suggesting that first cousin marriages will not be recognized in the state, even if those marriages were validly celebrated in a sister state domicile.

The United States Supreme Court has not addressed whether states have the power to refuse to recognize a marriage validly celebrated in a sister domiciliary state. If states do, it would not be

23. Estin, 334 U.S. at 553 (Jackson, J., dissenting).
difficult to imagine that the states might increase the number of marriages that would be subject to such non-recognition. To see one possible area of expansion, a little background is required.

Historically, some states made it very difficult to obtain a divorce, while other states had policies that were much more lax. Individuals who could not divorce in one state might become domiciled in another state with more forgiving policies and secure a divorce in that latter domicile. The Court has held that such divorces are subject to full faith and credit guarantees.

Recently, some states have created a special type of marriage called a covenant marriage that is more difficult to end than a traditional marriage. The justification for creating such a status is that various states and individuals believe that marriage as an institution would be strengthened were individuals to have more difficulty in securing a divorce. Although no state has yet done this, a state believing that marriage requires bolstering might revert to the days before no-fault divorce and only permit marriages to be dissolved based on a limited set of grounds. Such a law would affect the domiciliaries of that state— they would no longer be able to secure divorces in that state based on some of the grounds that are currently available. However, a state that modified its own laws in that way would not thereby be authorized to refuse to recognize divorces based on grounds that were not available locally.

Nonetheless, the power to refuse to recognize a marriage that could not be celebrated locally even if it was valid in the domicile at the time of the marriage might provide an opportunity for a state to use its marriage recognition policies in a way that would (allegedly) bolster the institution of marriage. Suppose, for example, that the Louisiana Legislature changed current law and instead established by statute that couples were permitted to divorce only if one of the parties could establish that the other party was guilty of adultery, abuse, or abandonment. Couples who could have divorced by virtue of their living separate and apart for a certain period would no longer be able to end their marriages on such a basis. Suppose further that the state legislature passed a law precluding the state from recognizing any second marriage of an individual if that person had secured a divorce on a ground that would not be rec-
ognized in the state. Such a policy might be thought to bolster marriage in that it might be thought to remove one of the incentives to divorce.

Suppose that an individual named Taylor is domiciled in Texas. She and her husband have been living separate and apart for years and she secures a divorce in that state on that basis. Not only would the divorce be recognized in Texas, but Williams v. North Carolina requires that Louisiana also recognize the divorce should there be some reason that the validity of the divorce were questioned in Louisiana.25

Suppose further that Taylor meets someone else in Texas and marries him. The couple decides that New Orleans would be a wonderful place to live and so moves to Louisiana. Suppose further that it becomes necessary to establish the validity of Taylor’s second marriage.

If indeed Louisiana could refuse to recognize a marriage validly celebrated in a sister domiciliary state if that marriage violated an important public policy of the state, then Louisiana could refuse to recognize Taylor’s second marriage. The state would not be denying the validity of her divorce and thus, for example, could not claim that she was committing adultery by living with her second husband. Rather, the state would simply say that it did not recognize the second marriage and thus that she would have neither the burdens nor the benefits that spring from marriage.

E. Conclusion

The domiciliary state at the time of the marriage is given much, although not unlimited, discretion with respect to which marriages it will recognize. For example, the state may not prohibit racial or religious intermarriages, and any law to that effect could not be given force to prevent the recognition of marriages either celebrated

locally or elsewhere. However, the state may prohibit the union of individuals who are too young or too closely related by blood. Further, the state could refuse to recognize a marriage between lineal descendants, even if that marriage had been validly celebrated in a sister domiciliary state.

Unless a marriage falls into a very narrow category of marriages, however, there is a longstanding tradition of recognition as long as the marriage was valid in the marital domicile. A variety of public policy considerations support a refusal to broaden the exception beyond its current limitations, even if one brackets that refusing to recognize a marriage valid in the domicile at the time of the marriage might violate federal constitutional guarantees.

Traditionally, the domicile is thought to have a greater interest in marital status than does a state where a couple happens to be vacationing. However, some states have stated that they will not recognize a same-sex marriage under any circumstances, thereby ignoring the priority given to the domicile. Arguably, the United States Constitution precludes a state from acting this way, although there is an important sense in which states should not have such a policy even if the Constitution does not forbid them from doing so. Important societal and individual interests are undermined by such blanket refusals.

Arguably, the refusal to recognize a same-sex marriage under any circumstances suggests animus, especially when such a marriage could be validly celebrated in a sister domiciliary state, which provides yet another possible basis upon which to claim that such blanket non-recognition offends constitutional guarantees. However, states might claim that they are merely following the example set by the federal government, which not only authorizes states to refuse to recognize such marriages but which also has decided that it will not recognize same-sex marriages under any circumstances. The Federal Defense of Marriage Act in which the United States Government made clear its view of same-sex marriage is discussed in the next chapter.
Chapter 3

The Federal Defense of Marriage Act

The Federal Defense of Marriage Act (DOMA)\(^1\) has two provisions. One makes clear that states are not required by the Full Faith and Credit Clause to recognize same-sex marriages validly celebrated in other states, and the other defines marriage for federal purposes as the union of one man and one woman. The two provisions are designed to do different things, and each must be examined and explained separately. While there is little or no dispute about some of the implications of these two provisions, the Act was not drafted with as much care as might have been desired and there are certain ambiguities that have not been clarified by the courts.

There are several reasons that it is important to clear up these ambiguities. First, absent an authoritative construction of the Act’s provisions, one cannot be certain what the Act authorizes states to do. If the Act attempts to confer broad powers on the states that the state would not otherwise have, then the Act may be more vulnerable to constitutional challenge and, in any event, the repeal or invalidation of the Act would leave states with less discretion than they might currently believe that they have. Ironically, based upon some interpretations of DOMA, the repeal or invalidation of the Act will have little or no effect on the power of states to refuse to recognize same-sex marriages validly celebrated elsewhere, whereas based upon other interpretations its repeal or invalidation will have important effects.

A. Why Was the Defense of Marriage Act Passed?

In 1993, the Hawaii Supreme Court decided *Baehr v. Lewin*, which involved a challenge to that state’s same-sex marriage ban. Rather than simply strike down the restriction, the court instead remanded the case for evaluation in light of the strictest standard under the Hawaii Constitution.

Many who read the *Baehr* decision understood that the standard in light of which the ban would be examined by the lower court was so strict that it would be almost impossible for the state to defend the marriage ban successfully. Absent an amendment to the state constitution or some other compromise, the relevant question would be when rather than whether Hawaii would recognize same-sex marriages.

The developments in Hawaii did not escape the attention of members of Congress. The legal recognition of same-sex marriage would implicate two separate concerns: (1) same-sex couples living in other states might go to Hawaii, marry, and then return to their domiciles asking that their marriages be recognized, and (2) federal benefits are accorded to those who are married according to state law and thus same-sex couples validly married under Hawaii law would be eligible to receive the same benefits that other couples receive.

As matters turned out, the Hawaiian litigation did not result in the recognition of same-sex marriage. By the time that the trial court had issued its opinion and the Hawaii Supreme Court had considered the state’s appeal of the trial court decision, the Hawaii Constitution had been changed by referendum. Even if same-sex marriage had been protected under the unamended state constitution, that document was changed to give the state legislature the power to reserve marriage for different-sex couples.

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Congress did not wait to see whether the Hawaii Constitution would be amended by referendum or whether the Hawaii Supreme Court would uphold the trial court’s striking down the state’s same-sex marriage ban. Instead, the Defense of Marriage Act was passed, one provision of which addressed full faith and credit matters and the other of which addressed which marriages would qualify for federal benefits.

B. The Full Faith and Credit Provision

One section of the Defense of Marriage Act reads as follows:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁵

Initially, this statute appears relatively easy to understand. As far as full faith and credit guarantees are concerned, a same-sex marriage validly celebrated in one jurisdiction may but need not be recognized in another. For example, Connecticut, Massachusetts, New Hampshire, and Vermont all permit same-sex marriages to be celebrated locally. A state like New York, whose law does not permit such unions to be celebrated within the state, might nonetheless decide that its public policy does not preclude the recognition of such unions as long as they are validly celebrated in another state. Thus, an individual domiciled in New York might go to Connecticut to marry a same-sex partner and then return home and have that relationship recognized, even though the relationship would not have been legally recognized if, instead, the couple had

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married in a local ceremony with a clergyperson officiating. The difficulty would not have been that a clergyperson had officiated (the marriage would have been recognized had the members of the couple been of different sexes), but that the couple had celebrated it locally rather than in a state that would accord the relationship legal recognition.

At the very least, the DOMA full faith and credit provision permits, but does not require, a domicile to refuse to recognize its own domiciliaries’ same-sex marriage, even if validly celebrated in a sister state. Thus, when the Act says that a state is not required to give effect to a public record respecting a same-sex relationship that is treated as a marriage under the laws of that other state, the Act is saying that New York will not be forced to recognize a Connecticut public record establishing that a particular same-sex couple has married. So, too, when the Act says that a state is not required to give effect to a public act respecting a relationship between persons of the same sex that is treated as a marriage, the Act is saying that New York is not required to give effect to a same-sex marriage celebrated in accord with Connecticut law. However, when the Act says that a state is not required to give effect to a judicial proceeding respecting a same-sex relationship that is treated as a marriage under a different state’s law, the Act’s meaning is not entirely clear.

One possibility would be that the Act is meant to include certain proceedings involving a judge, for example, a ceremony in which a justice of the peace marries two individuals. Or, the judicial proceedings clause might have been adopted to cover the following scenario: Alex and Brian are domiciled in Pennsylvania. They travel to Connecticut, marry, and then obtain a declaratory judgment in Connecticut that they are indeed married. They then seek to have that declaratory judgment given effect in Pennsylvania, notwithstanding that state’s refusal to recognize such marriages. By permitting Pennsylvania to refuse to give effect to the Connecticut declaratory judgment, Pennsylvania would not be forced to recognize its domiciliaries’ same-sex marriage, judgment affirming its validity notwithstanding.

Even assuming that it would be possible to get a Connecticut declaratory judgment in these circumstances, DOMA’s judicial proceedings language is not well-suited to an interpretation limiting
its application to cases involving a marriage by a justice of the peace or to cases in which a declaratory judgment affirming the existence of a marriage had been issued. There is no language in the Act limiting the kinds of judgments involving same-sex marriages that need not be given effect in other states, and the provision might be taken to mean that one state would not have to give effect to a divorce of a same-sex couple that had been issued by a court in a different state.

The non-recognition of divorce judgments might offer individuals ways in which they could evade their court-imposed responsibilities. Suppose, for example, that Carl and David divorce in Massachusetts, and the court awards Carl both property and spousal support. On one interpretation of the full faith and credit provision, David could avoid his court-imposed responsibilities simply by moving to a state that refuses to recognize the marriage (or divorce) of that couple.

Consider, for example, the following Georgia constitutional provision:

This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such relationship.6

Presumably, this means that if David moved to Atlanta and Carl sought to enforce the Massachusetts judgment, the Georgia courts would be precluded from considering or enforcing any of the rights arising from the Massachusetts decree. Needless to say, such a refusal might result in great unfairness. Carl might have made both

financial and non-financial contributions to the marriage, and the just distribution of the marital assets (as determined by the Massachusetts court) would not occur because David had evaded his obligations by moving to Georgia.

Yet, the full faith and credit provision need not be interpreted as authorizing a state to refuse to enforce a claim for money damages arising as a result of the termination of a same-sex marriage. To see why this is so, it will be helpful to consider both what the Act says and what it does not say. The provision specifies that states are not required “to give effect to any public act, record, or judicial proceeding of any other State [involving a same-sex marriage] … or a right or claim arising from such relationship.”7 Apparently, the drafters were not confident that the provision exempting acts, records, and judicial proceedings from full faith and credit guarantees would be understood to include associated rights and claims, so they also expressly stated that rights or claims arising from such a relationship would also not have to be given full faith and credit. Thus, states would not be required to give effect to the relationship itself or to any rights or claims arising from it.

What rights might the drafters have had in mind? While they did not elaborate, at least two come to mind. Individuals who are married enjoy a variety of rights including, for example, a presumption of parenthood of a child born into the relationship. The drafters might have wanted to make clear that a child born into a same-sex union need not be presumed to be a child of each of the parties. Or, the drafters might have believed that a married individual would be protected from prosecution for engaging in consensual sexual relations with his or her spouse. Given that DOMA was passed and signed in 1996 and state laws criminalizing same-sex relations were not held unconstitutional until 2003 in Lawrence v. Texas, it might have been thought that without congressional action same-sex marriage would provide a way whereby individuals with a same-sex orientation would be immunized from prosecution for engaging in sexual relations with their partners.

The point here is not to list all of the rights that are associated with marriage, but merely to point out the provision’s lack of parallelism with respect to the ways that relationships and judicial proceedings are treated. With respect to the latter, the Act did not say that neither the judicial proceeding itself nor any rights arising from such a proceeding would be entitled to full faith and credit, but simply said that a judicial proceeding itself would not need to be credited.

Why should a state be required to enforce rights or claims arising from a proceeding without recognizing the proceeding itself? Arguably, recognizing the divorce proceeding would recognize the marital union itself, whereas simply enforcing a claim for money damages need not involve a recognition much less an endorsement of a same-sex relationship. Money damages are awarded for a variety of reasons, and states might not be thought to be making any kind of broad policy statement simply by requiring an individual to pay an existing debt. The drafters might have been thinking that states would now be authorized to refuse to give effect to the proceeding (because giving effect to such a proceeding would involve recognizing a relationship that allegedly violated an important public policy of the state), but that states would not be authorized to refuse to enforce debts (which, after all, might have arisen in any number of circumstances).

It might be argued that the language referring to rights was included to make crystal clear that no rights arising from a same-sex relationship would have to be recognized. Yet, such an explanation raises still other issues. Even had that sentence not been included, it would have been assumed that rights arising by virtue of a marriage in one state would be subject to a public policy exception in a different state, precisely because those rights would be viewed as arising by virtue of the former state’s laws. However, the same assumption would not have been made about rights arising from a judgment, since the existing law had been that rights reduced to judgment were enforceable throughout the country, public policy of a particular state to the contrary notwithstanding. Thus, one would have expected the Act to make crystal clear that rights arising from judgments did not have to be accorded full faith and credit rather than that rights arising from a sister state’s laws did not have to be given effect. By
specifying that the rights arising by virtue of the relationship would not have to be credited but not saying the same about rights reduced to judgment, the Act implicitly reinforces existing law rather than supplants it.

One issue yet to be resolved by the courts involves what this provision was intended to do. Offering a definitive construction of legislative intent on this matter is quite difficult if only because members of Congress did not seem to appreciate the implications of modifying the credit due to judgments. First, some seemed to believe that the DOMA full faith and credit provision was simply reflecting current law, even though then-existing law required states to recognize divorce judgments validly issued in other states. Other members seemed to understand that this provision might be changing the current system, although they did not explore the kinds of changes that they were creating. The focus for most members of Congress seemed to be on whether same-sex marriages validly celebrated in Hawaii would have to be recognized in the other states rather than on whether divorce judgments would have to be recognized.

One ironic implication of this provision is that same-sex divorces might be subject to non-recognition even in states having no objections to same-sex marriage. Consider a state that recognizes same-sex marriage but strongly disapproves of divorce and limits the conditions under which individuals can terminate their marriages. That state’s law specifying the conditions under which marriages could be ended would of course apply to all local, married couples, whether composed of individuals of the same sex or of different sexes. The complication posed by DOMA is that the Act seems to authorize a state to refuse to recognize a same-sex divorce granted in another jurisdiction if that latter jurisdiction made it too simple to secure a divorce.

Suppose, for example, that Massachusetts changes its divorce law to reflect Maryland’s, which permits couples to divorce when they have been living separate and apart for at least a year. Vermont’s law is less stringent, since it permits couples to divorce if they have been living separate and apart for six months.

Consider the hypothetical couple, Ellen and Frieda, who have married in Vermont but have decided to divorce. They live separate and apart for the required six months, and then dissolve their union
in accord with local law. Ellen decides to move to Massachusetts to start a new life. On its face, DOMA would permit Massachusetts to refuse to recognize the Vermont divorce. The state’s rationale would not be that it disapproves of same-sex marriages, but that it disapproves of permitting individuals to divorce when they have only been living apart for six months.

The state would not be trying to punish same-sex couples. On the contrary, were the state permitted to do so, it would refuse to recognize any divorce granted when the couple had only been living apart for six months. However, the state is precluded by the Full Faith and Credit Clause from refusing to credit divorce judgments validly issued in other states, unless the members of the couple happen to be of the same sex.

The DOMA full faith and credit provision is not a federalism provision that simply accords states the power to decide which judgments are contrary to the strong public policy of the state. Rather, it picks out a subset of judgments — those involving same-sex couples — and makes only those subject to non-recognition in sister states. Rather than promote states’ rights, the provision is simply a vehicle by which members of the LGBT community can be subjected to unique burdens.

C. Is the Full Faith and Credit Provision Constitutional?

A separate issue is whether Congress has the power to pass this DOMA provision. While there is language in the Constitution authorizing Congress to pass laws affecting full faith and credit, that language has yet to be authoritatively construed. Article IV, section 1, of the United States Constitution reads:

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.
There has been some debate whether the second sentence gives Congress the power to increase or decrease the credit to be given to sister state acts, records, and proceedings or whether, instead, it only gives Congress the power to increase the credit to be given. For example, some commentators suggest that Congress does not have the power to decrease the credit due to judgments of sister states, although the Court has not yet fully discussed much less adopted that position.

The reason that the Court has not yet had to directly address the contours of Congress’s power under the Full Faith and Credit Clause is that Congress passed legislation in 1790 establishing that the judgments issued in one state would have “such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.” Often, when discussing the demands imposed by the Full Faith and Credit Clause, the Court considers the constitutional and statutory text in tandem, and does not distinguish between the demands imposed by the Constitution and the demands imposed by the congressional statute. Thus, in Magnolia Petroleum Company v. Hunt, the Court discussed “the command of the Constitution and the statute.” The Court explained that it was not “aware of any 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.” Even when discussing the unifying force of the Clause, which “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,” the Court did not make clear whether the Clause itself had this effect or, in-

10. Id.
11. Id. at 439.
stead, whether the Clause and the Act of Congress together had this effect.

The Court has explained:

The faith and credit required to be given to judgments does not depend on the Constitution alone. Article 4, § 1, not only commands that “full Faith and Credit shall be given” … but it adds “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” And Congress has exercised this power … and specifically directs that judgments “shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”

The Court had never made clear whether Congress would have been within its constitutional power if affording less faith and credit to judgments than it did in the 1790 Act, although the Court has hinted that Congress could not have qualified the obligation to enforce a judgment from a sister state. For example, the Court noted in Davis v. Davis that “Congress rightly interpreted the clause to mean not some, but full credit.” Perhaps that means that Congress would have been exceeding its power if reducing or qualifying the credit due to judgments.

After noting in Williams v. North Carolina that there was no public exception that would permit a state to refuse to give full faith and credit to a divorce judgment from another state, the Supreme Court expressly refused to address whether Congress had the power to create such an exception. Nonetheless, the Court made clear that the creation of such an exception would undermine the purposes of the Full Faith and Credit Clause to a “substantial degree,” especially considering “the considerable interests involved and the

substantial and far-reaching effects which the allowance of an exception would have on innocent persons.”\textsuperscript{15} Further, the Court has noted that “while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”\textsuperscript{16} On the other hand, Justices have sometimes suggested in dicta that Congress has broad powers under the Full Faith and Credit Clause.

Whether Congress had the power to enact the DOMA full faith and credit provision has not been extensively analyzed in the courts. For example, in Wilson v. Ake, a federal district court in Florida rejected that “Congress may only regulate what effect a law may have, it may not dictate that the law has no effect at all”\textsuperscript{17} by suggesting that “Congress’ actions in adopting DOMA are exactly what the Framers envisioned when they created the Full Faith and Credit Clause.”\textsuperscript{18} Regrettably, the Wilson court did not even consider the prevailing jurisprudence in this area, apparently unaware of the differing views expressed by members of the Court regarding whether Congress had the power to reduce the credit to be given to other states’ judgments.

At least one reason that this issue has not been analyzed thoroughly in the courts is that there have been relatively few cases challenging DOMA. Because no state recognized same-sex marriage until 2003, individuals did not even have standing to make a challenge until fairly recently. Further, just because some states recognize same-sex marriage does not give individuals standing to challenge DOMA unless they themselves have married in accord with local law. For example, Smelt v. County of Orange\textsuperscript{19} involved a constitutional

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\textsuperscript{15} Id. at 303–04.
\textsuperscript{17} Wilson v. Ake, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005).
\textsuperscript{18} Id.
\textsuperscript{19} 447 F.3d 673 (9th Cir. 2006).
\end{flushright}
challenge to DOMA by Arthur Smelt and Christopher Hammer. While the two had a legal relationship with each other in that they were domestic partners under California law, they were not married under California or any other state’s law. For that reason, the Ninth Circuit found that they lacked standing.

Were the Court to hear a challenge to the DOMA full faith and credit provision, it might take the opportunity to limit the power of Congress to decrease the credit due judgments. Indeed, in a different respect, the Court has taken the opportunity in the recent past to bolster the robustness of full faith and credit guarantees.

At one point, members of the Court hinted that there might be a public policy exception to full faith and credit guarantees regarding the enforcement of judgments. For example, after noting that as a general matter final judgments are entitled to full faith and credit, the Williams Court suggested that there are exceptions to this rule, although the “actual exceptions have been few and far between.” Thus, one would have inferred from Williams that there existed some, albeit very few, exceptions to the rule that final judgments must be respected by sister states. However, in Baker v. General Motors Corporation, the Court made clear that there was no public policy exception permitting a state to refuse to credit a final judgment from another state. So, too, in a case involving DOMA, the Court might take the opportunity to clear up some of the lingering doubts regarding Congress’s power to decrease the credit due judgments.

Perhaps the Court will continue to refuse to address Congress’s power in this regard head-on, instead deciding the constitutionality of the provision on other grounds. For example, the Court might suggest that whether or not Congress had the power to make general laws prescribing the effect that judgments will have in sister states, it cannot pick out a particular sub-group and make their divorce judgments, but no one else’s, subject to non-recognition.

20. See Williams I, 317 U.S. at 295.
D. Defining Marriage for Federal Purposes

The DOMA provision defining marriage for federal purposes reads:

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

This provision is not as open to multiple interpretations as is the full faith and credit provision. Further, the provision might seem less vulnerable to constitutional attack, because it is only attempting to provide clarification of what marriage means for federal purposes. Nonetheless, this section is of doubtful constitutional validity.

As an initial matter, the breadth of this provision must be appreciated, since it applies whenever marital status for federal purposes is at issue. Thus, while this provision affects who will receive benefits and implicates federal spending, the provision is by no means limited to spending. 23 For example, suppose that an American national marries a Canadian national, whether in Toronto or in Boston. If the couple is composed of individuals of the same sex, the United States government will not recognize the marriage, whereas the marriage would have been recognized had the couple

23. Cf. Gill v. Office of Personnel Management, 2010 WL 2695652, *16 (D. Mass. 2010) (“It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits.”).
been composed of individuals of different sexes. This differential treatment might have very important implications should the couple wish to reside in the United States.

Second, it must be understood just how unusual it is for Congress to attempt to define family, given that family law is a “peculiarly state province.” That said, Congress can and does pass legislation implicating domestic relations, although Congress must bear a special burden when doing so. In *Rose v. Rose*, the Court explained, “Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.”

What are the clear and substantial federal interests at stake? While money might be saved by refusing to accord federal benefits to same-sex couples, it is not at all clear how much that would be. Further, the Court has already suggested that saving money may well not suffice as a justification for supplanting state law with federal law in the domestic relations context. For example, after noting in *United States v. Yazell* that “there is always a federal interest to collect moneys which the Government lends,” the Court nonetheless rejected that a substantial interest was implicated that would justify supplanting state law with federal law. The *Yazell* Court explained that both “theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements.”

Members of Congress were concerned that additional federal monies might have to be spent were same-sex marriages recognized for federal purposes; however, they did not focus on how much that would involve but, instead, on who would receive the monies. Representative Barr explained that “if you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear.”

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27. *Id.* at 352.
Needless to say, a spouse hoping to receive Social Security benefits so that he or she would have enough to survive would be unlikely to be funding the “homosexual movement.” Indeed, it is hard to read a comment like this without suspecting that animus played some role in the Act’s adoption.29

The Court has already invalidated on rational basis grounds legislation that had been designed to prevent a disfavored group from receiving federal benefits. The *Moreno* Court explained that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”30 There, Congress was trying to make sure that hippies did not benefit from a federal program.

Arguably, this DOMA provision is unconstitutional on rational basis grounds31—it should not be difficult to show that it was adopted out of animus, since members of Congress were not shy about vilifying members of the LGBT community. But the point here is that the traditional test to determine whether Congress may supplant state domestic relations law is not merely the rational basis test—on the contrary, the federal government has a heavier burden to shoulder.

Some members of Congress seemed to believe that DOMA was necessary to protect the very institution of marriage. First, it should not be necessary to point out that the institution of marriage is alive and well in Massachusetts and other states, notwithstanding those states’ recognition of same-sex marriage. Second, the DOMA provision at issue does not prevent states from recognizing same-sex marriages. Nor does it prevent states from according benefits to such marriages, so that same-sex couples would have both symbolic and practical reasons to enter into such unions. Instead,

29. See *Gill*, 2010 WL 2695652, at *11 (suggesting that DOMA was passed for invidious reasons).
31. For a discussion of the differing tiers of scrutiny, see Chapter 6, section A.
DOMA merely withholds the federal benefits associated with marriage. Thus, the statute was not designed to secure the articulated goal of “protecting” marriage, even if it was plausible to believe that recognition of same-sex marriage would somehow hurt the institution.

E. The Challenges to the Federal Definition of Marriage Provision

The federal judiciary has offered mixed responses to the constitutionality of this provision. For example, in In re Kandu, a federal bankruptcy judge upheld the provision on rational basis grounds. After noting that the “review afforded under this rational basis standard is very deferential to the legislature,” the court held that “DOMA does not violate either the Due Process or Equal Protection Clause of the Fifth Amendment.”

Two federal court of appeals judges have suggested in separate orders that this DOMA provision runs afoul of constitutional guarantees. In In re Golinski, Chief Judge Kozinski of the Ninth Circuit addressed whether a staff attorney at the Ninth Circuit headquarters could have her same-sex spouse covered under the Federal Employees Health Benefit Act (FEHBA). Judge Kozinski construed the Act as permitting the coverage, notwithstanding DOMA, at least in part because his construction “avoid[ed] difficult constitutional issues.” He noted that if FEHBA were construed as precluding coverage for same-sex spouses, there would be some question whether “such an exclusion furthers a legitimate governmental end,” reasoning that because “mere moral disapproval of homosexual conduct isn’t such an end, the answer to this question is at least doubtful.”

33. Id. at 148.
34. In re Golinski, 587 F.3d 901, 903 (9th Cir. 2009).
35. Id.
36. Id.
In *In re Levenson*, Judge Reinhardt, also of the Ninth Circuit, addressed the same issue, namely, whether an individual’s same-sex spouse could be included under the federal employee’s insurance policy. While agreeing with Judge Kozinski that the spouse could not be excluded from coverage, Judge Reinhardt rejected that FEHBA was ambiguous and instead addressed the constitutionality of DOMA. Although believing that heightened scrutiny would have been the appropriate standard of review, he noted that “the denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny.”

A few points might be made about these differing views of the provision’s constitutionality. The disagreement has focused on whether this provision can withstand constitutional scrutiny under rational basis review. The bankruptcy judge held that it could, Judge Kozinski implied but did not state that it could not, and Judge Reinhardt expressly rejected that it could withstand such scrutiny.

Before one simply dismisses this as a difference of opinion and concludes, for example, that it should have relatively little persuasive power in the context of a challenge arising in a different circuit, an important element of the bankruptcy opinion should be emphasized. When analyzing the claim that “Congress may preempt state family law, in favor of a federal standard, only when specific conditions are met,” the *Kandu* court reasoned that in the case at hand there was “no conflict between state and federal policy.” The federal government’s supplanting state law was not at issue, because “Washington State has adopted its own definition of marriage identical to DOMA, defining marriage for state purposes as the legal union of one man and one woman.” Because no conflict was shown, the federal government did not need to establish which substantial interests would be served by supplanting state law.

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37. *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. 2009).
38. For a brief discussion of rational basis review, see Chapter 5, section A.
40. *Id.* at 133.
41. *Id.*
Suppose, however, that this had been a bankruptcy proceeding in Massachusetts, where the outcome depended upon whether the state rather than the federal definition of marriage was used. In that event, there would have been a “direct conflict between the state and federal policy,” and a different standard of review would have been triggered. While there might be some debate about whether this DOMA provision can survive constitutional scrutiny under the most deferential review, there likely would have been no debate whatsoever had a more stringent standard of review been employed.

F. Repeal of the Federal Definition of Marriage Provision

Suppose that a court were to strike down or that Congress were simply to repeal one or both DOMA provisions. While many of the fears articulated by members of Congress would be proven to have been baseless, it is nonetheless true that there would be various salutary effects for members of the LGBT community. Some of those are described below.

Were the definition of marriage for federal purposes provision repealed, members of the LGBT community would be benefited in a number of ways. A host of federal benefits are associated with marriage, including immigration rights and Social Security benefits. However, some additional points should be made about the effects that this would have. For example, merely because the fed-

42. Id.

43. In Massachusetts v. United States Department of Health and Human Services, 2010 WL 2695668 (D. Mass.), the federal district court in Massachusetts rejected that this provision should be examined under Congress’s spending power, in part, because “DOMA’s reach is not limited to provisions related to federal spending.” See id. at *9. The point here is that heightened scrutiny would be appropriate even were DOMA limited to spending.
eral government was willing to recognize a same-sex marriage that was valid in the domicile would not mean that Georgia would have to recognize same-sex marriages. Absent a finding that same-sex marriage bans themselves violate federal constitutional guarantees, the states would be free to prevent their domiciliaries from marrying same-sex partners. Further, the federal government’s recognizing same-sex marriages would not mean that the government would have to treat civil unions, for example, as the equivalent of marriages. Indeed, absent specific legislation to that effect by Congress, it seems likely that couples in a civil union or domestic partnership would not be viewed as “married” for federal purposes.

Even if this DOMA provision is repealed or struck down, some members of Congress will likely object to treating civil unions as the equivalent of marriages, perhaps out of a desire to continue to differentiate marriage from other kinds of relationships. Those who wish to privilege marriage might want to make marriage special, whether those entering into the relationship are of the same sex or of different sexes. Presumably, some believe that marriage is the bedrock of society providing the setting in which children can flourish, and for this reason should receive benefits that no other relationship should receive.

Even if marriage is the bedrock of society, that does not justify excluding those in civil unions from federal benefits, since those who have contracted civil unions have taken on all of the obligations of marriage and, further, may well have children to raise. Further, even if it were justifiable to accord more federal benefits to marriages than to other relationships involving fewer responsibilities, that would not suffice to establish that there should be no federal recognition of any relationships that did not involve all of the responsibilities of marriage.

Others do not seem to be interested in privileging marriage per se but, instead, are interested in privileging the “traditional marriage” between one man and one woman. Ironically, those who do not want civil unions recognized out of a desire to promote traditional marriage might well find that their policy choice will result in the celebration of many more same-sex marriages. This would be for several reasons:
(1) Same-sex individuals who are in a committed relationship might find the federal benefits accorded to marriage too good to resist. Thus, they might not find it sufficiently tempting to enter into a legal relationship that is recognized by the state but not by the federal government, such as a civil union or domestic partnership. However, the benefits accrued by entering into a relationship recognized by both the state and the federal government might be too valuable to refuse.

(2) Same-sex individuals who are in a committed relationship might be choosing between celebrating a civil union and celebrating a marriage. It might be, for example, that the state in which they live recognizes both civil unions and same-sex marriages. Or, it might be that the state permits civil unions to be celebrated locally, but is also willing to recognize a same-sex marriage if validly celebrated in a sister state. In that event, with civil unions only receiving state recognition but same-sex marriages receiving both state and federal recognition, the couple might decide to forego the civil union and instead celebrate a marriage.

(3) While states cannot control what federal benefits will be conferred on a relationship, they can control which relationships will be recognized and which state benefits will be conferred on particular relationships. Those states wishing to afford equal treatment to same-sex and different-sex couples might have recognized civil unions rather than same-sex marriages out of a belief that doing so: (1) would be more politically palatable to those opposing same-sex unions, but (2) would not have deprived same-sex couples of any of the material benefits that they would have had if they had been able to marry. However, if the federal government recognizes same-sex marriages but not civil unions, then those states recognizing civil unions might feel added pressure to recognize same-sex marriages, too. It could hardly be said that the state was affording equal treatment to same-sex couples domiciled in the state if those couples were in effect being denied the opportunity to enjoy the
various federal benefits that are accorded to married couples. Thus, if the federal government were to recognize same-sex marriages but not civil unions, states that might otherwise have only recognized civil unions might now be induced to recognize same-sex marriages either in addition to or instead of civil unions. The political gains afforded by offering a “separate but equal” status would be outweighed by the costs of imposing a separate and clearly unequal status.

The point here is not, for example, that states recognizing same-sex marriage should refuse to recognize civil unions. There might be reasons that two individuals, whether of the same sex or of different sexes, would prefer a civil union to a marriage, notwithstanding the federal benefits that might be associated with one and not the other. Indeed, individuals might lose particular benefits by (re)marrying, and they might want to have some legal recognition of their romantic relationship without marrying and losing the benefits that they otherwise would have. Indeed, whether the federal government decides to recognize same-sex marriage but not civil unions or both same-sex marriages and civil unions, states might try to create or maintain alternative statuses that promote the interests of the state while at the same time serving the needs of their domiciliaries. Thus, were civil unions treated as the equivalent of marriage for federal purposes (and benefits that might be lost by marrying would also be lost by entering into a civil union), states might decide to recognize domestic partnership or reciprocal beneficiary status. That way, they could induce individuals to have their relationships recognized, which might produce benefits for the individuals themselves and society as a whole. At the same time, however, some but not all of the rights and obligations of marriage would be associated with that different status, thereby making clear that the status was not the equivalent of marriage for legal purposes.

Were the federal-definition-of-marriage provision struck down or repealed, same-sex married couples would presumably be entitled to the same benefits that different-sex married couples receive. Yet, a number of other issues would have to be decided, including
whether other legally recognized relationships such as civil unions would also be entitled to benefits. Congress’s decision with respect to those would likely have many ramifications, including the possibility not only that many more same-sex couples would marry but also that many more states would recognize same-sex marriage.

G. Repeal of the Full Faith and Credit Provision

Even if the DOMA full faith and credit provision were repealed, there would not be the parade of horribles recounted by members of Congress when they feared that Hawaii would recognize same-sex marriage. Marriage itself would not suddenly disintegrate. Further, states would not suddenly be forced to recognize their domiciliaries’ same-sex marriages celebrated elsewhere during a weekend getaway.

Historically, states prevented a variety of individuals from marrying each other, for example, those who were too young, too closely related by blood, or of different races. Sometimes, individuals who could not marry in their own domicile were not barred from marrying in a different state. Such individuals might travel across a state border, marry, and then hope to have their marriage recognized in their domicile.

The first point to consider is that such marriages were not automatically recognized. Instead, the domicile would consider a variety of factors before deciding whether or not the union would be recognized. Usually, the marriage would be recognized if it did not violate an important public policy of the state, but would not be recognized if it did violate such a policy.

Divorces, however, were a different matter. Assuming that they were granted by a court having jurisdiction over the parties and the subject matter, they would have to be given full faith and credit throughout the nation. Were the DOMA full faith and credit provision repealed or struck down, states would not have the power to refuse to recognize a divorce judgment validly issued in another
state. Further, rights arising from such a judgment would also have to be enforced.

The repeal of this provision would not automatically render invalid the various state DOMAs that have been passed. Assuming no other federal guarantees are thereby violated, states can include provisions within their own constitutions that prohibit same-sex marriage, just as various states had constitutional provisions barring interracial marriage prior to *Loving v. Virginia*. However, a state constitutional provision that barred recognition of a judgment involving a same-sex marriage would be void. Without DOMA, there would be no arguable exception to the rule that divorce judgments validly issued in one state must be given full faith and credit in all of the states.

Many state DOMAs not only preclude the recognition of same-sex marriage but also the recognition of same-sex divorces or any rights arising from the relationship. In such a state, part of its DOMA would be void. As to whether the entire Act would be void or just that part of it that violates full faith and credit guarantees, this would be a statutory interpretation question for the state supreme court — essentially, the question would be whether the provision barring the recognition of judgments was severable from the rest of the statute or amendment.

Even were the entire Act void, the state would not thereby be forced to recognize same-sex marriages. There might be other laws on the books precluding the celebration of such unions. Nonetheless, without a state DOMA on the books, it would be more difficult for a state court to refuse to credit a same-sex marriage celebrated elsewhere, at least for some purposes. Further, were the state Defense of Marriage Act invalidated, there would no longer be a constitutional bar to the state’s recognizing same-sex marriages. The legislature might pass such an act or, perhaps, a court might strike down the existing ban in light of state constitutional guarantees.

Certainly, if a state Defense of Marriage Act were struck down on federal grounds, the Act might be passed again without the offending provision. However, prevailing attitudes toward same-sex marriage are changing, and it might be more difficult to pass a measure now than it was a mere decade ago. Even were it possible
to pass the more limited measure again, that measure might not have some of the draconian effects that some of the existing measures are thought to have.

H. Conclusion

The Defense of Marriage Act is constitutionally vulnerable, and one or both provisions may be struck down or repealed in the not-too-distant future.44 Were the Act repealed in its entirety, there would be a number of salutary effects. Same-sex married couples would be entitled to a large number of federal benefits to which they thus far have not been entitled. Further, individuals would not be able to avoid their court-imposed obligations by simply moving to a state that refused to enforce judgments arising from same-sex relationships. That said, however, even without DOMA, states could continue to refuse to recognize their domiciliaries’ same-sex marriages, absent a finding that such bans themselves violate constitutional guarantees.

The above description of effects might also be accurate even were DOMA struck down rather than repealed. Thus, the full faith and credit provision might be struck down because Congress does not have the power to decrease the credit due to judgments, and the federal definition provision might be struck down because no substantial interests could be articulated to justify the displacement of state law. Were these the bases for invalidation, DOMA’s unconstitutionality would have few if any implications for the constitutionality of same-sex marriage bans.

Suppose, however, that DOMA were struck down for other reasons. Were the Court to suggest, for example, that the refusal to

44. A Massachusetts district court struck down the definition of marriage for federal purposes provision in Massachusetts v. United States Department of Health and Human Services, 2010 WL 2695668 (D. Mass.) and Gill v. Office of Personnel Management, 2010 WL 2695652 (D. Mass.). Separate issues include whether these decisions will be appealed and, if so, whether they will be affirmed on appeal.
recognize same-sex marriage for federal purposes was animus-based and could not pass muster under rational basis review, that \textit{might} have implications for state same-sex marriage bans—were the latter held to be animus-based, they too would be struck down.\footnote{Cf. Romer v. Evans, 517 U.S. 620, 632 (1996) ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").}

The \textit{Lawrence} Court expressly refused to consider the constitutionality of same-sex marriage bans. Nonetheless, the Court struck down the Texas same-sex sodomy ban, at least in part, because those sexual relations might be an element of an enduring relationship. Given the importance of such relationships to the adults themselves and to any children whom they might be raising, and the lack of substantial or, arguably, even legitimate state interests to support such bans, the existing jurisprudence would seem to require the invalidation of same-sex marriage bans.

Yet, even if the current jurisprudence suggests that same-sex marriage bans violate federal constitutional guarantees, two points might be emphasized: (1) the unconstitutionality of such bans does not depend upon the presence or absence of DOMA, and (2) as Justice Antonin Scalia seems to have recognized, the lack of a constitutional basis to uphold such bans\footnote{See \textit{Lawrence}, 539 U.S. at 604 (Scalia, J., dissenting) ("Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").} does not necessitate their being struck down, given the Court’s willingness to ignore principle and logic in this area of the law.\footnote{\textit{Id.} at 605 (Scalia, J., dissenting) ("This case \textit{Lawrence} ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.").}
Chapter 4

Full Faith and Credit and Parental Rights

When the DOMA full faith and credit provision is repealed or struck down, it will be less tempting to believe that judgments establishing certain family relationships are nonetheless subject to non-recognition in sister states. However, DOMA is still good law currently and there have been two recent, high-profile cases involving adoptions by same-sex partners that highlight the potential difficulties that can arise when families composed of same-sex parents and their children cross state lines. In *Finstuen v. Crutcher*, the Tenth Circuit struck down an Oklahoma law that precluded the state from recognizing both of a child’s same-sex parents, even when those parent-child relationships had been established in other states in accord with local law. In *Miller-Jenkins v. Miller-Jenkins*, both the Vermont Supreme Court and a Virginia appellate court recognized that a Vermont court had jurisdiction to decide the custody and visitation issues arising from the dissolution of a Vermont civil union. While the courts reached the correct results in these cases, the cases themselves and the underlying jurisprudence suggest that differing state practices may both put children at risk and induce individuals to seek dissolutions of their relationships and determinations of custody and visitation rights prematurely.

States are required as a constitutional matter to give full faith and credit to final adoption decrees from other states. However,

1. 496 F.3d 1139 (10th Cir. 2007).
2. 912 A.2d 951 (Vt. 2006).
recognition of adoptive status does not afford as much protection as one might think. There is ample room for mischief to families even when that recognition has been accorded, and the foreseeable defensive measures that might be taken to prevent certain harms from occurring might themselves be non-optimal for the families involved. Because of the ever-increasing mobility of the population, it is becoming even more important that states act in concert to prevent individuals from gaming the system and imposing on their children and ex-partners unnecessary and undeserved costs. Interstate custody and visitation disputes are already complicated enough, and adding additional layers of complexity and indeterminacy will result in increased litigation, instability, and overall harm. Unless additional protective measures are incorporated into law either by Congress or by the courts, one can only expect more protracted litigation and more harm to children arising from these interstate disputes.

A. Full Faith and Credit and Supreme Court Jurisprudence

The Full Faith and Credit Clause reads: “Full Faith and Credit shall be given to each State to the public Acts, Records and judicial Proceedings of every other State.” As the Supreme Court has explained, the clause “substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns.”

If there were no Full Faith and Credit Clause, a state could consider its own public policy when deciding whether to credit another state’s judgment. Under the principles of comity, a state might decide to credit the judgment of another state out of deference or, perhaps, out of the belief that giving full faith and credit to the judgment of a sister state might induce the latter to reciprocate in a future case when the states’ respective positions had been reversed.

Nonetheless, the principles of comity permit a forum to refuse to give credit to a foreign state’s judgment if that judgment violates an important public policy of the forum.

The Full Faith and Credit Clause does not afford states the discretion to refuse to give full faith and credit to judgments validly issued in other state courts—the states are not “free to ignore obligations created under the laws or by the judicial proceedings of the others.” The clause effected a change in the status of the states, making 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.”

The effect of this change must not be minimized, since it means that a state might be required to submit “to hostile policies reflected in the judgment of another State.” The Court has noted that “the requirements of full faith and credit, so far as judgments are concerned, are exacting,” and that a “judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter.” For example, when a state court with jurisdiction over the parties and the subject matter issues a final judgment in which money damages are awarded, that judgment is enforceable, even if a different state would have treated the matter differently and would have denied recovery. The validity of the claim is not to be revisited by another state’s court; rather, the sole basis upon which another state court might decide not to enforce such an award would be if the court issuing the judgment lacked jurisdiction over the parties or subject matter.

It might seem that because family matters involve such important interests, the requirements of full faith and credit must be relaxed where such matters are at issue, so that states can give effect to their considered public policies when deciding whether to en-

6. Id.
7. Estin, 334 U.S. at 546.
8. Id.
force a sister state’s judgment in such a sensitive and important area. However, the Full Faith and Credit Clause has been interpreted to reflect a much different approach—the importance of the interests at stake militates in favor of the finality of judgments. For example, the Court has suggested that the vital interests implicated in divorce make “it is a matter of greater rather than lesser importance that there should be a place to end such litigation.” That way, marital status and the legitimacy of children would not depend upon the jurisdiction in which an individual happened to find herself.

While the Full Faith and Credit Clause limits the sovereignty of states in that they are not free to refuse to enforce judgments validly issued in other states on public policy grounds, the clause does not impose analogous obligations when something other than a judgment is at issue. The Supreme Court has recognized that states retain their sovereignty when deciding whether to give effect to the statutes of other states.

[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

Although one state might decide to defer to another state’s law in the interest of comity, the forum state is not required to do so by the Full Faith and Credit Clause. A distinction must be made with respect to “the credit owed to laws (legislative measures and common law) and to judgments.” A state need not ignore its own public policy determination and defer to the laws of another state, even when those laws contradict the public policy of the enforcing state. However, the state must yield to a judgment of another state.

court if the latter court had jurisdiction to issue that judgment. Thus, while a “court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy,”13 the Constitution does not support a “roving ‘public policy exception’ to the full faith and credit due judgments.”14 Where there has been a valid, final adoption in one state, sister states will not be permitted to refuse to recognize that judgment.

**B. Limitations on Who Can Be a Parent**

Some states do not permit those with a same-sex orientation to adopt children. Even an individual whose parenting skills are exemplary might be precluded from adopting a child if he or she is in a romantic relationship with a same-sex partner. Most states do not impose such a restriction, however, and instead permit individuals to adopt singly, regardless of their sexual orientation.

An individual who adopts might nonetheless be living with another adult in a romantic relationship. States differ with respect to whether each member of a non-marital couple is permitted to establish a legally recognized relationship with the child whom they both are raising. For example, one member of a same-sex couple might have adopted a child, had a child in a heterosexual relationship, or made use of assisted reproductive techniques to produce a child. In some states, that individual’s same-sex partner would be allowed to adopt that child via a second-parent adoption, so that both adults would be recognized as the legal parents of that child.

Affording legal recognition to the second parent’s relationship with a child might not have much effect on that child’s day-to-day routine—whether or not both adults were legally recognized as the child’s parents, one parent might transport the child to and from school while the other parent might take the child to the doctor. However, according to that recognition might have significant effects

13. *Id.*
14. *Id.*
on the family’s finances. For example, the second parent might be the only parent working outside of the home, and the legal recognition of the parent-child relationship might permit that parent to list the child as a dependent entitled to employer-provided medical insurance. According that recognition might also affect the second parent’s willingness to invest emotionally in the child, since she could be confident that her relationship with the child would continue even if her relationship with her adult partner were to end through death or dissolution.

At issue in *Finstuen v. Crutcher* was not Oklahoma’s refusal to permit each member of a non-marital couple to adopt the same child but, instead, a statute that precluded the state from recognizing adoptions performed in other states where both parents were of the same sex. In this case, three same-sex couples with children brought suit against the state of Oklahoma to have the adoption law struck down.

The law at issue could have serious consequences. Suppose, for example, that two women were in a long-term relationship in California. One gave birth to a child after having been artificially inseminated, and the other availed herself of the second-parent adoption option permitted under local law. They lived in California for several years, but decided to move to Oklahoma to take advantage of an employment opportunity. The Oklahoma law would preclude recognition of the relationship between the adoptive parent and the child, notwithstanding that the relationship had already existed in California for several years both in law and in fact.

When analyzing the issues implicated in *Finstuen*, the Tenth Circuit Court of Appeals cited to United States Supreme Court precedent establishing that the Full Faith and Credit Clause does not include a public policy exception for the credit due judgments, and then held that “final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause.” The court’s decision was unsurprising—as the court itself noted, “many courts—including Oklahoma’s Supreme Court—have determined that the Full Faith and Credit

15. *Finstuen*, 496 F.3d at 1156.
Clause applies to valid adoption decrees from other states.” Indeed, the Oklahoma Attorney General had suggested that Oklahoma was required to give full faith and credit to valid adoptions from other jurisdictions, even if that meant recognizing that a particular child had two fathers. Perhaps believing that the Attorney General was in error or wishing to have the issue settled by the courts, the Oklahoma Legislature passed the law at issue in Finstuen one month after the Oklahoma State Department of Health issued a new birth certificate naming two men as the parents of the same child. The Tenth Circuit made clear that the Oklahoma Attorney General’s analysis was correct.

Oklahoma’s announced refusal to recognize certain adoptions validly performed in other states forced families to make some difficult choices. For example, two of the Finstuen plaintiffs, Greg Hampel and Ed Swaya, had entered into an open adoption agreement with the biological mother of the child, agreeing to bring the child to Oklahoma periodically so that the mother could see how the child was progressing. The adoptive couple feared that if there were a medical emergency in which parental consent was required before a procedure could be performed, the state’s announced policy of refusing to recognize the parental rights of both members of the same-sex couple could result in harm to their child. If one of the parents were unable to make a decision because he, too, had been hurt in the automobile accident, the other parent’s medical authorization might not be accepted as valid.

Indeed, one could imagine a scenario in which parental permission for a medical procedure was required and the hospital refused to accept either parent’s authorization, instead choosing to wait until a court determined which parent’s authority would be recognized by the state. Such an action might be taken were there a law or policy requiring that (1) the child’s parent must first be identified, and then (2) that parent would be apprised of all the relevant information so that an informed medical decision could be made, and then (3) the decision would be made. Because it might be un-

16. *Id.* at 1155.
clear which adult in the same-sex couple was the “parent” and thus (1) could not be performed without a legal determination of parentage, the hospital administrator might believe that her hands were tied until a court had identified the child’s parent.

In a situation where one of the same-sex partners was a biological parent and the other subsequently adopted, a hospital would presumably recognize the biological parent’s authority. Where one of the partners had adopted before the other, the hospital would presumably recognize the first parent’s authority. But if both parents had adopted at the same time, the hospital might not know whose rights to recognize. Perhaps the hospital would say that as long as each member of the couple gave informed consent to the procedure it would not matter who was recognized by the state as the legal parent and thus the relevant procedure could be performed without waiting for a legal determination of parentage. However, it is not at all clear that the relevant decision-makers would adopt this procedure rather than say that a court would have to declare the “true” parent before the non-emergency procedure could be performed. Any delay might mean that a child would undergo needless pain and suffering.

While recognizing that a situation might occur in which it would be important to establish who was the parent and also recognizing that harm might result were the statute enforced in such a situation, the Finstuen court nonetheless suggested that the harm asserted by Hampel and Swaya was merely hypothetical rather than actual. After all, there was no reason to think that there was a great likelihood that the hypothesized medical emergency would occur. However, even if one brackets the medical nightmare in which there is a delay until the “real” parent is identified, it should be clear that the Oklahoma law harmed all of the concerned parties. The fathers in Finstuen would have brought their child to Oklahoma to see the child’s biological mother, but refrained from doing so out of fear that something might happen that would require Oklahoma to make a parentage determination. Here, the parties modified their behavior to avoid some of the potential difficulties that might arise were the statutory limitation triggered, and the change in behavior might have caused harm to the child, the biological mother, and the fathers themselves.
It is not difficult to imagine that other families involving children and same-sex parents might be reluctant to go to Oklahoma to visit extended family members for some of the same reasons that these fathers had articulated, even though that would mean that a child might have more difficulty in establishing and maintaining relationships with cousins, grandparents, and other extended family members. Such a law would undermine rather than promote family values, which suggests that the law is not rationally related to promote a legitimate state interest. After all, it is not as if such a law would deter same-sex parents from establishing legal relationships with their children. Nor would such a law deter parents from living with their children, although such a law might decrease the likelihood that they would have rich and enduring relationships with their Oklahoma relatives.

The Oklahoma statute might also have important implications for families living in the state. Consider the Finstuen-Magro family, who resided in Oklahoma. Anne Magro was the biological mother of the couple’s children, so her parental rights were not jeopardized by the statute. However, Heather Finstuen, who had adopted the children, feared “having her parent-child relationship invalidated, and this fear cause[d] her to avoid signing forms and papers—such as school permission slips or medical releases—that could trigger a question about her legitimacy as a parent.”17 As if this increased anxiety was not enough of a burden, Finstuen also noted that the children were “fearful due to her uncertain parental status, and that they ha[d] become more ‘clingy’ and [we]re ‘increasingly concerned about when and whether she w[ould] come home.’”18 The very existence of the statute imposed psychological burdens on the entire family.

Testimony about the psychological effects notwithstanding, the Finstuen court was unconvinced that the statute imposed actual harms on the family. The court noted that Finstuen had “recite[d] no encounter with any public or private official in which her authority as a parent was questioned.”19 Yet, one infers, her consistent refusal

17. *Id.* at 1145.
18. *Id.*
19. *Id.*
to bring any attention to her role as a parent was likely the reason that she did not encounter officials questioning her parental status. Further, given how the children reacted, they too might have been reluctant to treat her as a parent in public for fear that their doing so would have negative results.

While the court may have been correct that Finstuen had not encountered an official who questioned her authority as a parent, this should not be thought to establish that the statute had had no adverse effects on the family. On the contrary, the most plausible assessment would be that all members of the family were adversely affected by the ever-present threat of the state’s refusing to recognize Finstuen’s parental status.

Ironically, the court implicitly suggested that Finstuen should not have maintained such a low profile. The court noted that Finstuen had not “established that the amendment create[d] an actual, imminent threat to her rights as a parent or the rights of her adopted children, because she [was] not presently seeking to enforce any particular right before Oklahoma authorities.” Of course, she probably feared trying to enforce her rights precisely because she did not know what would happen either to the right that might be put at issue or to any other rights she might have.

Jennifer and Lucy Doel requested that the Oklahoma State Department of Health issue a new birth certificate that included both the first adoptive mother’s name — Lucy Doel — and the second adoptive mother’s name — Jennifer Doel — as the child’s parents. That request was refused. Also, when the child was brought to the emergency room, the Doels were told that only Lucy Doel could accompany the child. It does not take much imagination to envision a scenario in which both Lucy and the child required emergency treatment, e.g., as a result of an auto accident, and it would be unsurprising were Jennifer denied access to both of them. All of them would suffer from such a denial.

In its attempt to defend the constitutionality of the law, the state offered an argument that would have had far-reaching consequences

20. Id.
if accepted by the court. Essentially, the state argued that there was “no constitutional obligation to recognize California’s adjudication of the Doels’ adoption because no Oklahoma official was a party to the California adoption, and therefore the California court ordering the adoption had no personal jurisdiction over any Oklahoma official to enforce the order against such an official.” 21 However, this would mean that any adoption finalized in one state that violated an important public policy of the forum state would be subject to non-recognition unless a public official of the forum state had been a party to the adoption. Had the court accepted the State’s argument, full faith and credit guarantees might have been undermined significantly, both with respect to adoption decrees in particular and with respect to judgments from other states more generally.

The Finstuen court suggested that Oklahoma was required by the Full Faith and Credit Clause to recognize the adoption decree from another state, although a separate question under Oklahoma law involved the effect of the adoption, such as the inheritance rights of adoptive children. Because not at issue, the court did not explore whether there were any limitations on the state’s ability to make distinctions within local law with respect to the benefits to which adoptive children or parents might be entitled.

C. Adult Adoptions

The Finstuen court’s distinction between whether an adoption will be recognized and whether the adopted individual will be entitled to particular benefits has a long pedigree. These issues have been litigated both within and across state lines, and the basic distinctions are well established.

Consider, for example, adult adoption, that is, the adoption of one adult by another adult. Some jurisdictions have very permissive policies with respect to adult adoption, whereas others impose severe restrictions limiting the kinds of adult adoptions that can

21. Id. at 1154–55.
occur within the jurisdiction. Variations among the states notwithstanding, the important point is that a valid adoption, even of an adult, must be given full faith and credit in another state. However, it is less clear what limitations are imposed on the states with respect to the kinds of lines that may be drawn when states distinguish among adoptees, affording particular benefits to some but not others.

a. Why Adopt Another Adult?

One adult might adopt another adult for any number of reasons. It may be because the adopter has had a parent-child relationship with the adoptee for a long time but never formally adopted the individual due to legal impediments. Or, the adopter might wish to secure or protect inheritance rights for the adoptee or the adoptee’s children.

Suppose that Smith marries White, who has a child, John, from a previous relationship. Smith has a wonderful relationship with John and would like to adopt him. However, John’s father has not relinquished his parental rights. If John’s father dies after John has reached maturity, Smith might wish to formalize the parent-child relationship that has existed in fact for a long time and thus might seek to adopt John, notwithstanding John’s having reached adulthood. Indeed, John may not only have reached adulthood but may in addition have a wife and children.

Or, it may be that one adult is adopting another because the former wants to assure that the latter is able to receive an inheritance. That might be because the individuals themselves have a romantic relationship and the adopter wants to provide for his or her loved one.

There are several different scenarios in which a desire to provide for a romantic partner might lead to an adoption. In In re Adoption of Adult Anonymous, a man was adopted by his male lover. The adoptee had feared that unless he established a father-son

relationship with his partner, his family would interfere with his attempts to provide for that individual. At issue here was not a desire to have the adoptee inherit from someone else, but merely the desire to protect the individual’s right to dispose of his own property as he desired. Of course, depending upon the state, one individual adopting another would have certain implications for the relationship. For example, in one case, a man wanted to adopt his same-sex partner “to facilitate their estate planning,” to “prevent collateral claims on their respective estates from remote family members, and to obtain the reduced inheritance tax rate which natural and adopted children enjoy under Delaware law.” 23 The Delaware Supreme Court approved the adoption, noting that most jurisdictions permitting adult adoptions “recognize that adult adoptions for the purpose of creating inheritance rights are valid.” 24 However, the court issued a warning that should be considered whenever individuals think about whether to adopt a romantic partner, namely, that the crime of incest includes “sexual intercourse between a parent and child ‘without regard to … relationships by adoption.’” 25 Thus, the court warned that an individual who had sexual relations with the adult whom he had adopted would be open to prosecution for violating the incest laws.

Suppose that an adult adoption occurs in one state and an estate must be administered in another. This situation implicates two issues: whether the forum state will recognize the adoption and, if so, whether the adoptee will be allowed to inherit. As a general matter, states have recognized adult adoptions validly performed in other states. As the Ohio Supreme Court explained, “The status of adoption created by the law of the state of New York will be given the same effect in Ohio as is given by Ohio to the status of adoption as created by its own law.” 26

This means that even if the adoption could not have occurred locally, it will be given full faith and credit if it was performed in ac-

24. Id. at 1097.
25. Id.
cord with the law of the state where the adoption took place. The New Mexico Supreme Court addressed the legal effect of an adult adoption performed in Colorado. Because the adopting adult and the adult adoptee were only thirteen years apart, the adoption would not have been permitted under New Mexico law, even though it was permitted under Colorado law. The New Mexico Supreme Court explained:

[T]he fact that a judgment entered by a foreign court could not have been entered by a New Mexico court, because it would have offended the public policy of New Mexico, will not permit the courts of New Mexico to deny it full faith and credit as required under Art. IV, Section 1, U.S. Constitution.27

For that reason, the court held that the Colorado adoption had to be recognized.

b. Inheritance Rights of an Adopted Child

While it is generally accepted that an adoption validly performed in one state must be recognized in another, a different question is whether the adopted individual will be entitled to an inheritance under the laws of the forum state. Many states treat the adoptive child and the biological child interchangeably, for example, for purposes of intestacy. However, a court seeking to interpret a will must as an initial matter discern the intent of the testator, and some states presume that a testator would not intend to leave an inheritance to an adult who is adopted after the death of the testator. Further, some states presume that the testator would have intended to benefit a child but not an adult adoptee, or they suggest that the adoption statute must be construed differently when an adult adoptee seeks to inherit.

To further complicate matters, a different issue is whether one individual is adopting another as a way of thwarting the testator’s

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will. Some states will try to discern whether an adoption was performed to circumvent the wishes of a testator, whereas other states refuse to investigate the adopter’s intentions. Thus, depending upon the jurisdiction, a court might suggest that even if an adult adoptee could inherit from a grandmother as a general matter, the adoptee seeking to inherit in the case before the court would be precluded from receiving any proceeds from the estate because the adopter and the adoptee had clearly been trying to subvert the wishes of the adopter’s mother. There might be ample evidence, for example, that the adopter’s mother had hated the adoptee and had stated several times that she would never give the adoptee a dime.

The forum state can apply local law when determining the effect of an adoption. Whether an individual who is adopted as an adult is entitled to be treated in the same way as an individual who was adopted as a child is an issue for the state to determine under its own law. Yet, the fact that a state can give full faith and credit to an adoption from another state but nonetheless limit the effects of the adoption suggests an area in which there may be further litigation.

Suppose that Oklahoma passes a law affording fewer benefits to a child adopted by a same-sex couple than would be afforded to a child adopted by a different-sex couple by classifying the child as an heir to only one rather than both of her parents. The state’s decision to discriminate among adoptees in this way might be struck down as unconstitutional because a court might find that it was not rationally related to the promotion of a legitimate state interest. After all, it is not clear how anyone would benefit by imposing disadvantages on those adopted by same-sex couples.

The state might try to justify such a law by appealing to moral concerns. However, as Justice Sandra Day O’Connor suggested in her concurrence in Lawrence v. Texas, “moral disapproval of this group [those with a same-sex orientation], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”

Thus, a state’s appealing to

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morality to justify its imposing a burden on the children adopted by same-sex couples or even on the same-sex adopters might be rejected under rational basis review. On the other hand, a court might uphold such a statute if employing a very deferential rational basis review when examining it.²⁹

**D. Jurisdiction to Make Custody and Visitation Decisions**

State and federal courts have made clear that other states’ final adoptions must be given full faith and credit. Visitation and custody decisions are more complicated, however, because such judgments are subject to modification if the child’s interests should so require. Thus, at the time of an original custody award, the child’s best interests might be served by awarding custody to one parent and visitation to the other. However, it is of course true that circumstances may change, and a child’s best interests might later require that custody be modified. Precisely because states understand that conditions sometimes change, they do not make custody and visitation awards final but instead make them subject to modification should a change in circumstances so warrant.

Yet, the fact that custody awards are modifiable in the state initially making the award has full faith and credit implications. Because the Full Faith and Credit Clause only requires sister states to give a judgment the same credit that it would be given in the issuing state, a judgment that is modifiable in the issuing state can be modified by another state without offending full faith and credit guarantees.

Historically, parents who were dissatisfied with a court’s custody decision in one forum would sometimes kidnap their children and move to another state. Then, they would retry the case in that new forum, especially if that latter forum had a somewhat different analysis of what promoted a child’s best interests. To pre-

²⁹. For a brief discussion of the rational basis test, see Chapter 5, section A.
vent parents from taking their children to a different jurisdiction to retry custody issues, Congress passed the Parental Kidnapping Prevention Act (PKPA).

The PKPA was passed to lend support to the Uniform Child Custody Jurisdiction Act (UCCJA), which specified the conditions under which a state would have jurisdiction to decide custody and visitation issues. At issue in *Miller-Jenkins v. Miller-Jenkins* was whether Vermont rather than Virginia had jurisdiction to award custody and visitation rights in a case in which two women had dissolved their civil union.

Lisa and Janet Miller-Jenkins had lived together for several years in Virginia in the late 1990s. In December 2000, they traveled to Vermont and entered into a civil union. In 2001, Lisa was artificially inseminated, and in 2002 Lisa gave birth to IMJ. Lisa, Janet, and the child lived together for another four months in Virginia and then moved to Vermont in August 2002. In the fall of 2003, Lisa and Janet decided to separate, and Lisa moved to Virginia with IMJ. In November 2003, Lisa filed a petition to dissolve the civil union in Vermont. The family court issued a temporary order regarding parental rights and responsibilities in June 2004, awarding Lisa legal and physical custody and Janet parent-child contact for one week per month and three weekends during the summer. The court also required Lisa to permit Janet a telephone call with IMJ once each day.

Lisa did not permit Janet to have parent-child contact with IMJ after the first weekend of court-ordered, parent-child contact. On July 1, 2004, Lisa filed a petition in Virginia asking the court to establish IMJ’s parentage. Apprised of Lisa’s having filed elsewhere, the Vermont court reaffirmed its custody order and suggested that Lisa’s refusal to abide by the order would result in a hearing regarding whether parental rights and responsibilities should be reallocated.

On September 2, 2004, the Vermont court found Lisa in contempt for her failure to comply with the visitation order. One week later, the Virginia court said that all claims to parentage by Janet were based on a Vermont law that was considered null and void in Virginia. Subsequently, Janet appealed that decision to the Virginia Court of Appeals.
In November 2004, the Vermont court found that both Lisa and Janet had parental rights, and in December held that the Virginia decision regarding Janet’s parental rights was not entitled to full faith and credit. Lisa appealed both decisions.

When analyzing the merits of Lisa’s challenges on appeal, the Vermont Supreme Court suggested that the case basically involved “an interstate jurisdictional dispute over visitation with a child,” which is governed by the PKPA. The Vermont Supreme Court noted that because Vermont was the child’s home state, the Vermont trial court had jurisdiction under both the PKPA and local law. Because Vermont had rightly exercised jurisdiction, the Virginia court was precluded from exercising jurisdiction unless Vermont had somehow lost its jurisdiction. But Vermont had never lost its jurisdiction. The state continued to have jurisdiction under local law because IMJ recently had been living in Vermont and because evidence of IMJ’s relationship with Janet remained in Vermont. Vermont also continued to have jurisdiction under the PKPA because one of the contestants, Janet, had remained a resident of the state. Thus, because the Vermont court had exercised jurisdiction consistent with the PKPA, which meant that the Virginia court should not have exercised jurisdiction, the Virginia decision did not comport with the PKPA and was not due full faith and credit.

When offering its analysis, the Vermont Supreme Court mentioned but then sidestepped an issue raised by Lisa, who argued that the Federal Defense of Marriage Act modified the PKPA. Lisa argued that Janet was a parent by virtue of the civil union into which she and Lisa had entered, and then suggested both that the Virginia court was authorized by DOMA to refuse to give effect to the Vermont judgment and that Vermont was required to give full faith and credit to the Virginia judgment. In effect, Lisa argued that DOMA rendered the Vermont judgment void, which made the Virginia judgment the initial custody and visitation determination entitled to full faith and credit.

30. Miller-Jenkins, 912 A.2d at 957.
Lisa’s interpretation of congressional intent simply is not plausible. She suggested that the PKPA, which was passed in 1980, was amended by DOMA, which was passed in 1996. Yet, if that had been Congress’s intention, one would have expected Congress to say so expressly. Not only did Congress fail to say so expressly, but there is no discussion of the effect of DOMA on child custody or visitation in the Congressional Record. Thus, there is no evidence that Congress intended to modify the PKPA when passing DOMA, even bracketing the presumption against reading an implicit repeal into a statute.

Suppose, however, that one were to reject the importance of the absence of such evidence and one were to offer the implausible suggestion that the express language of DOMA is so clear on this point that no other interpretation is possible. Ironically, that same kind of analysis might be used to defeat the claim that DOMA modified the PKPA, because the PKPA was itself modified after DOMA.

If one reads the PKPA as having been modified by DOMA, the modified PKPA version would presumably have said that the “appropriate authorities of every State shall enforce according to its terms, and shall not modify … any custody determination … made consistently with the provisions of this section by a court of another State.” 31 However, this version would be read to have an exception, specifying that if a custody decision were made based on the rights arising from a same-sex relationship that was treated like a marriage under another state’s law, custody decisions would not have to be enforced if doing so would violate an important public policy of the forum state.

Yet, the PKPA was modified in 1998, two years after DOMA had been passed. Rather than include the exception allegedly created by DOMA, Congress instead reinforced the limitations imposed by the PKPA. The PKPA was modified to say that “appropriate authorities of every State shall enforce according to its terms, and shall not modify … any custody determination or visitation determination made consistently with the provisions of this section

by a court of another State.”32 The amended version did not include an exception for custody or visitation rights arising from a same-sex relationship that was treated as a marriage under local law. Instead, the amended version of the PKPA spoke to all custody and visitation decisions, whether involving the parental rights and duties of parents of the same sex or of different sexes. Thus, if one were to read the PKPA as having been implicitly amended by DOMA in 1996, one would presumably have to read the implicitly amended PKPA of 1996 as having itself been implicitly amended in 1998 in a way that deleted the implicit DOMA exception.

The PKPA determines which state has jurisdiction to decide parental rights and responsibilities. Basically, under the PKPA, Virginia was told that a Vermont rather than a Virginia court should decide who has custody and visitation rights. The whole point of the PKPA is to focus on which state has jurisdiction rather than to delve into the facts of a case to decide which parent should be awarded custody.

The Vermont Supreme Court made clear how Lisa’s explication of the law subverted the PKPA and was terrible public policy, because a “Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order unenforceable.”33 But this is exactly what the PKPA was designed to avoid, namely, to prevent parents who disagreed with a visitation or custody decision of one court to take the child to another state to re-litigate the case in the hope that the new forum’s public policy would yield a more desirable result.

If a court were to hold that the PKPA must be interpreted in light of DOMA, then custody or visitation awards arising by virtue of a same-sex relationship treated as a marriage under the laws of Vermont would not have to be recognized in a sister state if such recognition would violate the latter state’s public policy. However, it is important to understand the limitation allegedly imposed by DOMA. That Act does not suggest that parental rights of members of the LGBT community can be ignored as a general matter. Rather,

32. Id.
33. Miller-Jenkins, 912 A.2d at 962.
a sister state can only ignore those benefits or rights that are conferred by virtue of a same-sex relationship that is treated like a marriage by another state.

Under Vermont law, an individual who is not a civil union or marital partner of a parent may be able to adopt the parent’s child if the parent agrees, the adoption is in the best interest of the child, and the adoption does not abridge the rights of someone else. Because the hypothesized DOMA exception to the PKPA is only triggered if the rights or benefits are acquired by virtue of a same-sex marriage-like relationship, DOMA would not be triggered by a second-parent adoption. Thus, individuals in civil unions could protect their parental rights by adopting the child born into the union.

The Vermont Supreme Court recognized that forcing all civil union couples to avail themselves of formal adoption procedures was not what the Vermont Legislature intended, even though Lisa’s argument might appear to require that such adoptions take place. Yet, Lisa’s analysis does not account for another feature of Vermont law by which Janet could establish her parental relationship with IMJ. The Vermont Supreme Court noted that an individual who is not formally a parent might nonetheless be legally recognized as a child’s parent under certain conditions, including that the individual had participated in planning for and raising the child and that the child recognized that individual as her parent. Because so many of the relevant factors favored recognizing Janet’s parent-child relationship with IMJ, there was no need to decide which factors might be dispositive in a less clear case. However, it is important to understand just what the court suggested. According to local law, Janet’s legal relationship with IMJ could be recognized by a court on a basis other than that Lisa and Janet had been in a civil union. Because that was true, a sister state could not refuse to enforce the Vermont trial court’s recognition of the parent-child relationship and the provision of visitation rights, even if DOMA modified the PKPA.

While affording recognition to functional parents in Vermont might help Janet Miller-Jenkins, given that custody and visitation rights were decided in Vermont, the limitations of this approach should be made clear. First, the recognition of parental rights based on functional parenthood is a matter of state law and some juris-
dictions refuse to award custody or visitation rights on that basis. Just because such factors would provide an independent basis for parenthood in Vermont does not mean they would provide such a basis in another state. Second, because a state is not required to substitute another state’s law for its own, another state would not be required to consider the factors enumerated by the Vermont court in determining whether Janet was IMJ’s parent if doing so would be contrary to local public policy.

Suppose the hypothetical case of Adams v. Bright had the same facts as Miller-Jenkins except this time Lisa Adams waited until after she and her biological child had been living in a different state for seven months and then filed there to determine the parental rights and responsibilities of the different parties. Suppose further that the forum state did not recognize civil unions and did not recognize functional parenthood as a basis for awarding custody or visitation rights. Janet Bright might not even be awarded visitation rights, possible harm to the child notwithstanding.

The above scenario has important implications for an individual who might find herself in a position like Janet’s, not least of which is that she might not be able to afford to risk having another jurisdiction decide parental rights and responsibilities. This might mean that an individual would feel forced to file to have parental rights and responsibilities determined, which might further alienate a partner and remove any chance of reconciliation.

Suppose Jan and Heather entered into a civil union in Vermont. Jan subsequently gives birth to a child, Linda. Jan and Heather have a serious disagreement and Jan decides that she wants to go live with her sister for a while to get some perspective. She and Linda go to live with Jan’s sister in Virginia.

Were Jan and Linda to stay in Virginia for a week or even a month, there would be no problem for purposes here. However, if Jan stayed there for over half a year and then filed for a determination of parental rights, Heather might be cut off from Linda. Rather than allow time to elapse during which Heather and Jan might work out their differences so that their relationship might continue, the law builds in an incentive for Heather to file for a determination of custody and visitation rights before Vermont
loses its home-state designation. This might make all of the parties worse off than they would have been had this artificial incentive not been present. Further, at issue here is not merely whether one of the parents might be given an advantage such as an increased likelihood of getting custody or a greater share of shared-parenting time but, rather, whether Heather would even be recognized as a parent.

An additional wrinkle might be added here. Suppose that custody and visitation rights and responsibilities are awarded by a Vermont court and the custodial parent wishes to relocate to another state. Should the court take into account the law of the state where the parent wishes to relocate?

Many courts deciding whether to permit a parent and child relocation will consider whether the relationship between the child and the noncustodial parent would suffer were the relocation request granted. For example, the Vermont Supreme Court upheld a lower court’s decision to modify custody rather than permit the custodial parent to move with the children, because the lower court had found that remaining in the state would be more likely to preserve the non-custodial parent’s relationship with the children. Often, at least part of the analysis is focused on the willingness of each parent to promote the relationship between the children and the other parent. If a parent seems unwilling to promote contact between the child and the other parent, a court may be less willing to permit the parent to relocate to another state for fear that the non-custodial parent would no longer be able to have a relationship with the child. The issue pointed to here is that a jurisdiction itself might be unlikely to promote or even allow contact between the child and the noncustodial parent.

Suppose that two individuals, Alice and Bernice, had entered into and then dissolved a marriage in Vermont. Bernice was awarded custody of her biological child, Clara, while Alice was awarded liberal visitation rights with Clara, whom she has adopted. Suppose Alice meets someone else, Donna, and marries her. Alice and Donna frequently see Clara and all seem to be getting along quite well.

34. See Rogers v. Parrish, 923 A.2d 607, 611 (Vt. 2007).
Bernice receives a very attractive job offer in another state, and seeks to relocate there with Clara. Suppose, however, that the new state’s case law incorporates a presumption that an individual who is cohabiting with a non-marital partner has a bad moral influence on a child and that courts should impose severe restrictions on visitation while the non-custodial parent cohabits with a non-marital partner.

While the Vermont court had jurisdiction over custody and visitation, the presumption against non-marital cohabitation would not affect Alice’s visitation rights. Thus, even were the relocation request granted, Vermont law would govern visitation for some time. However, if the new state was operating under the Uniform Child Custody and Jurisdiction Act (UCCJA), then it could exercise jurisdiction to modify the visitation terms once the new state had become the child’s home state. If the new state had a marriage amendment similar to Virginia’s that precluded recognition of a same-sex relationship, then Alice and Donna’s marriage would not be recognized and that relationship would simply be viewed as non-marital cohabitation. Because under state law Alice would be viewed as cohabiting with a non-marital partner, her visitation rights with Clara would be at risk of being severely limited under local law.

At least two points might be made about the example involving Alice and Donna. First, state law might force Alice to choose between living with Donna and having reasonable visitation with Clara, harm to all three of these parties by such a forced choice notwithstanding. Second, a separate issue is whether the Vermont court deciding whether to permit the relocation should consider that such a relocation would put Alice at risk of having to choose between living with Donna and having reasonable visitation with Clara. While a state with an official policy that same-sex relationships should be viewed with distaste might believe it good public policy to undermine such relationships, Vermont would not hold such a view. Given that Vermont views a relocation request by a custodial parent less favorably if the relocating custodial parent would be likely to undermine the relationship between the child and the non-custodial parent, perhaps the court should also consider whether the state to which the individual wishes to relocate would make the
relationship between the child and the noncustodial parent too difficult to maintain.

One of the worries pointed to here is that the UCCJA gives the child’s home state jurisdiction to decide visitation matters, which might mean that the relationship between the child and the noncustodial parent would be at risk if the child moved to a state disapproving of same-sex relationships. That worry has been greatly mitigated because most states have replaced the UCCJA with the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). As the Colorado Supreme Court explains, the UCCJEA includes certain improvements over the UCCJA including that “the UCCJEA provides for exclusive continuing jurisdiction for the state entering the initial custody decree,” as long as one of the parents continues to live there. This means Clara’s home state would not be entitled to exercise jurisdiction and make use of that local presumption to modify visitation, assuming that Vermont did not decide to decline to exercise its jurisdiction. However, that would not prevent a related difficulty from arising.

Suppose that Alice and Donna are considering whether to relocate to the state where Clara now lives so they can be closer to her and have more regular visitation. Such a move would not be without its risks, because by leaving the state Alice would no longer have the protection of Vermont courts. Indeed, the same point might be made even if Alice and Donna wanted to move to another state that would recognize their marriage and would be much closer to Clara, namely, they would lose the protection of the Vermont court, and a court in the state where Clara lived might severely limit Clara’s visitation with Alice and Donna.

It might be claimed that the same difficult calculation could be imposed on a different-sex, cohabiting couple deciding whether to move to the state where a child lived or, perhaps, to some third state. However, at least as a general matter, such couples are not precluded from having their relationship recognized as a matter of law by marrying. Further, once they had married, their marriage

would presumably not be subject to non-recognition by the forum state.

**E. Conclusion**

The recent high-profile cases, *Finstuen v. Crutcher* and *Miller-Jenkins v. Miller-Jenkins*, illustrate some of the difficulties same-sex parents and their children may face in the interstate context. While the courts in both cases applied and reaffirmed existing law, there is nonetheless reason to worry about the kinds of cases that are likely to appear in the future. *Finstuen* reaffirms that final adoptions are subject to full faith and credit guarantees, although questions remain with respect to what kinds of incidents might be reserved for particular adoptees or adopters. The dueling cases involving the *Miller-Jenkins* litigation suggest that the Defense of Marriage Act does not modify the Parental Kidnapping Prevention Act and thus states will not be able to circumvent the existing system with respect to which state has jurisdiction to decide custody and visitation matters.

Yet, *Miller-Jenkins* would have been a much different case if Virginia rather than Vermont had been the initial state determining parental rights. Same-sex parents raising children are especially vulnerable to some of the variations in local law, which may make calculations about whether and where to file for a determination of parental rights even more complicated than they are for other kinds of families. Presumably, states should be creating incentives for individuals to stay together rather than to file for dissolution of their relationships. But a race to the courthouse might be the best way for an individual to protect her custody or visitation rights should the relationship come to an end.

The point here should not be misunderstood. The claim is not that such individuals are acting selfishly by filing earlier than they otherwise would have. On the contrary, filing early might be the best way to promote the best interests of the child by protecting the relationship between the child and the non-biological parent. Indeed, where there is no official, adoptive relationship between the functional parent and the child she has been raising, there may be great
incentive to file and take advantage of the protections of local law that might not exist in another jurisdiction. The failure to take advantage of such protections might result in great opportunity costs for both the potentially non-legally-recognized parent and the child. That said, the kind of public policy forcing individuals to make these kinds of choices serves no one’s interests. Congress or the courts must act to prevent states from imposing invidious burdens on same-sex parents and their children, which only result in harm to all concerned. At a time when many decry the break-up of the family and the accompanying instability thereby imposed on innocent children, states’ placing extra burdens on LGBT families is simply unconscionable.
Chapter 5

The Right to Privacy

Over the past decade, several state appellate courts have analyzed whether their respective state constitutions protect the right to marry a same-sex partner. Those courts addressing the issue have differed both in their analyses and in their ultimate conclusions, although there have been striking similarities among those opinions upholding same-sex marriage bans and among those striking them down, differences in wording among the respective state constitutional provisions notwithstanding.

When courts analyze whether same-sex marriage is constitutionally protected, they consider the analyses offered by other courts regarding the guarantees included within the United States Constitution and within their respective state constitutions. While the United States Supreme Court has never addressed whether the Constitution protects the right to marry a same-sex partner, the Court has nonetheless addressed a variety of issues that are relevant to any such analysis. Of particular concern in this chapter is the Court’s analysis of related constitutional guarantees.

To understand the widely differing analyses regarding the right to marry someone of the same sex, it will be helpful to understand some of the background law regarding the right to marry in particular or the right to privacy more generally. The United States Supreme Court has recognized that certain rights related to family matters are extremely important and cannot be abridged by the state, absent a showing that compelling state interests would be undermined were those rights respected. A matter of some dispute involves the criteria used by the Court to determine which rights qualify for this heightened protection and how the scope of those rights should be defined.
A. Privacy Rights

The United States Supreme Court has recognized that certain rights fall within the right to privacy including marriage, procreation, contraception, family relationships, and child rearing and education. Such a designation is important because statutes abridging those rights falling within the right to privacy will be struck down as unconstitutional unless meeting a very demanding standard.

Basically, the Court distinguishes between two kinds of rights—those that are fundamental and those that are not. A statute abridging a fundamental right will be examined with “strict scrutiny” and struck down unless that statute is narrowly tailored to promote a compelling state interest. In contrast, a statute abridging a non-fundamental right will be examined in light of the “rational basis test” and upheld as long as the statute is rationally related to a legitimate state interest.

Practically speaking, a statute examined with strict scrutiny will almost invariably be struck down, whereas a statute examined in light of the rational basis test will almost invariably be upheld. All else being equal, someone seeking to have a statute declared unconstitutional has a much higher likelihood of success if the challenged statute is found to burden a fundamental rather than a non-fundamental right and, thus, much may depend on how a particular right is characterized.

Given the importance of how rights are characterized, one might expect that there would be a clear test to determine which rights are fundamental and which not. Various tests have been articulated. For example, the Court has suggested that for a right to be fundamental, it must be deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if that right were sacrificed.¹

This test, which is frequently cited in analyses holding that a particular right does not merit increased protection, is clear and

very demanding. Very few rights evaluated in light of this test qualify as fundamental. Such a result might be thought unsurprising—if fundamental rights cannot be abridged unless very important state interests would otherwise be at risk, one might expect that the list of such rights would have to be relatively short if only because legislatures might otherwise be hamstrung in their attempts to regulate everyday affairs.

Reasonable people might disagree about whether the constitutional test to determine fundamental rights should err on the side of giving states more discretion for fear that legislatures would otherwise be straitjacketed, or less discretion for fear that legislatures would otherwise run roughshod over very important rights. Yet, regardless of whether one believes that public policy is better served by protecting the individual or, instead, giving legislatures freer rein to promote the public good, a separate consideration is that any test for fundamental rights should account both for those rights that have been recognized as fundamental and for those that have not. The difficulty with the history and traditions test is that it performs its gate-keeping function too well—many of the rights currently recognized as falling within the right to privacy could neither be described as deeply rooted in this nation’s history and tradition nor as implicit in the concept of ordered liberty such that neither liberty nor justice would exist were those rights not recognized.

Consider, for example, the right to access contraception. Laws had been on the books for 85 years criminalizing contraception at the time that the Court found contraception for married couples protected by the Constitution, and had been criminalized for an even longer period when the Court found the right to access contraception by unmarried persons to be constitutionally protected. Yet, a practice that had been criminalized for several decades could hardly be said to be deeply rooted in the Nation’s history and traditions or implicit in the concept of ordered liberty such that neither liberty nor justice would exist were the right not recognized.

Historical prohibitions notwithstanding, the statute banning access to contraception for unmarried individuals was struck down as unconstitutional, and the right to access contraception is considered a fundamental right falling within the right to privacy.

The same point might be made about the right to abortion, which had been criminalized for over a century before it was found to be protected by the right to privacy. Here, too, a right recognized as falling within the right to privacy involved a practice long criminalized. Indeed, the Court suggested in Roe v. Wade that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”

By using “or” rather than “and,” Roe suggests that it is mistaken to believe that “fundamental” is appropriately defined in terms of what is implicit in the concept of ordered liberty. Instead, a right falling under privacy protections will be fundamental (where that term is defined independently) or implicit in the concept of ordered liberty.

One final illustration might be offered to establish why the history and traditions test is simply not the correct test. Consider the right to marry someone of a different race. Anti-miscegenation statutes had existed since before the nation’s founding, so it could hardly be thought that such a right was protected by the Nation’s history and traditions. Further, when holding that the right to marry someone of another race was protected by the right to privacy, the Court neither stated nor implied that the several states prohibiting interracial unions lacked liberty and justice.

It might be thought that the reason that the right to marry someone of another race is protected is that the right analyzed by the Court was not described with such specificity—the right to marry as a general matter is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of another race is not. Yet, the same point might be made about the right to marry some-

one of the same sex.⁶ The right to marry as a general matter is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of the same sex is not. In any event, the Court refused to address the correct level of specificity when holding that the right to marry someone of another race was protected. It was only after the Court had already recognized various rights including rights to contraception, abortion, and the right to marry someone of another race that the Court suggested that there must be “a ‘careful description’ of the asserted fundamental liberty interest”⁷ whenever a particular right is claimed to be fundamental. Had the right to marry someone of another race been carefully described, it could not have passed the history and traditions test.

The history and traditions test, especially when requiring a careful description of the right alleged to be fundamental, provides an extremely effective bulwark against courts recognizing that interests have or deserve robust constitutional protection, although that test’s very effectiveness counsels against its being helpful for determining which rights are fundamental and which not. Indeed, the “implicit in the concept of ordered liberty” test comes from Palko v. Connecticut,⁸ where the Court offered a catalog of those rights in the criminal context that would not qualify under the applicable test as being fundamental. Those allegedly non-fundamental interests included the right to a trial by jury, the right against compulsory self-incrimination, and the right not to be subjected to double jeopardy. Needless to say, all of these are now viewed as fundamental.

⁶ See Perry v. Schwarzenegger, 2010 WL 3025614, at *68 (N.D. Cal.) Plaintiffs do not seek recognition of a new right. To characterize plaintiffs’ objective as “the right to same-sex marriage” would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.


B. The Right to Marry

The right to privacy is understood to protect the right to marry, and it is helpful to examine the cases in which the Court developed this jurisprudence. The Court first recognized that the right to marry was protected by the Due Process Clause in *Loving v. Virginia*, where Virginia’s anti-miscegenation statute was held to violate both equal protection and due process guarantees.

The Due Process analysis was surprisingly underdeveloped in that case. Basically, the *Loving* Court made a few observations about the importance of marriage, but said very little to flesh out the constitutional limitations on the states with respect to their power to determine who could marry whom. The Court noted that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” and that marriage is “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” After making these points, the Court explained that to “deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes … is surely to deprive all the State’s citizens of liberty without due process of law,” and concluded that the “freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State.”

Needless to say, this analysis needs to be unpacked. For example, the Court fails to explain why marriage is fundamental to our very existence and survival. There could be a number of reasons, ranging from (1) the kinds of emotional and financial benefits that marriage provides to those in the relationship, to (2) the kinds of benefits that marriage provides to those children who might be brought up within that setting, including their being taught important societal values, to (3) other kinds of societal benefits, for

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10. *Id.*
11. *Id.*
12. *Id.*
example, alleged domesticating effect of marriage on individuals who might otherwise be “wild” singles.

The Court’s suggesting that marriage is fundamental to the existence and survival of humankind might be thought to be saying something about future generations, although the Loving Court nowhere expressly discusses children in the opinion and only indirectly refers them in the discussion of the state’s justifications for its anti-miscegenation statutes. The Court noted that a justification for Virginia’s interracial marriage ban had been offered in Naim v. Naim, where the Virginia Supreme Court had announced with approval that “the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’”13 When eschewing the desirability of having “mongrel citizens,” Virginia was invoking one of the arguments that had long been made with respect to why interracial marriages should not be allowed, namely, that the children of such marriages were allegedly inferior to the children produced when the couples were composed of individuals of the same race. The United States Supreme Court dismissed such purposes as an obvious “endorsement of the doctrine of White Supremacy.”14 Nonetheless, the Court was strikingly reluctant to discuss the role, if any, that children play in making the right to marry fundamental, perhaps because of a desire to shift the focus of the argument away from Virginia’s contention that the anti-miscegenation statutes should be upheld to promote the interests of children.

The United States Supreme Court was much less reticent about children when discussing the right to marry in Zablocki v. Redhail. At issue was a Wisconsin statute making it very difficult for non-custodial parents to marry if they could not establish their ability to support those children for whom they were already legally responsible. Basically, the state believed that if indigent, noncustodial parents were prevented from marrying, fewer children would

13. Id. at 7 (citing Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
14. Id.
be born to those parents and there would then be fewer children in need of public assistance.

The Zablocki Court made a number of points. First, it explained that while the Loving Court had talked about the importance of the right to marry in the context of a challenge to a law banning interracial marriage, “the right to marry is of fundamental importance for all individuals.”15 This time, however, the Court wanted to explain why the right to marry has such significance.

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.16

A few points might be made about what constitutes family. First, it cannot plausibly be thought that the Court believed that children were only born into existing marriages. Roger Redhail had fathered a child out of wedlock while he was still in high school and later had conceived a child with a different woman, whom he wanted to marry. Regardless of his marital status, he was the father of one child and would soon be the father of another. The state’s refusal to permit him to marry his pregnant fiancée would not reduce the number of children produced, but would instead simply increase the number of children not living in a marital home.

Nor can the Court plausibly be thought to be saying that legal as opposed to biological parenthood must occur in the context of marriage. That approach had already been rejected in Stanley v. Illinois,17 where the Court had recognized that unwed fathers have constitutionally protected rights.

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16. Id. at 386.
17. 405 U.S. 645 (1972).
The Zablocki Court was suggesting that decisions related to: (1) procreation, (2) childbirth, (3) child rearing, and (4) family relationships are all on the same level of importance, and that each of these involves a constitutionally protected, fundamental interest. In addition, the Court was criticizing the state’s setting up barriers to the creation of legally recognized families without adequate justification.

When describing marriage as the foundation of family, the Court had at least two relationships in mind: the relationship between the adults, and the relationship between the parent(s) and child. The Court noted that the marital setting was the only context in which sexual relations could legally take place, referring to one of the important aspects of the relationship between the adults. Basically, it was still permissible at the time for a state to criminalize non-marital relations, and Wisconsin had a law making sexual relations between unmarried, consenting adults a misdemeanor.

Marriage is important to the adults in the relationship for other reasons as well, since it involves an expression of emotional support and public commitment, and may have religious significance for the parties. Further, it is a precondition for a variety of state or federal benefits. In short, marriage implicates a variety of interests of the adults in the relationship, even when they have no ability or desire to have children.

Marriage is also important for those individuals who have or plan to have children, and the Zablocki Court pointed out that it defied common sense to recognize the fundamental nature of the relationships between parents and their children while not permitting the parents to marry. Yet, members of the LGBT community are having and raising children, and those parent-child relationships trigger constitutional protection and are of fundamental importance. It is no more sensible for states to deny same-sex couples the right to marry when they have children to raise than it was to deny Redhail the right to marry when he was about to have another child to raise.

The *Zablocki* Court was careful to qualify its holding, noting that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” Thus, the Court was not precluding states from enacting any regulations regarding marriage. Nonetheless, where “a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” Needless to say, any statute *precluding* an individual from marrying a same-sex partner is significantly interfering with that person’s ability to enter into such a relationship. A separate issue is whether the state has sufficiently important reasons to justify the prohibition, but same-sex marriage bans cannot plausibly be thought an insignificant stumbling block for members of the LGBT community wishing to marry.

Perhaps it would be argued that the *Zablocki* Court was not even considering members of the LGBT community when striking down the Wisconsin law at issue. Yet, Justice Lewis Powell noted in his concurrence that the Court’s analysis might have ramifications for same-sex relations and relationships.

The Court’s analysis of the fundamental right to marry suggests that a whole host of issues are implicated in marriage—the adults have a number of very important interests including their relationship with each other, sexual and otherwise, and their ability to make a statement to the world about their relationship. Marriage may fulfill religious duties or aspirations as well as provide a basis for the receipt of various benefits. Yet, a discussion of the adults’ relationship should not obscure the importance of marriage both for the children being raised and for the adults raising those chil-

20. *Id.* at 388.
21. *See Perry*, 2010 WL 3025614, at *45 (noting that marrying someone of a different sex is not a realistic option for the vast majority of gay men and lesbians).
dren. Notwithstanding that all of these interests are implicated in families whether the parents are of the same sex or of different sexes, courts and commentators have somehow come to the conclusion that states are free to ban same-sex marriage.

C. Regulation of Sexual Activity

One of the perceived stumbling blocks to the recognition of same-sex marriage has been that up until 2003 when the Supreme Court overruled *Bowers v. Hardwick*, states had been permitted to criminalize same-sex sexual relations. In *Bowers*, the Court upheld a Georgia statute prohibiting sodomy, reasoning that there was no connection between family, marriage, or procreation on the one hand and same-sex relations on the other.

Yet, the Court’s inability to see this connection cannot go unexamined. There was no connection between marriage and same-sex relations because no state allowed same-sex couples to marry, and there was no connection between same-sex relations and family because in the Court’s eyes two individuals of the same sex who were not related by blood or adoption could not be members of the same family. Further, it is of course true that sodomitical relations, whether between individuals of the same sex or of different sexes, are not directly related to procreation, but that hardly establishes that such relations are criminalizable.

The *Bowers* analysis was disappointing in a number of respects, and much of the reasoning could have been used to justify laws prohibiting sexual relations between members of different races. Before *Loving v. Virginia*, various states prohibited interracial marriage, so it could not have been argued that there was a connection between interracial coupling and marriage in those states. Further, because the marriages were prohibited, the families were not recognized—indeed, any children produced through such unions would be illegitimate. Finally, even the procreative aspect might

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have been understood in a way that would justify the prohibition. Just as Virginia had claimed that interracial marriage bans should be upheld to avoid the production of allegedly inferior, bi-racial children, states prohibiting interracial relations might attempt to justify their bans by appealing to the same theory.

In 2003, the United States Supreme Court overruled *Bowers* in *Lawrence v. Texas*, taking the unusual step of suggesting not only that *Bowers* was no longer good law but that *Bowers* had been wrongly decided at the time the decision was made. *Lawrence* is noteworthy for several reasons. While refusing to address whether same-sex marriage was constitutionally required, the Court went out of its way to note that when “sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”

But that is to say that the relationship itself has value independent of the sexual relations.

Justice Antonin Scalia in his *Lawrence* dissent complained that the Court had laid the foundation for a federal constitutional right to same-sex marriage. He may well be correct, although not because *Lawrence* somehow made adultery and bestiality constitutionally protected, but because the Court removed a barrier that had falsely been thought to prevent recognition of a right to marry a same-sex partner. Now, same-sex, adult, consensual relations could not be criminalized, although the Court had already made clear in *Zablocki* that there was nothing incompatible with a state’s criminalizing sexual relations outside of marriage while protecting such relations within marriage.

Traditionally, the Constitution has prioritized relationships over sexual relations—marital relations were found to be constitutionally protected in 1964, and marriage itself was found to implicate

25. *See id.* at 604 (Scalia, J., dissenting).
26. *Id.* at 599 (Scalia, J., dissenting).
27. *Griswold v. Connecticut*, 381 U.S. 479 (1965) is understood to preclude the state from regulating voluntary, sexual relations within a marriage, absent some compelling justification.
a fundamental interest in 1967 in *Loving*. However, the right to have sexual relations outside of marriage was not recognized until 2003.

Almost 50 years ago, Justice John Harlan argued:

[L]aws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. 28

Here, Justice Harlan is describing a world in which same-sex relations only occur outside the familial context and children are only born and raised within that context. There is reason to doubt that such a picture was accurate when offered, and it certainly is not accurate now. Members of the same sex are living together as families, sometimes with children and sometimes without. It simply is not true that same-sex relations should somehow be thought to be the negative of marriage and family.

Nonetheless, Justice Harlan is capturing something important when suggesting that family provides the foundation upon which the jurisprudence in this area is based. That said, one can build upon a foundation, and thus starting with the family does not mean that the jurisprudence cannot go beyond the family. Adult, consensual relations even outside of marriage are sufficiently central to individual identity and autonomy that they should not be subject to state control, absent some compelling justification.

*Lawrence* protects single adults engaging in consensual relations whether or not those individuals are in a committed relationship. Yet, if Justice Harlan is correct that marriage and family are the

bedrock of privacy jurisprudence, then one would expect that if relations between individuals engaging in a one-night stand are constitutionally protected, then consensual relations between individuals in a committed relationship are also constitutionally protected. Further, Zablocki counsels that the relationship itself should be afforded constitutional protection, especially if those individuals are raising children.

The claim here is not that the state must recognize same-sex marriage and LGBT families even if extremely important interests would thereby be severely undermined, but merely that a state refusing to accord such recognition should identify what those interests are and offer a plausible analysis showing how those interests would be adversely affected were LGBT families given legal recognition. In several cases decided since the Court issued its Lawrence opinion, courts in different jurisdictions have discussed the justifications behind same-sex marriage bans.

D. State Court Treatment of Same-Sex Marriage Bans

Various state courts have discussed addressed whether their respective state’s same-sex marriage ban can pass muster after Lawrence. The analyses and holdings varied so dramatically that an individual reading the opinions might wonder whether all of these courts were addressing the same issue.

a. Arizona

An Arizona appellate court was one of the first to examine the constitutionality of that state’s same-sex marriage ban in light of the Lawrence decision. The Standhardt court correctly noted that

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the *Lawrence* Court did not hold that the right to marry a same-sex partner was protected by the Constitution. ³⁰ That issue had not been before the Court, so it is unsurprising that the Court had refused to reach the question. Nonetheless, the Arizona court paid too little attention to what the Court had said in *Lawrence* and in other cases, and also paid too little attention to local law to offer a persuasive analysis of the implicated legal issues.

The *Standhardt* court understood that using the history and traditions test to deny that there was a fundamental right to marry a same-sex partner was undercut by *Loving*, given Virginia’s long-standing anti-miscegenation laws. However, the court tried to distinguish between interracial and same-sex marriage by suggesting that the former was a mere expansion of the traditional scope of the fundamental right to marry, rooted in procreation, whereas recognizing same-sex marriage would involve redefining the term. ³¹ Yet, by this point in time, it was not as if same-sex marriage was unimaginable. It had been thought that Hawaii would be the first to recognize same-sex marriage in this country years before the question was addressed by the *Standhardt* court, civil unions were already recognized in Vermont, and the Netherlands had already started recognizing same-sex marriage. To expand a definition is to include what had not previously been included, and expansion versus redefinition is too slim a reed to base a refusal to recognize something as fundamental as the right to marry one’s life-partner.

The *Standhardt* court’s distinguishing between interracial and same-sex unions by appealing to procreation to justify affording constitutional protection to the former but not the latter relationship was misguided for two distinct reasons. First, the *Loving* Court tried very hard to avoid discussing the children of interracial couples when discussing why Virginia was precluded from arbitrarily precluding interracial couples from marrying. Second, the procreation aspect of marriage, property understood, is a reason to recognize rather than refuse to recognize same-sex marriage.

³⁰ *Id.* at 457.
³¹ *Id.* at 458.
Consider the claim that marriage is necessary to the survival of the human race. Presumably, this is because marriage provides a setting in which the young may be raised and nurtured. Yet, both same-sex and different-sex couples are providing environments in which children can grow and thrive,\textsuperscript{32} whether those children are biologically related to neither parent, one parent, or both parents. While it is of course true that a child’s biological parents might well be able to provide such a setting, others can too, and the human race will continue as long as children are born and these nurturing homes are provided.

The \textit{Standhardt} court accepted that Arizona had a legitimate interest in promoting procreation and childrearing in stable homes and that limiting marriage to different-sex couples was rationally related to promoting that end. Yet, it was unclear how precluding same-sex couples from marrying would promote the interests of children. Indeed, the court recognized both that same-sex couples are having and raising children and that those children would benefit if their parents were able to marry.

To add insult to injury, a brief review of Arizona law undercuts the state’s commitment to limiting marriage to those capable of reproducing though their union. For example, Arizona does not bar individuals who are beyond their procreative years from marrying, which one might have expected were Arizona only interested in having marriages among those able to reproduce.

The United States Supreme Court has never stated that those beyond their procreative years retain the fundamental right to marry, although the Court would presumably so hold precisely because of the irrationality of limiting marriage that way. But that is to say

\textsuperscript{32} See Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009)

Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.
that the fundamental right to marry should not and does not rest on one’s ability to have children.

Suppose that Arizona were to argue that it would preclude the elderly from marrying if only it could, but that the United States Constitution bars the state from doing so. Even if one were to ignore the very low probability that the state would embrace or ever articulate such a policy, given the political firestorm that would result among the many retired individuals in Arizona, there is additional reason to doubt that the state values procreation so highly. Arizona, one of many states that bars first cousins from marrying, has a somewhat unusual provision in its statute, namely, such marriages may be celebrated only if the first cousins can show that they are unable to have a child through their union.33

There is no case law suggesting that Arizona must provide such an exception as a constitutional matter, and the state is one of the few to do so. This means that Arizona goes out of its way to permit such marriages, which might well be sensible as a public policy matter but is antithetical to the state’s alleged commitment to limiting marriage to those capable of producing children through their union.

The state offered and the court accepted other articulations of alleged state policy that were surprising at best. For example, the court implied that the state only had an interest in promoting fidelity among those who might have children.34 Yet, the state’s criminal prohibition of adultery does not include an exception for those who do not or, perhaps, cannot have children.35

The Standhardt court argued that Arizona would be unwise to insist that different-sex individuals show that they were able and willing to procreate before allowing them to marry. The reasons offered included that those not intending to have children at the time of their marriages might later change their minds, those unable to have children at the time of their marriages might later be aided by improved medical technology, and it would be intrusive

34. See Standhardt, 77 P.3d at 461.
to find out whether couples had the ability and willingness to have children. In any event, the court noted, couples might later decide to adopt.\textsuperscript{36}

The court’s points would be well-taken were the hypothesized requirement really at issue, but rang somewhat hollow in the context under discussion. While it is of course true that different-sex couples currently unable to have children may be helped by scientific breakthroughs or, in any event, might decide to adopt, those same points might also be made about same-sex couples. That couples sometimes have a change of heart and later wish to have children is true, but might be said of couples regardless of whether they are composed of individuals of the same sex or of different sexes. The worry that asking members of a couple about their ability to have children does not prevent the state from requiring first cousins to establish their \textit{inability} to have children in some cases. Basically, all of the points made were either undercut by existing practices or might also have been made about the very couples whose denial of access to marriage was being upheld by the court.

Those challenging Arizona’s marriage law were not trying to preclude different-sex couples unable or unwilling to have children from being permitted to marry. On the contrary, they argued that those couples should be permitted to marry as should same-sex couples. The court seemed to accept that the mere \textit{possibility} that different-sex couples might have children was reason to permit them to marry but that the actuality of same-sex couples having children to raise was not enough to justify their having the opportunity to marry.

b. Massachusetts

In the same year that the Arizona court upheld a challenge to that state’s same-sex marriage ban, the Supreme Judicial Court of Massachusetts struck down that state’s ban in \textit{Goodridge v. Department of Public Health}. The court examined the numerous ben-

\textsuperscript{36} Standhardt, 77 P.3d at 462.
benefits that marriage provides, and tried to discern whether the state had adequate reasons justifying the exclusion of those wishing to marry a same-sex partner. The court rejected that the state had an interest in limiting marriage to those who could procreate through their union, noting that the state promoted both adoption and the production of children through noncoital means. Indeed, Massachusetts recognizes second-parent adoption, so two members of a same-sex couple might each be recognized as the legal parent of the same child. The court understood that prohibiting the same-sex partners from marrying would inure to the detriment of those adults and to any children that they were raising without providing any offsetting benefits to different-sex couples and their children.

One of the surprising aspects of the Goodridge opinion was the claim in the dissent that reserving marriage for different-sex couples was rationally related to the state’s desire to provide an optimal setting in which children might be raised.\(^\text{37}\) Suppose that one brackets that children raised by same-sex parents are thriving and that various national organizations whose mission is to promote the interests of children have recognized the parenting abilities of members of the LGBT community. Even so, the position offered in the Goodridge dissent makes no sense. It imposes opportunity costs on the children raised by same-sex couples by denying those children the tangible and intangible benefits that would have accrued had their parents been permitted to marry, but does not provide any offsetting benefits for anyone else. It is not as if prohibiting the parents from marrying would prevent them from having children. Instead, they would still have the children, although both they and their children would be denied the goods associated with marriage.

c. Indiana

A new justification was offered for limiting marriage to different-sex couples by an Indiana court in *Morrison v. Sadler*. The In-

diana court recognized that many same-sex couples are having and raising children. However, the court noted, there is a key difference between same-sex and different-sex couples, namely, the ease of procreation. The court noted:

Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.\textsuperscript{38}

The court believed that this difference in the ways that couples might reproduce would justify the state’s promoting the institution of different-sex marriage so as to increase the likelihood that children would be born within rather than outside of wedlock. The court further noted that once individuals were married they would be encouraged to remain together.

Yet, one would think from this analysis that children produced because of the planning performed by their same-sex parents would somehow not benefit from the extra stability provided by a marital setting. One might also infer that the difficult part of parenting is in producing rather than in raising children, as if it were true that once the children were in the world the rest was easy. Yet many parents, whether in same-sex or different-sex relationships, would say if asked that raising children involves numerous challenges. As a general matter, the state benefits when both same-sex and different-sex parents remain together and provide homes where their children might thrive. Precisely because the state does not have to choose between permitting different-sex couples to marry on the one hand and same-sex couples on the other but might instead permit both types of couples to marry, the state cannot justify limit-

\textsuperscript{38} Morrison v. Sadler, 821 N.E.2d 15, 23 (Ind. App. 2005).
ing marriage to different-sex couples because same-sex couples are allegedly more responsible than their different-sex counterparts.

As a separate matter, one would infer from the *Morrison* opinion that same-sex couples would have been more likely to win had they been less responsible. It would be as if a woman would have a better chance of being able to marry her same-sex partner if she would be willing to approach males whom she did not know and ask them to provide a sperm sample to be used in artificial insemination. Apparently, because she would not want to raise the child with a stranger, it would *then* be in the state’s interest to promote her relationship with her partner so that the child could be raised in a stable, responsible environment in contrast to the manner in which the child had been conceived.

d. New York

The responsible procreation argument might seem so obviously specious that it should not be mentioned. Yet, it was cited with approval by New York’s highest court when it analyzed that state’s same-sex marriage ban. The New York Court of Appeals reasoned that the legislature could find that different-sex “relationships are all too often casual or temporary . . . [and] that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.” 39 The court also reasoned that the legislature “could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.” 40

Here, the court was addressing a situation not before the court, namely, if the legislature could recognize different-sex marriages or same-sex marriages but not both, which should be chosen? As Chief Judge Judith Kaye pointed out in dissent, however, there was no need to choose; there were enough marriage licenses for everyone.

40. *Id.*
The New York court also suggested that the Legislature might have reserved marriage for different-sex couples, believing that it was better for children to grow up with a father and a mother. But this rationale simply does not make sense in this context. First, New York, like Massachusetts, permits second-parent adoptions. Precluding same-sex couples from marrying is not preventing same-sex couples from raising children; it is merely denying those families the benefits that marital status might have afforded. Precluding same-sex couples from marrying will not increase the number of children born into marriages; on the contrary, it will increase the number of children being raised in a non-marital context.

e. Washington

The Washington Supreme Court offered reasoning that tracked the reasoning offered by the New York court:

[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents. Allowing same-sex couples to marry does not, in the legislature’s view, further these purposes. Yet, the court never explained how the legislature could hold these views. Washington also recognizes second-parent adoption, so the state obviously does not object to LGBT parenting. No argument was offered to suggest that limiting marriage to different-sex couples would somehow induce more couples to have children while married. Nor has any evidence been presented somehow demonstrating that different-sex couples would be more likely to di-

41. Id.
42. Andersen v. King County, 138 P.3d 963, 969 (Wash. 2006).
orce were same-sex couples allowed to marry. But without some kind of account suggesting how restricting marriage would promote marriage among different-sex couples or promote procreation within marriage, it is not rational to believe that the prohibition would promote these ends.

Permitting same-sex couples to marry would not directly promote the interests of those children being raised by their biological parents, although doing so would promote the interests of children more generally. However, presumably, no one would seriously claim that legislatures are solely concerned with those members of the next generation being raised by both of their biological parents, given the huge number of children who do not fall into that narrow category.

The Washington Supreme Court noted that the legislature could have found that “encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.”43 But those challenging the Washington ban were not questioning that, but were instead questioning whether the legislature could have found that it would be better for the children of same-sex parents to be raised by unmarried parents. If not, then the question would be whether the legislature could have found that the benefits of such a ban for the parents or children in families where the parents are of different sexes could plausibly be thought to outweigh the costs to the families where both of the adults were of the same sex.

The Washington court seemed to understand that the legislative classification was not closely tied to the desired ends. The court explained:

[T]he link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple’s willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples

43. Id. at 982.
raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.\footnote{Id. at 983.}

But the question at hand involves the work that the link is supposed to perform. Even if many different-sex, married couples cannot or do not choose to have children, it is fair to suggest that many married couples do have children. It might indeed be rational for a legislature to encourage different-sex couples to marry in the belief that the adults, the children, and society itself would thereby benefit. Yet, a separate question is whether these same benefits \textit{plus others} would be accrued were marriage open not only to different-sex couples but to same-sex couples as well.

\subsection*{f. New Jersey}

The New Jersey Supreme Court recognized that same-sex couples were forced to endure various “social indignities and economic difficulties” because of the inability to marry,\footnote{See Lewis v. Harris, 908 A.2d 196, 202 (N.J. 2006).} and that promoting procreation and optimal parenting could not credibly be used to justify restricting marriage to different-sex couples. While rejecting that the right to marry a same-sex partner was a fundamental right in light of the history and traditions test, the court nonetheless found that the state’s refusal to grant the tangible rights and benefits associated with marriage was not constitutionally justifiable.

\subsection*{g. Maryland}

The Maryland Supreme Court’s analysis of the right to marry a same-sex partner began with whether the right to marry a same-sex partner was deeply rooted in the state’s history and traditions,
notwithstanding that none of the right-to-marry cases were predicated on a preexisting history or tradition of recognizing the particular marriage at issue. Thus, there was no history and tradition in Virginia of having a right to marry someone of another race or history in Missouri of permitting those incarcerated to marry even when it was claimed that prison security might thereby be threatened or history in Wisconsin of permitting individuals to marry even when they had already had children not in their custody whom they could not support.

The Maryland Supreme Court claimed that almost all of the marriage cases were focused on producing children. Yet, *Loving v. Virginia* was not, since the Court nowhere mentions children and seemed determined to shift the focus away from the children that might be produced through the union of the parties. As the Maryland court itself recognized, *Turner v. Safley* did not focus on procreation. Even *Zablocki*, which involved a man who wanted to marry his pregnant fiancée, did not focus on producing children in particular but, instead, on a number of aspects of families including the production and raising of children.

The Maryland court focused upon the alleged inextricable connection between marriage and procreation, notwithstanding that some different-sex couples are neither willing nor able to have children and that some same-sex couples are having and raising children. Indeed, the court recognized the changing demographics of the American family. Yet, given these changing demographics, one might well wonder how to spell out this inextricable connection between marriage and procreation.

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50. *Id.* at 630.
51. *Id.* at 632.
The Maryland court noted that the *Lawrence* Court had not expressly recognized a fundamental right to engage in same-sex relations and thus presumably had not “intended to confer such status on the public recognition of an implicitly similar relationship.” Yet, the Maryland court failed to include within its analysis that the United States Supreme Court had recognized a right to engage in same-sex relations. Further, when discussing why the right to engage in adult, consensual relations had to be protected, the United States Supreme Court had discussed many of the important recent right to privacy cases including *Griswold v. Connecticut*, in which the Court recognized the right of married individuals to have access to contraception; *Eisenstadt v. Baird*, in which the Court recognized the right of unmarried individuals to have access to contraception; *Roe v. Wade*, in which the Court recognized a right to be free from unwarranted government interference in one’s attempt to secure an abortion; *Carey v. Population Services*, in which the Court struck down certain limitations on the sale and distribution of contraceptives to minors; and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.” If all of these involved rights falling within the right to privacy but adult, consensual relations do not involve a right falling within the right to privacy, then one might rightly ask, “Why are those cases being cited as support for protecting an interest that does not fall within the right to privacy?”

While the *Lawrence* Court did not expressly designate the right to have non-marital relations with a same-sex partner as a fundamental right, the Court also did not expressly designate such relations as implicating a mere liberty interest subject to rational basis review. Instead, the Court simply said that the sodomy statute “fur-

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52. *Id.* at 626.
55. *Lawrence*, 539 U.S. at 573–74.
thers no legitimate interest which can justify its intrusion into the personal and private life of the individual.” 56

The Court’s language is important to examine. The Court refrains from saying that the state has no legitimate interest at all in regulating non-marital conduct. Instead, the Court suggests that the state has no legitimate interest that justifies the intrusion. If the state had no legitimate interests at all in regulating the conduct, then the statute should of course be struck down. But even if the state had some legitimate interests at stake, those interests might not have been “sufficiently important” to justify the prohibition. 57

Consider the statute at issue in Zablocki, where Wisconsin was trying to restrict the marriage rights of indigent, noncustodial parents. The state had a legitimate interest at stake, namely, protecting the public fisc. The difficulty was that Wisconsin’s legitimate interest could not justify the limitation on Redhail’s personal life. It would have been quite accurate to say that Wisconsin did not have a legitimate interest that justified the burden imposed, notwithstanding that Wisconsin clearly had a legitimate interest in conserving scarce resources.

The Lawrence Court suggested that the Constitution precludes states from criminalizing voluntary, adult, consensual relations. What justification could be offered for such a statute? A state might claim that by criminalizing such relations it is providing couples with an incentive to marry, where their voluntary, sexual relations would be legally permissible. Promoting marriage is considered a legitimate state interest, and it seems reasonable to believe that some might be induced to marry were voluntary, non-marital, sexual relations criminalized. Basically, the Court is suggesting that the state’s legitimate interest in promoting marriage is not sufficiently important to justify its criminalizing non-marital relations.

Here is at least one of the difficulties posed by Lawrence for those who oppose same-sex marriage. Suppose that it is read as only implicating rational basis scrutiny. If that is so, then it must be claimed

56. Id. at 578.
57. See Zablocki, 434 U.S. at 388.
that the state’s promoting marriage by criminalizing consensual, non-marital relations either is not a legitimate goal or, perhaps, the state’s chosen method is not rationally related to the promotion of that goal. But it seems reasonable to believe that at least some would be more likely to marry if their consensual, non-marital relations were subject to criminal penalty, and the state is permitted to promote marriage by reserving certain benefits for marital couples.

Consider, instead, how prohibiting same-sex couples from marrying is supposed to promote marriage. Courts do not find it credible to claim that different-sex couples are less likely to get or remain married because same-sex couples are also allowed to marry. But if promoting different-sex marriage is the goal, and it is less credible to believe that restricting marriage would promote different-sex marriage than it is to believe that criminalizing non-marital relations would promote marriage, then Lawrence counsels that same-sex marriage bans are constitutionally infirm even using the rational basis test.

Suppose, instead, that adult, voluntary, non-marital relations (including such relations between same-sex partners) fall within the right to privacy and thus trigger close scrutiny. Then, presumably, the same would be said for marriage (even between same-sex partners), which would also mean that the state will have some difficulty justifying its ban.

One of the noteworthy omissions in the Lawrence Court’s recounting of the privacy cases involved its utter refusal to discuss Loving, Zablocki, and Turner, notwithstanding the Court’s mentioning marriage when discussing privacy rights. The Lawrence Court made quite clear that it was not discussing same-sex mar-

58. See Perry, 2010 WL 3025614, at *47 (“Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.”).


60. Lawrence, 539 U.S. at 573–74.
riage. Yet, the claim here is not that Lawrence held that same-sex marriage must be recognized, but that its reasoning supports that conclusion.

In 1964, the Supreme Court examined a Florida law imposing a more severe penalty on interracial, non-marital relations than on intra-racial, non-marital relations. The state claimed that the statute at issue promoted its anti-miscegenation law. While rejecting the state's justification, the Court expressly declined to reach "the question of the validity of the State's prohibition against interracial marriage." Three years later, the Court struck down anti-miscegenation laws in Loving v. Virginia. While the Lawrence Court expressly declined to address whether the right to marry a same-sex partner is constitutionally protected, the Court nonetheless provided an analysis that strongly supports or, perhaps, requires such a holding.

h. California

When addressing the protections offered by the state constitution, the California Supreme Court addressed a relatively narrow question, namely, whether the state was violating constitutional guarantees by reserving marriage for different-sex couples and offering same-sex couples virtually all of the benefits of marriage through domestic partnerships. The court suggested that opening up marriage to same-sex couples would not deprive different-sex couples of anything, and that the vital interests that the state has in promoting marriage for the sake of the next generation would be served rather than undermined by permitting same-sex couples to have access to that institution. The California court explained that the right to marry has never been understood to be limited to those who can procreate through their union, and noted the irony in jus-

61. See id. at 578.
tifying restrictions on marriage by appealing to the possibility of accidental procreation, as if it made sense to burden individuals for being responsible when making decisions about when to have and raise a child.

i. Connecticut

The Connecticut Supreme Court addressed a similar issue—the question was whether the state’s creating a separate status of civil unions for same-sex couples violated state constitutional guarantees. The state’s recognition that sexual orientation does not affect one’s ability to parent played an important role in the court’s analysis.64 Basically, the state could not offer sufficient justification for its restriction of marriage.

j. Iowa

The most recent state supreme court decision examining the right to marry was issued by the Iowa Supreme Court.65 The court noted that the societal benefits that accrue when different-sex couples are permitted to marry would also accrue were same-sex couples permitted to marry, for example, the benefits that are thereby provided the children that the couple might be raising. Indeed, the court noted that the state’s same-sex marriage ban neither promoted the interests of children raised by same-sex parents nor the interests of children raised by different-sex parents, and so could not be supported using a child’s best interests justification. Further, the court gave short shrift to the claims that restricting marriage would somehow promote more procreation among different-sex couples or would somehow promote stability among different-sex couples. Basically, the Iowa Supreme Court rejected that the state had offered an adequate justification for its restrictions on marriage.

64. See Kerrigan, 957 A.2d at 435.
E. Conclusion

The right to marry has already been recognized as falling within the right to privacy — the only question confronting those courts analyzing whether same-sex marriage is constitutionally protected is whether the right to marry includes the right to marry a same-sex partner. The analyses offered are often remarkably disappointing. The Court has never suggested that marriage rights are somehow tied to the ability and willingness to have children through the parties’ union, and no court would ever suggest that they are in any other context.

Traditionally, the right to marry has been given greater protection than the right to engage in adult, consensual relations outside of marriage, at least in part, because the right to marry has been associated with a variety of family functions including having and raising children, even though it is of course true that non-marital relations can also result in the production of children. Yet, if non-marital (including same-sex) relations are protected, it is difficult to see why same-sex marriage should not also be protected, especially because it is more plausible to believe that permitting states to regulate non-marital relations promotes marriage than it is to believe that precluding same-sex couples from marrying somehow promotes marriage.

Courts upholding same-sex marriage bans have deferred to the legislature’s alleged judgment that marriage restrictions would somehow promote marriage among different-sex couples or somehow advance the interests of children when no plausible connection could be made between the restriction and the goals to be promoted, even when it was assumed that same-sex couples and their children do not have interests that should be weighed in the balance. But that very kind of analysis makes clear that members of LGBT community are being treated as non-persons in these analyses, which alone makes such laws constitutionally suspect.

If it could be shown that opening up marriage to same-sex couples would impose costs on different-sex couples, then a more difficult cost-benefit analysis would have to be performed, which
included justifications for imposing benefits on one group to benefit another. But maintaining such restrictions when they do not benefit anyone and instead harm both the families of those precluded from marrying and society as a whole is simply unconscionable, and courts upholding such bans have, in the words of the Connecticut Supreme Court, abdicated their own responsibility.\textsuperscript{66}

\textsuperscript{66} See Kerrigan, 957 A.2d at 480.
Chapter 6

Equal Protection

The Fourteenth Amendment to the United States Constitution precludes states from denying equal protection of the laws, and state constitutions contain analogous protections. In several cases, plaintiffs have challenged state same-sex marriage bans, arguing that such statutes violate state or federal equal protection guarantees.

Some state supreme courts have held that the state’s same-sex marriage ban violates the state constitution’s equal protection guarantees, whereas other supreme courts have reached the opposite conclusion. This lack of uniformity is unsurprising, both because the language in one state constitution might differ from that of another and because, even where the language is the same, the jurisprudence in the respective states fleshing out the depth and breadth of the guarantees might differ. What seems more surprising is that courts cannot even agree about whether same-sex marriage bans employ a sex-based classification. Yet, if courts are having difficulty in determining that, then there are important implications both for analyses regarding the constitutionality of same-sex marriage bans in particular and for any analyses of equal protection guarantees more generally.

Equal protection guarantees are not designed to impose unreasonable limitations on the ability of legislators to craft solutions to promote the public welfare but merely to prevent states from arbitrarily imposing burdens on disfavored individuals. In some cases, it is unclear whether the state is simply promoting the public good as a general matter, which almost invariably involves a distribution of burdens and benefits to which some will object or, instead, is invidiously discriminating against a particular group. To help courts assess in a particular case whether a classification is legitimate or,
instead, offends constitutional guarantees, the Court has offered some helpful guidelines.

A. The Tiers of Scrutiny

The United States Supreme Court has long recognized that some “factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.” When such factors are used, there is a presumption that the classification is not promoting a legitimate state purpose and should be struck down.

Classifications that likely reflect prejudice are exactly the sorts that are less likely to be rectified through the usual legislative processes. The Court has suggested that where “such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” Thus, in part because certain classifications are likely to be the product of animus rather than a desire to promote legitimate state objectives and in part because the normal correction mechanism within the political process may not operate properly when these groups are involved, the Court will view certain classifications with skepticism.

To help courts determine whether classifications should be examined very closely or instead with greater deference, the Court has developed a system employing differing levels of scrutiny for three different kinds of classes: suspect classes, quasi-suspect classes, and a catch-all category that includes the rest. Suspect classifications will rarely be upheld, whereas classifications falling into the catch-all category are rarely struck down.

2. Id.
Classifications that are suspect will be examined with the closest scrutiny—a statute employing such a classification will be upheld only if it is narrowly tailored to promote a compelling state interest. Classifications that are quasi-suspect will be subjected to somewhat less exacting scrutiny—a statute employing such a classification will be upheld only if it is substantially related to the promotion of an important state interest. Finally, the remaining classification will be examined with much more forgiving scrutiny—a statute examined under rational basis review will be upheld as long as the classification is rationally related to the promotion of a legitimate state interest.

B. The Indicia of Suspect Status

A classification will be treated as suspect or quasi-suspect under certain conditions. The classification must involve a group that has certain indicia: it must be “discrete and insular”; members of the group must have a disability over which they do not have control; the defining characteristic of the group must not bear a rational relationship to a legitimate state purpose; and the group must have “experienced a history of purposeful unequal treatment or have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” Further, group membership must be stigmatized by society and thus, for example, members cannot be expected to be able to secure equal treatment through the political process. Where a group has those indicia, it will be designated as a suspect or quasi-suspect class.

When a group or class has the relevant indicia, the Court will subject the classification to increased scrutiny. For example, once the Court recognized that statutes targeting women should be subjected to heightened scrutiny, the Court began to examine statutes

targeting men or women for adverse treatment to close scrutiny. Then, the Court suggested that expressly classifying on certain bases would itself be enough to trigger heightened or strict scrutiny, even without evidence of animus or, perhaps, stereotypical assumptions regarding the abilities of the different sexes.⁵

The Court has offered examples of suspect status—race, religion, nationality and alienage—and examples of quasi-suspect status—gender and illegitimacy. While members of the Court have sometimes suggested that other classes, “not now classified as suspect … are unfairly burdened by invidious discrimination unrelated to the individual worth of their members,”⁶ the Court has been reluctant to recognize new suspect or quasi-suspect classifications.

This reluctance needs further examination. It might mean, for example, that the Court is unwilling to add new indicia to the list or relax the degree to which a group must have the relevant indicia when another class seeks to be recognized as suspect or quasi-suspect. Or, it might mean that the Court is unwilling to recognize a new class as suspect or quasi-suspect even if the group has the indicia to the same extent as do the existing classes. The former view might be understandable if great difficulties would be created were the implicit standards changed because, for example, relaxing the standard would somehow open up the floodgates to a whole host of classes no less deserving of special solicitude. However, the latter view seems much less justifiable because it suggests that a group’s suspect and quasi-suspect status is not being decided on the merits but, instead, in light of other criteria. It would be most ironic if a particular group was not given protected status because some on the Court believed that stigmatizing a group historically subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities was nonetheless somehow permissible and appropriate.

⁵. Cf. Mississippi University for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (“The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”).

C. Threshold Levels

One difficulty posed by the Court’s indicia approach is its utter indeterminacy. The Court has never made sufficiently clear whether a class must have all or merely most of the indicia, whether certain indicia are more important than others, or the extent to which particular indicia must be met. By failing to explain the degree to which the differing indicia must be met, the Court makes it more difficult for lower courts to make reasoned assessments regarding which additional classes, if any, should be recognized as triggering a higher level of scrutiny. Basically, lower courts might adopt one of two different approaches: (1) they might simply refuse to recognize any new classes, instead waiting for the Supreme Court to do so, or (2) they might examine those classes that have already been recognized as triggering increased scrutiny and try to discern the degree to which the existing indicia must be possessed in light of the degree to which the recognized classes had those indicia.

Consider, for example, the degree to which it is necessary that individuals in the class be unable to change the characteristic that is the basis for the classification. Race is very difficult if not impossible to change, whereas the same cannot be said of religion. The same point might be noted when contrasting ancestry with alienage—one cannot change who one’s ancestors were but one can change one’s alienage status, e.g., by becoming a United States citizen. So, too, it is difficult if not impossible to change one’s sex, whereas one’s illegitimacy status can be changed much more readily if one’s parents will cooperate.

Arguably, orientation should be recognized as a classification triggering heightened scrutiny. However, the United States Supreme Court has heard cases involving members of the LGBT community and has never recognized that orientation triggers intermediate or strict scrutiny. In Bowers v. Hardwick, for example, the Court upheld a Georgia law making consensual sodomy a crime. The Court restricted its analysis to due process guarantees, and so did not even address equal protection. Nonetheless, there is reason to think that the Court would have been unwilling to find that ori-
Orientation triggers heightened scrutiny and, indeed, some read *Bowers* as endorsing homophobia.

Even when reaching a more favorable result for the LGBT community, the Court did not suggest that orientation is a protected classification. In *Romer v. Evans*, the Court addressed the constitutionality of Colorado’s Amendment 2, which read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.  

The *Romer* Court did not expressly address whether sexual orientation constitutes a suspect or quasi-suspect class, instead suggesting that this amendment was unconstitutional even on rational basis review. The Court likened what was before it to what had been before the Court in *United States Department of Agriculture v. Moreno*, in which the Court had struck down legislation targeting a particular class (hippies) on rational basis grounds. The *Moreno* Court had noted that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”  

Basically, the *Romer* Court was suggesting that the passage of Amendment 2 was motivated by animus and thus had to be struck down.

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Two different points might be made about the Romer Court’s analysis. First, there was no need for the Court to reach whether orientation was a suspect or quasi-suspect classification if the law at issue could not even pass rational basis review. The Court noted that “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”\(^9\) Thus, because the statute could not even pass that low level of review, there was no need to reach the question of whether the statute at issue would pass a more demanding test.

A different point is sometimes made about Romer’s citation of Moreno. Justice O’Connor has suggested that the Court has unofficially recognized two different tiers within the catch-all category subject to rational basis scrutiny. Economic legislation triggers the least demanding review because it can most readily be rectified by normal political processes. However, when a law targets “a politically unpopular group, … [the Court applies] a more searching form of rational basis review.”\(^10\) It may be that the Court has implicitly decided not to recognize any new suspect or quasi-suspect classes but will instead recognize gradations within the category subjected to rational basis scrutiny.

Lawrence v. Texas, the case in which the Court overruled Bowers, does not cast much light on the level of scrutiny triggered by classifications on the basis of orientation. First, the Court struck down the Texas law criminalizing same-sex sodomy on due process grounds, although the Court did suggest that Texas’s statute was also constitutionally suspect on equal protection grounds. Once again, because the classification at issue was unconstitutional in any event, it was not necessary to address whether classifying on the basis of orientation should raise the level of scrutiny employed by the Court, either up to the intermediate scrutiny associated with gender or to the heightened rational basis scrutiny discussed by

\(^9\) Romer, 517 U.S. at 632 (emphasis added).
Justice O’Connor in her *Lawrence* concurrence in the judgment. Thus, the Court simply has not offered an analysis of the appropriate level of scrutiny for classifications on the basis of orientation in light of the relevant indicia, instead leaving that task to others.

### D. Orientation as a Protected Classification under State Constitutions

When state supreme courts have analyzed the constitutionality of local same-sex marriage bans on equal protection grounds, they often address two distinct issues—whether orientation is a protected classification under the state constitution and whether same-sex marriage bans classify on the basis of sex. The analyses of the latter are rather surprising if only because they are so radically different that they do not seem to be interpreting the same guarantees. This utter lack of consensus about how to apply the standard equal protection jurisprudence may bode poorly for future analyses implicating equal protection guarantees, regardless of which group is claiming to be unconstitutionally targeted by the classification at issue.

Several state courts have addressed whether sexual orientation is a classification triggering strict or heightened review under their respective state constitutions. When doing so, they take into consideration the indicia articulated by the United States Supreme Court, although that of course does not end the analysis. As should not be surprising, some state supreme courts have concluded that orientation is a classification triggering heightened scrutiny, whereas others have reached the opposite conclusion.

Consider the analysis offered by the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health*. The court discussed each of the enumerated criteria, noting that orientation had the relevant indicia when considered in light of those classifications already recognized as meeting the articulated standards. The court explained:

> Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimina-
tion that continues to manifest itself in society. The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.\footnote{11. Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 432 (Conn. 2008).}

The court rejected that members of the LGBT community were too politically powerful to be considered a class worthy of protection, noting that sex was declared a quasi-suspect classification at a time when women as a class were considered more powerful than members of the LGBT community are today. As the court explained, given that orientation meets the other indicia and that members of the LGBT community are not as powerful as were members of another group when that classification was held to trigger heightened scrutiny, it would be at the very least unfair not to recognize that orientation triggers heightened scrutiny as well.

The court considered whether orientation is an immutable characteristic, noting that different courts had reached different conclusions about whether orientation is in fact immutable, but also noting that there is no requirement in the jurisprudence that the characteristic be immutable. One need only consider some of the classifications that have been recognized as triggering heightened or strict scrutiny to see that immutability is not required.

The Washington Supreme Court reached very different conclusions when trying to decide whether orientation triggered heightened scrutiny. For example, the court reasoned that because some protective legislation had been passed, it was obvious that the LGBT community was not completely powerless. However, if the presence of express protective legislation is indicative of power, then the presence of express protection within the United States Constitution would certainly seem to be indicative of power and would obviate the need to find additional protections within Fourteenth Amendment guarantees. Were that the relevant test, one would
have assumed that sex could not be a protected classification because, after all, the Nineteenth Amendment to the United States Constitution affords express protection on the basis of sex. So, too, one might have assumed that race would not be a suspect classification, because the Fifteenth Amendment to the United States Constitution affords express protection on the basis of race, which would allegedly establish that racial minorities were and are not powerless.

The difficulty with the Washington court’s approach was not that it focused on whether members of the LGBT community were powerful but that the threshold degree of powerlessness used to disqualify the class as being suspect or quasi-suspect was artificially low and might have been used to disqualify classes that had already been recognized as meeting the relevant standard. Instead, the Washington court should have considered the degree of powerlessness of the recognized classes at the time of recognition as establishing the relevant baseline. Or, perhaps, the court should have considered the current degree of powerlessness of the recognized classes as setting the relevant baseline.

The same point might be made about the Washington court’s analysis of whether orientation is immutable. The court explained that because sexual orientation had not been established as an immutable characteristic and because the immutability of the characteristic was still subject to debate, the classification would not be treated as suspect. Yet, this would mean that religion could not be a suspect classification, since orientation is more difficult to change than one’s religion. So, too, it is easier to change one’s alienage or illegitimacy status than one’s orientation. Basically, if the Washington court’s approach were correct, some of the classifications currently recognized as suspect or quasi-suspect could not be so recognized.

While there is much to be said for the proposition that orientation should be treated as a suspect or quasi-suspect classification,

12. The Court held that sex was an invidious classification in Reed v. Reed, 404 U.S. 71 (1971), and decided to impose intermediate scrutiny on sex-based classifications in Craig v. Boren, 429 U.S. 190 (1976).
a separate question is whether same-sex marriage bans already make use of a protected classification and thus should be examined with at least heightened scrutiny. Various courts have considered this claim, and there has been a surprising lack of consensus about how this issue should be resolved.

E. Classifications on the Basis of Sex

Several courts have addressed whether same-sex marriage bans classify on the basis of sex. Both their conclusions and their analyses have varied so greatly that one cannot help but conclude that there is no common understanding about how the equal protection guarantees are supposed to be applied. But if that is so, then there are important implications for equal protection analyses more generally and not only for those involving LGBT plaintiffs.

a. Hawaii

More than fifteen years ago, the Hawaii Supreme Court in *Baehr v. Lewin* analyzed that state’s marriage statute, which included in relevant part that “the marriage contract, … shall be only between a man and a woman.”13 The court made two points: (1) “Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female,” and (2) “the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.”14 Basically, the Hawaii Supreme Court examined the express language of the statute and noted that the statute precluded males from marrying males and females from marrying females, but allowed males to marry females as long as no other limitations was violated, e.g., the parties were old enough and were not too closely related by blood. The

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court concluded that the statute facially classified on the basis of sex.

A separate question was whether the classification was sufficiently closely tailored to support sufficiently important interests for such a classification to be upheld. That depended upon the level of scrutiny imposed by the state constitution for sex-based classifications—under the Hawaii Constitution, classifications on the basis of sex are examined with strict scrutiny.

In his Baehr dissent, Judge Walter Heen denied that the Hawaii statute classified on a forbidden basis, noting that “HRS § 572-1 treats everyone alike and applies equally to both sexes.” Yet, it is unclear whether he was asserting that the classification is not sex-based, because it allegedly affects the sexes equally, or is sex-based but not invidiously, because a statute might classify on the basis of sex but nonetheless be permissible.

Judge Heen noted, “A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has.” He then suggested that the statute should be examined in light of the rational basis test, thereby implying that the statute did not classify on the basis of gender. Yet, the United States Supreme Court has already explained that this is not the proper way to analyze whether a statute classifies on a particular basis.

Consider McLaughlin v. Florida, in which the Court examined Florida’s making interracial fornication or adultery a separate crime in addition to the state’s general prohibition of fornication and adultery. The Court explained that the statute under which Dewey McLaughlin and Connie Hoffman were charged could only apply to an interracial couple. That said, however, the Court noted that “all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty.” Notwithstanding this equal appli-

15. Id. at 71 (Heen, J., dissenting).
16. Id. (Heen, J., dissenting).
cation, the Court struck down the statute as a violation of equal protection guarantees. The Court pointed out:

Judicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida’s cohabitation law and those excluded.18

The McLaughlin Court explained that a racial classification was at issue, equal application to whites and blacks notwithstanding. A separate issue involved an analysis of the statute’s constitutionality, which might include a variety of factors, e.g., that a criminal statute was at issue and that the classification triggered strict scrutiny.

The same point about classification might be made in the civil context. In Loving v. Virginia, the Court examined Virginia’s anti-miscegenation statutes. The Court struck down the statutes, including the statute declaring interracial marriages void, concluding that they were “designed to maintain White Supremacy.”19 However, at least two points must be made. First, the Loving Court noted that the statutes would have been struck down even were that not the intent and, second, there was no doubt that what was at issue were racial classifications.

That the Loving Court struck down Virginia’s marriage laws involving racial classifications does not establish that sex-based classifications must also be struck down. Whether sex-based classifications are constitutionally permissible depends upon the implicated interests of the state and the tightness of fit between the classification and the promotion of those interests. While the federal standard used to determine whether sex-based classifications

18. Id. at 191.
pass muster is not as demanding as the federal standard determining the constitutionality of racial classifications, the former standard nonetheless requires that “a party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification.”

Judge Heen’s analysis was mistaken in at least two respects. First, one does not determine whether a statute classifies on a particular basis by looking at whether different groups are affected differently. As McLaughlin illustrates, a classification might result in an equal imposition of burdens across groups and nonetheless classify on a basis triggering closer scrutiny.

A separate issue is whether the classification violates constitutional guarantees, and it might be important to see who is adversely affected when answering that question. But that analysis does not involve determining the basis of the classification (that question has already been decided), but whether the standards used to determine whether the constitutional permissibility of such a classification have been met.

b. Vermont

In Baker v. State, the Vermont Supreme Court found that the state’s same-sex marriage ban violated state constitutional guarantees under a particular provision of the Vermont Constitution—the Common Benefits Clause. The court began its analysis by identifying the type of classification embodied in the statute, recognizing that the “marriage statutes apply expressly to opposite-sex couples [and] ... exclude anyone who wishes to marry someone of the same sex.”

One might think that the court’s recognition that the statute expressly excluded on the basis of the sex or gender of the would-be spouse would be enough to establish that the statute classified on the basis of sex. However, surprisingly, the Baker court reasoned that “the marriage laws are facially neutral; they do not single out men

or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."

22. Basically, the *Baker* court adopted the Heen method of identifying the basis of classification, United States Supreme Court precedent to the contrary. The *Baker* court failed to recognize that a statute treating different groups equally might still be using a classification triggering heightened scrutiny, e.g., statutes that focus on the racial identity of the members of would-be marital couples. Ironically, the very United States Supreme Court precedent cited by the *Baker* court in support of its position, namely, *Personnel Administrator of Massachusetts v. Feeney*, actually undermined the Vermont court's analysis.

The *Feeney* Court examined a Massachusetts veterans' preference statute that “operate[d] overwhelmingly to the advantage of males.”

23. The Court distinguished between two kinds of classifications—those that facially involve a protected classification and those that involve a neutral classification that might have a disparate impact on a protected class. The *Feeney* Court explained that certain classifications, paradigmatically race, “in themselves supply a reason to infer antipathy.”

24. Such a “classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”

25. Here, the Court is suggesting that a statute expressly using a racial classification must be examined with strict scrutiny—it will not do to say, for example, that the racial classification is benign. Even an allegedly non-invidiously motivated statute using a protected classification will be examined closely for fear that it is motivated by an invidious purpose.

Subjecting *express* racial classifications to strict scrutiny will not alone eradicate invidious discrimination, because an individual who is intent on invidiously discriminating might try to do so in a more subtle way. After all, laws classifying on allegedly neutral

22. *Id.* at 880 n.13 (emphasis added).
24. *Id.* at 272.
25. *Id.*
grounds might nonetheless target on the basis of race. To prevent individuals from invidiously discriminating via an allegedly neutral classification, the Court will strictly scrutinize “a classification that is ostensibly neutral but is an obvious pretext.”

What would count as a classification that is ostensibly neutral? Here, the Feeney Court is discussing a classification that involves a non-race-related term that allegedly is being used to target on the basis of race in a more subtle manner. The Baker court misunderstood how the term “neutral” was being used, mistakenly thinking that the Feeney Court was talking about a policy that was neutral in the sense that the races were affected equally. But that could not have been the Court’s meaning, because the Court had just offered McLaughlin as an example of facial, racial discrimination, and McLaughlin involved a racial classification that had been applied to the races equally.

To understand what the Feeney Court was doing, it is helpful to consider the classification that had been at issue. The challenged classification used a neutral term — “veteran” — that on its face was not associated with gender. Indeed, the Court pointed out that there were both male and female veterans.

When a classification, neutral on its face, is challenged as offending equal protection guarantees, the Court uses a specific test to determine whether the neutral classification has been used to impose a burden on a protected class. The Feeney Court explained:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

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26. Id.
27. Id. at 274.
Consider a statute that permits a man to marry a woman but not a man, and a woman to marry a man but not a woman. Suppose that a court for whatever reason interprets such a statute to be gender-neutral. The Feeney twofold inquiry tells the court to reconsider whether in fact the classification is gender-based. The question to be decided is not whether the genders are being treated equally but simply whether gender is the basis of the classification. Only if the classification is not gender-based should the next questions be considered.

Suppose that a neutral classification is nonetheless challenged as discriminatory on the basis of gender. Given that there is no gender-linked term in the statute, the only way that one could plausibly argue that the classification was in fact discriminatory on the basis of gender would be to show disparate impact. But, the Court suggests, where there is no express classification, one must show both disparate impact and an intent to discriminate.

Suppose that the Baker analysis were applied in McLaughlin and the Court had required disparate impact even when a facial racial classification was used. In that event, the Court would presumably have said that because whites and blacks were affected equally by the statute, rational basis scrutiny should be used. But this is exactly what McLaughlin did not say; on the contrary, McLaughlin imposed strict scrutiny, equal application of the prohibition notwithstanding.

In her concurring and dissenting Baker opinion, Justice Denise Johnson pointed out that “an individual’s right to marry a person of the same sex is prohibited solely on the basis of sex.”28 As she rightly suggested, once the gender-based classification was established, it was incumbent upon the state to establish that the statute was sufficiently “narrowly tailored to further important, if not compelling, interests.”29

It is not claimed here that the Baker court was somehow blinded by its desire to avoid at all costs the conclusion that same-sex rela-

28. See Baker, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part).
29. See id. (Johnson, J., concurring in part and dissenting in part).
tionships should not be given legal recognition. On the contrary, the *Baker* court held that the Common Benefits Clause required that the state offer legal recognition to same-sex relationships, so the court’s misapplication of *Feeney* cannot plausibly be attributed to that kind of result-oriented reasoning. Nonetheless, the *Baker* court misapplied the relevant equal protection guarantees in a way that simply cannot account for the existing federal jurisprudence.

c. New York

The New York Court of Appeals addressed the constitutionality of that state’s same-sex marriage ban in *Hernandez v. Robles*. The court dismissed the equal protection argument in one paragraph, noting:

The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.\(^{30}\)

Yet, as the United States Supreme Court has repeatedly made clear, there is no requirement that one group be subordinated to another in order for a protected classification to be struck down. Indeed, such a requirement flies in the face of the jurisprudence—certain classifications are presumptively prohibited because so rarely legitimate. To invalidate a statute that expressly uses a protected classification only if the statute can be shown to subordinate is to return to a jurisprudence explicitly repudiated in *McLaughlin*, where the *McLaughlin* Court explained that judicial “inquiry under the

Equal Protection Clause … does not end with a showing of equal application among the members of the class defined by the legislation.\textsuperscript{31}

Not only did the New York court offer an interpretation of equal protection guarantees which hearkened back to the days of \textit{Pace v. Alabama},\textsuperscript{32} where the United States Supreme Court upheld Alabama’s punishing interracial fornication more severely than intraracial fornication, but the New York court offered a very unusual analysis of suspect and quasi-suspect jurisprudence more generally. The court considered whether orientation might be a suspect or quasi-suspect class under the New York Constitution. The court suggested that it might “apply heightened scrutiny to sexual preference discrimination in some case,” but would not when reviewing “legislation governing marriage and family relationships.”\textsuperscript{33}

Why are those areas excluded? Because the court decided that a “person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best.”\textsuperscript{34} Yet, evidence was presented to the court that children were thriving when raised by LGBT parents, which is to say that one’s “preference” for sexual partners of the same sex was simply not correlated with one’s ability to parent. That evidence did not win the day, because “the studies on their face do not establish \textit{beyond doubt} that children fare equally well in same-sex and opposite-sex households.”\textsuperscript{35}

The New York court’s analysis was startling in a number of respects. First, New York permits second-parent adoption, so two members of a same-sex couple might each be recognized as the legal parent of the same child. This means that New York accepts that LGBT adults are good parents. However, the state has nonetheless decided that it will not permit same-sex parents raising a child together to marry, even though doing so would help those children

\textsuperscript{31} \textit{McLaughlin}, 379 U.S. at 191.
\textsuperscript{32} 106 U.S. 583 (1883).
\textsuperscript{33} \textit{Hernandez}, 855 N.E.2d at 11.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}. at 8 (emphasis added).
and would not in any way hurt the children who are being raised in different-sex families.

The New York court distinguished what was before it from the “kind of sham equality that the Supreme Court confronted in Loving.” Yet, the court failed to pay close enough attention to the issues raised in Loving.

Virginia supported its anti-miscegenation law by claiming that the children of interracial couples were inferior and that children were better when produced by intra-racial couples than when produced by interracial couples. What proof did the state have that its contention was true? None. But the state argued that none was required because the races were being treated equally. However, if equal protection guarantees were not offended by a statute that did not treat the races differently, then mere rational basis scrutiny should be employed. The Loving Court explained Virginia’s position:

The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

With respect to which judgment was Virginia arguing that the Court should defer to the wisdom of the legislature? With respect to the claim that children would be better off if they were not produced by interracial couples. Apparently, if the New York court had been deciding Loving and if the state could show that the statute was not promoting white supremacy because the state could establish that its interest was in maintaining the purity of all races

36. Id. at 11.
37. Loving, 388 U.S. at 8.
and not just the white race, then the New York court would have decided the case differently. After all, if the state could show that the interracial marriage ban was not “in substance anti-black legislation,” then plaintiffs could not have claimed that the statute was designed to subordinate one race to another and rational basis would appropriately have been used. If rational basis scrutiny was used, then the court would presumably have deferred to the legislature’s judgment about what was best for children, because it could not be shown beyond doubt that the legislature was wrong. But this is a fundamental misunderstanding of Loving, where the Court made clear, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” The Loving Court was not saying that interracial marriage bans were only unconstitutional when involving an attempt to subordinate one race to another but, instead, that they were unconstitutional “even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”

In her masterful dissent, Chief Judge Kaye argued that the New York law violated equal protection guarantees, because it discriminated both on the basis of gender and on the basis of orientation. She explained, “That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex.” Regrettably, the New York court simply chose to ignore that its approach had already been rejected in Loving.

d. Washington

The Washington Supreme Court offered an analysis much like that of the New York Court of Appeals, rejecting the equal protection argument in a cursory and conclusory fashion. The Washington court reasoned, “If plaintiffs’ case were truly analogous to Loving, we would first have to find that DOMA [the Washington statute

38. Hernandez, 855 N.E.2d at 11.
40. Id. at 11 n.11.
41. Hernandez, 855 N.E.2d. at 29 (Kaye, C.J. dissenting).
banning same-sex marriage] discriminates on the basis of sex and then conclude that the right to marriage is violated because of the restriction due to sex discrimination. However, as the State urges, DOMA treats men and women the same.”42 Yet, Loving did not establish that differential racial treatment had to be established before strict scrutiny would be employed for a racial classification. On the contrary, the very use of a racial classification triggered strict scrutiny, just as the very use of a racial classification in McLaughlin had triggered strict scrutiny, equal application to the races notwithstanding. But that means that the Washington court should indeed have found that the statute classified on the basis of sex, thus triggering closer scrutiny. The court would then have decided whether the state same-sex marriage ban passed muster under this closer scrutiny.

Would the Washington court have struck down the statute when employing closer scrutiny? While such a result is not foreordained simply by virtue of the imposition of higher scrutiny, the court implied that it would indeed have felt compelled to strike down the statute, perhaps because Washington subjects gender classifications to strict scrutiny.

Suppose that the Washington jurisprudence for determining whether a statute classifies on the basis of gender differs from the federal jurisprudence in a crucial way by requiring that classifications affect the sexes differently in order for higher scrutiny to be employed under state constitutional guarantees. Even if that were so, however, the federal jurisprudence does not so require, which means that the Washington statute should have been subjected to intermediate if not strict scrutiny.

e. California

In In re Marriage Cases, the California Supreme Court understood that the California marriage statute precluded a man from marry-

42. Andersen, 138 P.3d at 989. See also Conaway v. Deane, 932 A.2d 571, 598 (Md. 2007) (“Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.”).
ing a man but not a woman and a woman from marrying a woman but not a man, but reasoned that there was no discrimination because no one could marry someone of the same sex. The court understood that the Virginia statute at issue in Loving permitted a white person to marry a white person and a black person to marry a black person but precluded a white person from marrying a black person. However, the California court pointed out:

[T]he antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in Perez) “the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians.”

Regrettably, there was no discussion of whether the Virginia statute would have been upheld had it been established that Virginia was trying to preserve the purity of all races. Such a question would not have undermined the California court’s contention that Virginia’s attempt to promote white supremacy violated constitutional guarantees—rather, it simply would have helped underscore that Virginia’s statute was unconstitutional whether or not it was trying to promote white supremacy. But since that is so, Loving is not so easily distinguished, because the state’s attempt to promote racial supremacy was sufficient but not necessary to establish the unconstitutionality of the state’s artificial restriction of marriage.

The California Supreme Court explained:

[C]ourts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of the same race or of different races generally reflects a policy disapproving of the integration or

close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of racial discrimination with respect to the interracial couple and both of its members.44

Yet, one would have thought from the court’s previous analyses that treating interracial couples differently from intra-racial couples would involve racial discrimination only if there was some implicit or explicit attempt to privilege one race over another. Without any such showing, one still could claim that the statute was classifying on the basis of race. However, one would need more before one could show disparate impact upon one race or another.

The California court contrasted the statute precluding interracial couples from marrying from one precluding same-sex couples from marrying by suggesting:

[A] statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of sexual orientation rather than an instance of sex discrimination, and properly should be analyzed on the former ground.45

Here, the court suggests that because there is no disparate impact on the basis of sex and there is such an impact on the basis of orientation, the statute should be examined in light of its discriminating on the basis of orientation rather than sex. Certainly, the court was correct to recognize that such a statute would impose a burden

44. Id.
45. Id. See also Conaway, 932 A.2d at 605 (“While Family Law § 2-201 does not draw a distinction based on sex, the legislation does differentiate implicitly on the basis of sexual preference.”).
on the LGBT community, but a separate question is whether such a statute should *in addition* be examined in light of its using a sex-based classification.

Consider the statute that precludes interracial marriage out of a desire to protect the integrity of all races. For purposes here, let us assume that the statute is not designed to privilege one race over others and does not have the effect of privileging one race over others. While such a statute classifies on the basis of race, it *ex hypothesi* does not have a disparate racial impact. Yet, *Loving* teaches that such a statute should be examined with strict scrutiny, even if it does not have a disparate racial impact and even if the purpose behind it is to promote racial integrity generally. But if that is so, then the fact that the races are affected equally does not immunize a race-based classification from strict scrutiny. So, too, even if in fact a same-sex marriage ban affects the sexes equally, that should not immunize the statute from scrutiny for using a sex-based classification.

Ironically, the California court did not even have to reach the question of whether the state’s same-sex marriage ban classified on the basis of sex, because the court held that orientation was a suspect classification under the California Constitution.\(^{46}\) One infers that the court wanted to choose the “correct” classification to subject to strict scrutiny, as if a classification could not discriminate on the basis of both sex and gender.

\(^{46}\) See *Marriage Cases*, 183 P.3d at 442 (“sexual orientation should be viewed as a suspect classification for purposes of the California Constitution’s equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision”). By the same token, the Supreme Judicial Court of Massachusetts did not address whether that state’s same-sex marriage ban should be examined with heightened scrutiny, because it found that the ban could not even pass rational basis review. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.”).
A court believing that it had to choose the “correct” classification for constitutional review when considering a same-sex marriage challenge might be tempted to focus solely on the group on whom the burden has primarily if not exclusively been imposed, namely, the LGBT community. Yet, limiting one’s focus to the intended target may well contradict the existing jurisprudence. For example, no court would suggest that a race- or gender-based classification in a statute should be reviewed in light of the rational basis test as long as the statute was designed to impose a burden on the poor. So, too, a classification normally triggering closer scrutiny should not be subjected to more deferential review merely because the group intended to bear most of the burden has not yet been held to trigger more careful review.

One of the difficulties posed by an analysis requiring that disparate impact be shown before the level of scrutiny is raised is that the higher level of scrutiny is imposed to discover some of the non-obvious adverse effects of employing certain classifications. Consider, for example, the former admissions policy of the Mississippi University for Women (MUW), which precluded males from taking nursing courses for credit. On its face, such a policy might seem to advantage rather than disadvantage women. Yet, the MUW Court worried that MUW’s “admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.” The Court has made clear that when “determining the validity of a gender-based classification,” the analysis “must be applied free of fixed notions concerning the roles and abilities of males and females.” Such an analysis cannot be properly performed if the Court is going to approach classifications based on gender with a deferential eye.

The United States Supreme Court has suggested, “‘Inherent differences’ between men and women … remain cause for celebra-

48. Id. at 724.
49. Id. at 724–25.
tion, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” At least one issue to be examined is whether same-sex marriage bans are based on stereotypical understandings of the roles of the men and women, either as parents or as romantic partners. But analysis of whether particular classifications promote fixed notions about the proper roles of the sexes is much less likely to take place under rational basis review, which is one of the reasons that closer scrutiny is and should be employed for sex-based classifications.

### F. Conclusion

Same-sex marriage bans impose significant and undeserved burdens on LGBT families and should be struck down. Arguably, orientation should be treated as a suspect or quasi-suspect classification, because the class has the relevant indicia as much as or more than some of those classes already recognized.

A separate question, however, is whether same-sex marriage bans should trigger closer scrutiny because employing a classification that has already been recognized as requiring close examination. Those courts denying that such scrutiny should be employed have suggested that men must be treated differently from women in order for heightened scrutiny to be triggered. But the argument that express classifications applied equally do not trigger close scrutiny was rejected decades ago. Unless the United States Supreme Court makes clear that this is a fundamental misunderstanding of how equal protection guarantees work, it seems safe to assume that some courts will try to adopt this kind of approach in other cases.

To say that closer scrutiny should be employed when express sex-based classifications are employed is not to say that such classifications must be struck down. Rather, it is merely to say that the state’s burden is higher when it chooses to use a presumptively invalid classification. As long as a state can offer “an exceedingly per-

suasive justification for the classification,“ the same-sex marriage ban will pass muster, at least on federal grounds.

Express use of a protected classification triggers closer scrutiny, and any contrary holding will return us to an age when “separate but equal” will only result in deferential review. Presumably, no one would advocate returning to that bygone era, and it is nothing short of amazing that some courts, whether upholding or striking down same-sex marriage bans, do not appreciate that their reasoning commits them to a return to a jurisprudence that has been repudiated for decades.

51. Id. at 524.
Chapter 7

The Right to Travel

Historically, states limited marriage on a variety of bases—individuals were precluded from marrying because they were too young, of different races, or too closely related by blood. Further, some states limited the ability of individuals to remarry if these individuals were responsible for the termination of their first marriages. However, because family law has traditionally been a matter left up to the states, a marriage prohibited in one state might be permitted in a neighboring state.

Difficult issues involving interstate recognition arose when individuals barred from marrying within one state went elsewhere to celebrate their unions. Traditionally, states considered a number of factors when deciding whether to recognize a marriage prohibited locally but validly celebrated in another jurisdiction. Factors included the degree to which the union at issue violated public policy and the kinds of interests that would have been compromised had the union been declared invalid. An additional consideration involved where the individuals had been domiciled at the time of the marriage, because the justified expectations of the parties would have been very different if they had married in accord with their domicile’s law rather than if they had attempted to evade local law by slipping across the border and marrying during a weekend holiday.

Most courts when determining the validity of marriages celebrated elsewhere did not feel constrained by federal constitutional guarantees and, instead, reached their conclusions in light of local law and policy as well as considerations of comity. However, it seems likely that the United States Supreme Court will soon have to confront the degree to which federal constitutional constraints
limit the power of states to refuse to recognize marriages validly celebrated in other domiciliary states.

A. Interstate Recognition Where Burdens Had Been Imposed on the Right to Marry

State marriage laws differ in a number of respects. For example, although no state permits a parent to marry his or her child, state marriage laws nonetheless impose differing limitations with respect to how closely individuals are related by blood and are still permitted to marry or with respect to the age at which individuals may marry. Before 1967 when the Supreme Court struck down anti-miscegenation laws as violating federal constitutional guarantees, states also differed with respect to whether interracial couples could marry. Some states also imposed limitations on the right of an individual to remarry if that person had caused the dissolution of his or her prior marriage. Difficulties arose when a forum state was asked to determine the validity of a marriage that could not be celebrated locally, but was permissible in the state where it had been celebrated.

In the past, several states imposed burdens on individuals who had caused their first marriages to end. For example, the Supreme Judicial Court of Massachusetts explained in Inhabitants of West Cambridge v. Inhabitants of Lexington that an individual whose marriage had been dissolved because he had committed adultery would be barred from remarrying within the state. That such a marriage could not be contracted locally, however, did not mean that the marriage could not be contracted elsewhere. Indeed, it is not at all clear how a state could preclude someone who had changed domiciles from remarrying, even if the state had a desire to do so. As the United States Supreme Court has explained, “Laws have no

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force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states.”

Judgments including remarriage limitations have usually, but not always, been viewed as having no extraterritorial effect, although it is important to distinguish between two different kinds of scenarios. In one, an individual barred from marrying locally decides to move to another state and marries in accord with the law of his new domicile. His marriage would be recognized in the new domicile, although he might have difficulties should he decide to change his domicile again and move back to the state where he had been precluded from remarrying. A second scenario involves an individual barred from marrying locally who decides to take a quick vacation to another jurisdiction where the desired marriage would be permissible. He marries in accord with local law and comes back to his domicile with his new spouse. Such a marriage might not be recognized by the domicile, because evasive marriages not only violate local public policy but also involve an attempt to defraud the state.

While many of the reported cases involved individuals domiciled in one state who had crossed state lines to evade local law, courts have sometimes suggested that states have the power to refuse to recognize marriages contrary to local law regardless of where and when the marriage was celebrated. For example, in the context of discussing an evasive marriage, the Tennessee Supreme Court in Pennegar v. State suggested that the state had the power to refuse to recognize any marriage, although much of the opinion supported the proposition that the state should not have plenary power in this regard.

The Pennegar court noted:

The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demands that one state or nation shall recognize the validity of marriage had in other

states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise.³

Because of the important interests implicated, there is “a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere.”⁴ However, there are exceptions to that rule: (1) “marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries,” and (2) “marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication.”⁵ Basically, the court in Pennegar suggested that it was in the interest of both society and the individuals themselves to recognize most marriages, although there were two exceptions to this general rule.

Included in this first category cited by the Pennegar court were polygamous or incestuous marriages, where incest is understood to apply only to marriages in the direct line of consanguinity or to marriages between siblings. The justification offered for not recognizing these unions was not merely that the marriage would not be recognized locally, but that there was general, if not universal, agreement that such marriages would not be recognized outside of the jurisdiction where they were celebrated. The North Carolina Supreme Court pointed out that such “marriages may be declared unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous.”⁶

The second exception used by the Pennegar court was more difficult to explain, at least in part, because it was obviously overbroad as stated. If a marriage celebrated elsewhere would not have to be recognized as long as there was “some positive statute or pro-

⁴. Id.
⁵. Id.
nounced public policy of the particular state,” there would be no limitation at all on which marriages would not have to be recognized in the forum. Basically, the question at hand involved determining which locally prohibited marriages would be recognized if validly celebrated elsewhere. However, if the rule was that all marriages prohibited by local law or public policy would not be recognized, then there would be no marriages prohibited locally that would nonetheless be recognized because validly celebrated elsewhere. The Pennegar court understood that its formulation of the second exception was overly inclusive.

It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection [because to] so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property. 8

Enforcement of any and all substantive limitations would have been too destructive to fundamental interests. But this meant that some way had to be devised to determine which substantive prohibitions could be overlooked, so that this “most solemn relation” might be maintained and preserved.

Certainly, one possibility was to require legislatures to make their intentions clear — they would have to say not only that certain marriages would not be permitted if parties attempted to celebrate them within the state but also that such marriages would not be recognized even if validly celebrated in another domicile. However, this proposal presented at least two difficulties. First, the legislature could simply announce that it would not recognize certain marriages, notwithstanding the lack of important or compelling reasons to refuse to afford that recognition. Second, the legislature could inadvertently fail to announce that it would not rec-

7. Pennegar, 10 S.W. at 306.
8. See id.
ognize certain unions, even though it had compelling reasons justifying the refusal to accord that recognition. For example, the *Pennegar* court noted that the Tennessee Legislature had not “deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriage.” However, rather than simply assuming that this meant that such marriages would be recognized if validly celebrated elsewhere, the court decided that it had the duty of determining whether the state would recognize the marriage.

Some of the factors that were considered when determining whether a marriage validly celebrated elsewhere should be recognized included whether there was a statute criminalizing such a marriage and whether innocent parties would suffer if the marriage were recognized. In particular, Tennessee had a “policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded ... by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of avoiding our statute.” The *Pennegar* court announced that Tennessee would not recognize marriages that had been celebrated elsewhere to bypass the limitations imposed in Tennessee on individuals who had committed adulterous behavior during a prior marriage. The ramifications of such a holding for couples should not be minimized, since it would not only mean that the alleged spouse would be treated as a legal stranger for purposes of inheritance, but also that the new couple might be subject to criminal penalty for living together without benefit of (a legally recognized) marriage.

Suppose, however, that the individuals' purpose in marrying elsewhere was not to evade local law. What then? This might depend upon who was seeking to establish the validity of the marriage and

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9. *Id.* at 307.
10. *Id.* at 308.
why. For example, it might be that an individual barred from marrying in his current domicile changes his residence and marries in the latter domicile, where he lives and ultimately dies. Eventually, a suit is brought in the former domicile to establish the validity of the marriage, for example, because a child of that marriage would be entitled to property within the forum only if the validity of her parents’ marriage were recognized so that she would be a legitimate heir. In this kind of case, there would have been no attempt to impose a fraud on the forum. Indeed, the individual barred from marrying locally had never returned to his former state where the marriage’s validity might have been challenged.  

Yet, the situation might be more complicated, for example, if the individual who had married after changing his domicile had changed his domicile yet again and moved back to the original domicile. Suppose that an individual secures a divorce after having been found to have committed adultery. He and his paramour decide to leave the state and start a new life elsewhere, thereby changing domicile. A little time passes. By the time that they are ready to marry in their new domicile, they have decided that they miss their former state and now wish to relocate back to where they had lived before. The case would be relatively straightforward if the couple had intended all the while to return to the state where they had been prohibited from marrying. Then, they never would have changed domicile, and the validity of the marriage would have depended upon how the forum treated evasive marriages. In the envisioned scenario, however, the marriage would have been valid according to local law, and the couple would not have been attempting to impose a fraud on the domicile.

Traditionally, a non-polygamous, non-incestuous marriage was treated as valid everywhere if valid in light of the domicile’s law at the time of the marriage’s celebration. However, an exception has

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11. It is important to note, however, that were there a state statute or constitutional amendment precluding the recognition of the marriage at issue for any purpose, then a court would be precluded from recognizing the marriage, even if that would mean that the child would then not be entitled to the property.
been grafted onto this rule — if a couple marries in their domicile but plans on moving to another domicile immediately after the marriage, then the marriage may be held invalid if violating the law of the post-wedding domicile. Basically, the future domicile is thought to have a very important interest in the validity of the marriage at the time of its celebration, and thus should be able to determine the union’s validity.

**B. Interstate Recognition of Interracial Marriages**

One area that has been especially confusing historically involved the conditions under which interracial marriages, valid where celebrated, might be recognized in a domicile where such unions were prohibited. In *Inhabitants of Medway v. Inhabitants of Needham*, the Supreme Judicial Court of Massachusetts upheld the validity of an evasive, interracial marriage that had been celebrated in accord with Rhode Island law. The court explained that the marriage was valid where celebrated and that “it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature valid in a neighboring state, could be dissolved at the will of either of the parties, by stepping over the line of a state, which might prohibit such marriages.”

Basically, the court understood that the state’s refusal to recognize such marriages would create the potential for a party to escape his or her marital responsibilities by having the union declared void and of no legal effect in the forum. The court noted, for example, that a refusal to recognize the validity of such marriages would have “disastrous consequences to the issue of such marriages.”

Other courts focused on the issue of such marriages — the children — but reached the opposite conclusion about what would best

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13. *ld.* at 159.
promote public policy. For example, in upholding that state’s in-
terracial marriage ban, the Georgia Supreme Court suggested that 
the “amalgamation of the races is not only unnatural, but is always 
productive of deplorable results ... [because] the offspring of these 
unnatural connections are generally sickly and effeminate, and ... 
they are inferior in physical development and strength, to the full-
blood of either race.” 14 This was thought to be a reason to refuse to 
recognize such marriages.

Many of the interracial marriage cases involved individuals who 
evaded local law by going to a jurisdiction that did not bar such 
unions, and then returning to their domicile to live together as a 
married couple. For example, in State v. Kennedy, the couple had 
been domiciled in North Carolina but had gone to South Carolina 
to marry so that they could evade local law. They then immedi-
ately returned to North Carolina to live. The state supreme court 
refused to uphold the validity of the marriage, reasoning that a 
“law like this of ours would be very idle if it could be avoided by 
merely stepping over an imaginary line.” 15

Sometimes, the question was whether an interracial marriage, valid 
where celebrated, would be recognized for purposes of descent, 
where the individual and spouse had never lived together in the 
forum as an interracial married couple. Instead, the couple would 
have married and lived elsewhere. There would have been no at-
tempt by the couple to circumvent the domicile’s law by marrying 
elsewhere and then returning to the domicile to live. The validity 
of such a marriage might be recognized precisely because the cou-
ple had never lived together in the forum, although its validity likely 
would not have been recognized had the couple tried to return to 
the state as a married couple.

At least two different issues might be implicated in many of the 
marr iage evasion cases: (1) a couple knows the local law precludes 
their marrying so they go elsewhere to contract a marriage, and 
(2) the couple seeks to compel the state to recognize their marriage,

notwithstanding a local statute that prohibits the union. While the couple contracting an evasive marriage would have been doing both (1) and (2), there are a variety of situations in which both would not be implicated. For example, members of a couple precluded from marrying by the state’s anti-miscegenation law might decide to become domiciled in a state where their marriage would be permitted. Their decision to move would be motivated in part by the desire to avoid this restriction, but their changing domicile would not amount to an evasion of local law in the relevant sense. Rather, they might have simply decided to make a new state their home, and their marrying in accord with the laws of their new domicile and remaining there would be unobjectionable to the former domicile.

Another kind of example would also involve no evasion in the relevant sense. Suppose an interracial couple marries in one state in accordance with local law and then, because of an opportunity arising after the marriage had been celebrated, subsequently moves to a new forum to live as a married couple, even though this new forum prohibits the celebration of interracial marriages. This couple has not evaded local marriage laws and indeed has married in accord with the law of the domicile, although they have now moved to a state prohibiting their union and they nonetheless want their marriage to be recognized by their new domicile. Pearson v. Pearson involved an interracial couple who had validly established their union in Utah, and then moved to California where they were precluded by law from marrying. The California Supreme Court upheld the validity of the marriage, because “being valid by the law of the place where it was contracted, [it] is also valid in this State.”

Courts were not always willing to recognize marriages validly celebrated in other domiciles even where there had been no attempt to evade local law. In State v. Bell,17 the Tennessee Supreme Court refused to recognize the validity of an interracial marriage validly celebrated in a different domicile, although it was never clear whether

17. 66 Tenn. (7 Baxt.) 9 (1872).
the couple had moved to Tennessee immediately after their marriage in Mississippi or, instead, had lived together as a married couple in Mississippi for awhile before migrating to Tennessee. In contrast, in an analogous case, the North Carolina Supreme Court in *State v. Ross* framed the issue as “whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterwards migrate here.”18 The North Carolina State Attorney General had likened the marriage to one that was incestuous or polygamous.19 However, the *Ross* court rejected that comparison, reasoning, “It is impossible to identify this case with that of an incestuous or polygamous marriage,”20 because it “cannot be said to be the common sentiment of the civilized and Christian world” that the interracial marriage should not be recognized.21

When recognizing the interracial marriage validly celebrated in a different domicile, the North Carolina Supreme Court was not striking down the state’s interracial marriage ban. Indeed, in the very year in which *Ross* was decided, the North Carolina court explained that “a State may by legislation extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries [or states] by whose law no such incapacities exist.”22 Because North Carolina’s marriage law governed the validity of a marriage between individuals who had married in South Carolina to evade North Carolina’s law, North Carolina was under no obligation to recognize the marriage, which meant that its domiciliaries could be convicted of living together without benefit of (a valid) marriage.

As a general matter, states are free to refuse to recognize an evasive marriage that violates an important public policy of the domi-

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19. *Id.*
20. *Id.* at 247.
21. *Id.* at 246. For a fuller discussion and comparison of *Bell* and *Ross*, see Chapter 2, section B.
cile, and are also free to refuse to recognize a polygamous or incestuous marriage validly celebrated elsewhere. However, there is no uniformity among the courts with respect to whether a state can refuse to recognize a marriage validly celebrated in another domicile if that non-polygamous, non-incestuous marriage nonetheless violates an important local policy. Some courts have suggested that the recognition of such marriages was required by comity23 or good public policy,24 whereas other courts have implied that any marriage as disfavored as polygamous or incestuous marriages would also be subject to non-recognition.25

Those states deciding whether to accord recognition to the marriage celebrated in another domicile did not feel constrained by federal constitutional guarantees. Such states did not believe that the refusal to allow such unions to be celebrated locally implicated equal protection or due process guarantees or that the refusal to recognize a marriage validly celebrated in a sister state implicated right-to-travel guarantees. However, it is simply false to think that states have as much discretion to formulate their marriage policies as countries do, and federal right-to-travel guarantees must be examined before one can conclude that states can refuse to recognize marriages validly celebrated elsewhere if those unions violate an important policy of the state.

C. Federal Right to Travel Jurisprudence

Currently, several states permit same-sex marriages to be celebrated locally, and other jurisdictions recognize such marriages if validly celebrated elsewhere, even though such marriages cannot be celebrated locally. However, many jurisdictions have not only precluded the local celebration of such marriages, but have also re-
fused to recognize such marriages even when these marriages are valid according to the law of the domicile at the time of celebration. At least one issue that should be addressed is whether states are constitutionally precluded from refusing to recognize same-sex marriages validly celebrated in a sister domiciliary state.

The United States Supreme Court has long recognized that the United States Constitution guarantees the right to travel. The Privileges and Immunities Clause protects the rights of citizens to travel though other states to engage in “lawful commerce, trade, or business without molestation.” As the Supreme Court made clear in Crandall v. State, a state may not impose a tax on individuals simply for passing through the state. Yet, the right to travel has not been limited to the right to pass through a state. On the contrary, it includes a citizen’s right to emigrate to a new state.

Two caveats must be issued, however. States can discriminate between residents and non-residents for certain purposes. If the affected interest is not important, then right-to-travel protections may not be implicated. The Supreme Court explained in Baldwin v. Fish & Game Commission of Montana that “[o]nly with respect to those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally,” and that elk-hunting by nonresidents does not qualify as sufficiently fundamental to trigger privileges and immunities guarantees.

One of the factors the Baldwin Court considered important was that elk-hunting was recreational rather than a means to a livelihood. Had the elk-hunters’ livelihoods been involved, a much dif-

27. 73 U.S. (6 Wall.) 35 (1867).
28. See Toomer v. Witsell, 334 U.S. 385, 396 (1948) (“[T]he privileges and immunities clause is not an absolute [and] … does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.”).
30. Id. at 388.
ferent analysis might have been offered. For example, the Court struck down a differential licensing law in South Carolina where residents were charged $25 per shrimp boat and non-residents were charged $2,500 per shrimp boat.\textsuperscript{31}

Privileges and immunities protections are also implicated when important non-commercial interests are at stake. For example, at issue in \textit{Memorial Hospital v. Maricopa County} was an Arizona durational residence requirement for the provision of free, non-emergency medical care. The Court noted that medical care is as much of a basic necessity to an indigent as is welfare assistance.\textsuperscript{32} One of the considerations articulated by the Court was whether the restriction at hand was likely to deter migration. The Court noted:

A person afflicted with a serious respiratory ailment, particularly an indigent whose efforts to provide a living for his family have been inhibited by his incapacitating illness, might well think of migrating to the clean dry air of Arizona, where relief from his disease could also bring relief from unemployment and poverty. But he may hesitate if he knows that he must make the move without the possibility of falling back on the State for medical care should his condition still plague him or grow more severe during his first year of residence.\textsuperscript{33}

The fact that a state policy has the effect of deterring migration does not establish that the state policy violates constitutional guarantees—there is no per se rule making the imposition of burdens on travel unconstitutional. Nonetheless, where right-to-travel guarantees are implicated, the state bears a heavy burden to justify its policy. The Court has to examine both the importance of the interest asserted and how closely tailored the means adopted by the state is to the promotion of that interest.

The Court is wise to insist that the state’s interest be important or, perhaps, compelling rather than merely legitimate. Many of the

\textsuperscript{31} See Toomer v. Witsell, 334 U.S. 385 (1948).
\textsuperscript{32} Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974).
\textsuperscript{33} \textit{Id.} at 257.
right-to-travel cases involve economic burdens or benefits that adversely impact individuals who are either domiciled in other states or who have only recently moved to the forum. But if the regulation would be upheld as long as it promoted a legitimate interest of the state, then a great many policies deterring travel would nonetheless be constitutional. For example, states as a general matter have a legitimate interest in conserving financial resources. It might be thought, then, that the state’s withholding benefits from individuals who had traveled or might travel to the state would save money and therefore be constitutional. However, the Maricopa County Court cautioned that “a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens.”

Further, the Court cautioned, it is unconstitutional to try to inhibit the immigration of citizens from other states.

When suggesting that constitutional guarantees would be violated by an attempt to inhibit immigration, the Court did not include an intent element in the right-to-travel analysis. In other words, it would not have to be shown that the state was trying to burden the right to travel in order for the state to run afoul of constitutional guarantees. For example, in Dunn v. Blumstein, the Supreme Court examined a durational residence requirement for voting. The state of Tennessee had defended its requirement against a privileges and immunities challenge by arguing that “durational residence requirements for voting neither seek to nor actually do deter ... travel.” The Court characterized this defense as involving “a fundamental misunderstanding of the law,” because a statute might offend right-to-travel guarantees even if the state did not intend to deter migration and even if it was not established that the regulation had in fact deterred migration.

The effect of the Tennessee law was summed up as follows: “Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote [in the next elec-
tion] is absolutely denied.”  

But this was too great a price for the state to exact. Because the right to travel is a basic constitutional right, laws abridging that right must be examined closely. The statute will have to “further a very substantial state interest” and the State will have to have chosen a means that does not “unnecessarily burden or restrict constitutionally protected activity.”  

Because Tennessee had other methods by which to prevent fraud and because the method chosen was not particularly well-suited to accomplish that end, the durational residency requirement was struck down.

The purpose behind the Privileges and Immunities Clause was to help fuse a collection of independent states into one Nation, and to help assure that all citizens would “be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”  

However, “travel throughout the length and breadth of our land” requires interpretation, since it might simply refer to the ability to cross states to get to one’s final destination. The Court has interpreted that phrase broadly, since the right to travel:

  protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

The focus of discussion here is on the latter two facets of the right to travel, since the validity of one’s non-incestuous, non-polygamous marriage celebrated in accord with the law of one’s domicile at the time of the marriage might be challenged in a different state either when one was traveling through the state or, in-

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38. Id. at 341.
39. Id. at 343.
40. Toomer, 334 U.S. at 395.
stead, when one had decided to relocate to that state. In dicta, the federal district court in *Ex parte Kinney* discussed both possible scenarios when explaining the conditions under which Virginia would recognize a marriage, void locally, that had been celebrated elsewhere.

*Kinney* involved an interracial couple domiciled in the state who had traveled to the District of Columbia to marry so that Virginia’s anti-miscegenation law could be avoided. The *Kinney* court rejected that the state was required to recognize this marriage, prohibited locally, merely because this couple had traveled to the District to marry. In dicta, however, the *Kinney* court explored how the case would have been handled had the facts been modified. For example, the court noted that the case would have been essentially different if, instead, the interracial couple had been domiciled in the District of Columbia, had married there, and then had later moved to Virginia. Such a couple would have had a right of transit “through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence,” as the right to travel would have protected them insofar as they wished to pass through the state. However, the court believed that the couple would not have been protected if they had taken up residence in Virginia. The *Kinney* court was correct that the right to travel would protect a couple visiting the state, but was too quick to assume that right-to-travel guarantees would not similarly protect someone who had immigrated to the state.

The United States Supreme Court has suggested that marriage is the kind of right that triggers right-to-travel guarantees. In *Sosna v. Iowa*, the Court examined Iowa’s divorce residency requirement. The challenge was analyzed in light of the right-to-travel jurisprudence, although the Court noted various respects in which the harms at issue in that case differed from the harms that had been discussed in some of the other cases. For example, while states could not justify durational residence requirements by appealing to budgetary considerations, the interests implicated in this case

were much different. First, the plaintiff was not foreclosed by the one-year residency requirement from getting a divorce. On the contrary, she was merely being asked to delay the proceeding. Once she had met the residency requirement, she could get a divorce and would then be eligible to remarry should she wish to do so. Further, the Court noted, while the plaintiff had important interests implicated in her marital status, the same could be said about her soon-to-be ex-husband, and his interests might militate in favor of the residency requirement. Finally, the children’s interests had to be considered as well. Basically, the Court implied that the strength of the implicated interests justified Iowa’s imposition of a residency requirement for divorce, although the Court mentioned other interests of the state as well, such as the state’s interest in minimizing the susceptibility of its own divorce decrees to collateral attack.

The important lesson of Sosna is not in its holding that residency requirements for divorce do not offend constitutional guarantees, but in its finding that marriage is sufficiently important to trigger right-to-travel guarantees. Such a finding is unsurprising. Justice Thurgood Marshall noted in his Sosna dissent that the “right of marital association is one of the most basic rights conferred on the individual by the State.” 44 As the Court explained in Loving v. Virginia, the right to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” 45

As Sosna illustrates, that marriage (or divorce) triggers right-to-travel guarantees does not end the analysis—a separate determination must be made with respect to whether the state has sufficiently important interests to justify the burden that has been placed on the right to travel. That said, however, the increased burden on the state to justify its deterring travel should not be minimized. Sosna suggests that a refusal to recognize a marriage validly celebrated in a sister domicile is constitutionally vulnerable if, for example, there are no countervailing interests such as those of the other spouse or of children, and if the burden imposed would not merely be tem-

porary but, instead, would involve an absolute denial of the fundamental interest in marriage.

D. The State’s Interests in Refusing to Recognize a Same-Sex Marriage Validly Celebrated in a Different Domicile

There is ample reason to believe that states do not have sufficiently important interests to justify refusing to recognize same-sex marriages validly celebrated in sister domiciliary states. Indeed, states may even have difficulty in establishing that there is a legitimate interest in refusing to recognize such marriages. The Court noted in Romer v. Evans that a disadvantage imposed against members of the LGBT community because of animus does not promote a legitimate state interest. Even more to the point, when the Court struck down Texas’s same-sex sodomy law in Lawrence v. Texas, the Court did not merely focus on why the state was overstepping federal constitutional bounds when seeking to regulate intimate, consensual acts between adults but, in addition, focused on the enduring, same-sex relationships, themselves. The Lawrence Court noted, “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” 46 Such a comment would not make any sense as support for striking down the statute at issue unless these enduring bonds themselves had value.

The claim here is not that the Lawrence Court recognized a right to marry a same-sex partner. The Court did not strike down same-sex marriage bans and, indeed, made quite clear that it was not addressing the constitutionality of such bans. Nonetheless, if the state does not have sufficiently important interests to justify prohibiting same-sex, non-marital relations, and the Court has traditionally viewed the individual’s interest in his or her marital relationship

as more important than his or her interest in non-marital relations, then it would seem that the Lawrence analysis has important implications for the constitutionality of one state’s refusing to recognize a same-sex marriage validly celebrated in a sister state domicile.

Various state supreme courts have recently addressed the constitutionality of local same-sex marriage bans on state constitutional grounds. It is helpful to distinguish among these decisions in terms of the level of scrutiny employed by the courts. The state supreme courts have been split when analyzing the constitutionality of such bans in light of the rational basis test. For example, the Supreme Judicial Court of Massachusetts struck down that state’s same-sex marriage ban on rational basis grounds, whereas the New York Court of Appeals held that the state’s same-sex marriage ban survived this low-level scrutiny.

There has been greater uniformity when the state supreme courts examine the same-sex marriage bans with a higher level of scrutiny—in those cases, same-sex marriage bans were held to violate constitutional guarantees. The point here should not be misunderstood. These analyses were in light of state constitutional guarantees. That same-sex marriage bans have not yet been upheld when the state courts have examined them with heightened scrutiny does not guarantee that a federal court, closely examining a refusal of a state to recognize a same-sex marriage validly celebrated in a sister domiciliary state, would also strike down the relevant state law or policy. Nonetheless, these cases are strongly suggestive that such a refusal would not pass constitutional muster.47

E. The Limited Nature of This Thesis

The argument made in this chapter is rather narrow. It is not argued here that any marriage validly celebrated in one of the states

47. Indeed, it might be noted that one federal district court struck down California’s same-sex marriage ban on rational basis grounds in Perry v. Schwarzenegger, 2010 WL 3025614 (N.D. Cal.).
must be recognized by all of the other states. Such a thesis would require the recognition of all evasive marriages. In addition, it is not argued here that a domiciliary state never has the power to refuse to recognize a marriage of its own domiciliaries when those domiciliaries purposely evaded the local law so that they could foist their marriage on the state. If, indeed, same-sex marriage bans pass constitutional muster, then a state’s refusing to recognize its domiciliaries’ evasive, same-sex marriage would also seem to be constitutional, assuming that the state’s interest in refusing to recognize such marriages validly celebrated in a different state could pass muster. Nonetheless, states face a heavier burden when they seek to justify their refusal to recognize a same-sex marriage validly celebrated in a sister domiciliary state, and it is doubtful that states can meet that heavier burden.

This conclusion is much less surprising than might first appear. In *Loughran v. Loughran*, the United States Supreme Court explained that marriages “not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.”\(^{48}\) There, when discussing marriage not “otherwise declared void by statute,” the Court was discussing the law of the domicile at the time of the marriage.\(^{49}\)

It might be argued that Congress could exempt states from the requirement that they recognize same-sex marriages valid at the time of the marriage, just as it has attempted to exempt states from


\(^{49}\) Id. In the very next sentence, the Court makes clear that it is discussing the law of the domicile at the time of the marriage:

The mere statutory prohibition by the State of the domicile either generally of the remarriage of a divorced person, or of re-marriage within a prescribed period after the entry of the decree, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof.

*Id.* But if the marriage must be recognized in all other states unless considered void by the domicile at the time of the marriage, then the other states would include all future domiciles, except possibly for the state that would be the domicile immediately following the marriage.
being required under Full Faith and Credit guarantees to recognize same-sex marriages celebrated elsewhere. Yet, the language authorizing Congress to modify full faith and credit guarantees is not replicated in the Fourteenth Amendment. Instead, section five of the Fourteenth Amendment is phrased much differently, and Congress’s power under this section has been construed much more narrowly than has its power under the Effects Clause. Further, the United States Supreme Court has already rejected that Congress has the power to dilute privileges and immunities guarantees, having pointed out both that “Congress may not authorize the States to violate the Fourteenth Amendment”\textsuperscript{50} and that “the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States.”\textsuperscript{51}

The Court has long understood that onerous burdens are imposed when a state refuses to recognize a marriage, having discussed “consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery.”\textsuperscript{52} The Court recognized in Williams v. North Carolina that the “marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal.”\textsuperscript{53} The Williams Court worried that leaving marital status uncertain “could not help but bring considerable disaster to innocent persons and bastardize children hitherto supposed to be the offspring of lawful marriage.”\textsuperscript{54} Indeed, because marriage “affects personal rights of the deepest significance..., every consideration of policy makes it desirable that the effect should be the same wherever the question arises.”\textsuperscript{55} Thus, there are numerous in-

\textsuperscript{50} Saenz, 526 U.S. at 507.
\textsuperscript{51} Id. at 507–08.
\textsuperscript{52} Maynard v. Hill, 125 U.S. 190, 208 (1888).
\textsuperscript{54} Id. at 301.
individual and state interests militating in favor of recognizing marriages valid in the domicile at the time of the celebration of the nuptials.

It might be thought that the same argument could be used to require a domicile to recognize an evasive marriage. But that is not how the current system works. Basically, the law of the domicile determines the validity of the marriage. Assuming that the domiciliary state’s marriage statute passes constitutional muster, then the domicile at the time of the marriage determines the validity of the marriage, both for that state and for other states as well. If the non-polygamous, non-incestuous marriage is considered valid by the law of the domicile at the time of celebration, then it should be valid in each of the states. If it is not valid locally, then it would not be valid in other states either.

F. Conclusion

The right to travel is guaranteed by the United States Constitution. States are precluded from deterring travel by burdening fundamental interests, absent compelling reasons for doing so. Marriage is a fundamental interest for right-to-travel purposes, and states have a heavy burden of justification when making citizens sacrifice their marriages as a price of migrating to the state.

That right-to-travel guarantees are triggered when states force citizens seeking to immigrate to leave their marriages at the border does not somehow create a national marriage law. On the contrary, individuals’ marriages are governed by the law of the domicile at the time of the marriages. Merely because same-sex partners can contract a marriage in certain states does not mean that they can contract it in their domicile. In order to marry, they must be domiciled in a state that recognizes same-sex marriage.

Would this mean that there might be cases in which it was contested whether the individuals had changed domiciles or, instead, had tried to contract an evasive marriage? Of course, but that has been true for a long time and courts have long been forced to decide whether individuals had contracted evasive marriages or, in-
stead, had been domiciled elsewhere when celebrating a marriage that could not have been contracted in the forum state.

It might seem counter-intuitive that the right to travel would protect marriages that could not be celebrated locally. Privileges and immunities are thought to assure that citizens or other states receive the same treatment as, but not better treatment than, citizens in the forum. After all, the Privileges and Immunities Clause was “designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy,” and *ex hypothesi* the citizens of State B are not permitted to marry their same-sex partners.

The claim here is not that citizens from another state should be allowed to *get* married even though citizens from the forum cannot, but merely that a citizen whose non-incestuous, non-polygamous marriage had already been validly established in a sister domiciliary state should be able to *remain* married and should not be forced to sacrifice that marriage as a price of migrating to the new state. Basically, the citizen of State A wants to be treated in the same way as the citizen of State B—both want to and should have State B recognize their non-polygamous, non-incestuous marriages, valid in the domicile at the time of its celebration. Indeed, the claim here is not particularly robust, since the claim is merely that to refuse to recognize such a marriage a state must show that it has sufficiently important interests implicated and that the refusal to recognize such marriages is closely tailored to the promotion of these interests.

The claim that the right-to-travel jurisprudence cannot force State B to recognize the marriage of a citizen in State A, if citizens in State B cannot also contract that marriage, has been rejected for over a hundred years. The *Kinney* court recognized that the right to travel protected a marriage, void locally, if the married couple was traveling through rather than migrating to the forum. But the United States Supreme Court’s jurisprudence in this area suggests that the right to migrate has more protection than the *Kinney* court had imagined. Basically, the Court has made clear that states can-

not deter individuals from exercising their right to migrate by depriving those individuals of important privileges or rights. There is no question that marriage is sufficiently fundamental to trigger right-to-travel guarantees—the only real question is whether the state interests in refusing to recognize such relationships are sufficiently compelling to justify the imposition of such a burden. No such interests have yet been articulated that would meet that burden, and it seems quite doubtful that such interests exist. Whether or not states can refuse to allow their domiciliaries to marry their same-sex partners without violating constitutional guarantees, they simply cannot justify refusing to recognize such a marriage validly celebrated in a sister domiciliary state.
Chapter 8

Same-Sex Marriage and Matters of Conscience

As more states have come to recognize same-sex marriage or civil unions, commentators are increasingly interested in discussing the merits of passing conscience clause legislation, whereby those who for religious reasons wish not to play any role in promoting same-sex unions are exempted from doing so. The justifications offered for affording such exemptions often involve a claim about respect for tolerance and religious diversity. Regrettably, proponents of these provisions tend not to provide sufficient limitations on the reach of the exemptions, neither with respect to the types of activities subject to the exemption nor to the groups against whom the exemptions might be applied.

While the creation of an exemption based on sincere belief might seem an ideal compromise whereby same-sex couples and their families can receive legal recognition and those with religious qualms will not be forced to violate their convictions, such a compromise loses its luster upon further consideration. By creating one exemption specifically for same-sex relationships rather than a more generalized exemption for those with religious qualms about facilitating or being associated with relationships contrary to belief, the state would undermine its commitment to equality by implicitly suggesting that individuals might rightly object to this kind of union, but no other, on religious grounds. Such a message reinforces rather than reduces stigma and second-class citizenship, which is exactly what the state should not be doing. Yet, expanding the exemption and making members of a variety of communities subject to ostracism by others would lead to even greater balkanization in this
country. The creation of these exemptions may violate constitutional guarantees and, in any event, would be a public policy disaster.

A. The Limitations of Conscience

Employees have long asserted in a variety of contexts that they were precluded by conscience from performing certain tasks. For example, individuals have refused to participate in war because of their sincere objections to killing. In Welsh v. United States, the Court examined the case of Elliot Welsh II, who refused to report to be drafted, because he was “conscientiously opposed to participation in war in any form.” 1 He was not claiming that his objections were based in religion, since his beliefs were based on his reading history and sociology. That said, however, he held these convictions with the same strength as might someone whose objection to war was religiously based. The Court interpreted the statutory exemption to include individuals like Welsh whose heartfelt reservations about war were not directly based on religious beliefs.

The conscientious objection at issue in Welsh might be contrasted with a different type of objection to promoting a war effort where the objection is to participating in particular wars rather than to participating in war as a general matter. In Gillette v. United States, one of the plaintiffs was a devout Catholic who believed it “his duty as a faithful Catholic to discriminate between ‘just’ and ‘unjust’ wars, and to forswear participation in the latter.” 2 Asked to decide whether the conscientious objector law included those who objected to particular wars on religious grounds, the Court held that the objection to particular wars rather than to war as a general matter did not qualify under the relevant statute. Yet, this meant that those with sincere religious beliefs that included an objection to all

wars would qualify for an exemption, whereas someone with equally sincere religious beliefs that included an objection to only unjust wars would not qualify for such an exemption.

Plaintiffs claimed that the refusal to grant an exemption to those who wished to differentiate among wars violated Establishment Clause guarantees. In rejecting that assertion, the Court noted that the touchstone for determining whether the Clause had been violated was neutrality, emphasizing that the Establishment Clause prohibits the government from putting its “imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.”3 However, the Court did not believe that Congress was attempting to favor some religions over others when affording an exemption to those opposing all war rather than only certain wars, but merely attempting to effect a compromise that took account of conflicting interests. On the one hand, Congress recognized the practical difficulties associated with trying to force a sincere conscientious objector to fight, and wished to take into account a “concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.”4 On the other hand, Congress also had a need for manpower and, further, an important interest in employing a fair system for determining who would be selected for inclusion in the armed services. The Court was persuaded by the Government’s claim that the interest in fairness would be at risk if objections to particular wars were permitted, because there would be “a real danger of erratic or even discriminatory decision-making in administrative practice.”5

This interpretation of the relevant statute was driven in part by public policy considerations. The Court foresaw the difficulty that would otherwise arise when trying to fashion a way to cabin the exemption—a whole host of individuals might claim to have an

3. Id. at 450.
4. Id. at 453.
5. Id. at 451.
objection of conscience to a particular war, and it would be difficult if not impossible to determine which claims had merit in a fair or accurate way. The potential for abuse must always be considered whenever exemptions are proposed or applied, and the kinds of abuse that one might reasonably expect if there were an exemption afforded to those objecting to LGBT families are frightening to contemplate.

The Court has made clear that an individual who objects to one war in particular rather than to war as a general matter will not be protected by federal constitutional guarantees when refusing to serve in the military. Yet, it should not be thought that the only cases involving religious objections to war have involved individuals seeking to avoid the draft. On the contrary, there have been other contexts in which individuals with religious qualms about aiding a war effort have argued that they should not be forced to perform certain jobs. In *Thomas v. Review Board of Indiana Employment Security Division*, the plaintiff claimed that his religion prevented him from helping make war materials. The *Thomas* Court noted that “beliefs rooted in religion are protected by the Free Exercise Clause,” although the Court recognized that determining “what is a ‘religious’ belief or practice is more often than not a difficult and delicate task.” In an effort to provide some guidance about how to determine whether a belief or practice is religious, the Court pointed out some criteria that should not be used, noting that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”

Thomas had been forced to choose between working on the one hand and maintaining his religious beliefs on the other. He chose the latter, and the question before the Court was whether Indiana could deny him unemployment benefits—the state had claimed that he had failed to establish that he had left work for good cause.

7. *Id.* at 714.
8. *Id.*
The Court held that the state could not deny him benefits based on his refusal to work for religious reasons. Indeed, the Court offered a rather robust understanding of the free exercise jurisprudence.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.9

Here, the Court followed the position offered in Sherbert v. Verner,10 where the Court struck down South Carolina’s refusal to accord unemployment benefits to an individual who refused to work on Saturday because of her religious beliefs. The South Carolina Employment Security Commission decided that for purposes of the statute a refusal to work on one’s Sabbath did not qualify as a justification or excuse.

The Court rejected the South Carolina Commission’s position, reasoning that Sherbert was forced to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”11 Such a choice “puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”12 After finding that the state requirement imposed a substantial burden on Sherbert, the Court sought to determine whether the state had a compelling interest that would justify the infringement. No such interest was present. The Court was careful to note that the recognizing Sherbert’s right to unemployment benefits did not abridge anyone

9. Id. at 717–18.
11. Id. at 404.
12. Id.
else’s religious liberties. Yet, one of the ways that exemptions for people refusing to perform same-sex marriages differs from other kinds of exemptions is that marriage rights for members of the LGBT community may be of religious as well as civil import and thus the denial of those rights may implicate matters of faith.

When explaining that the Constitution does not require individuals to forsake the precepts of their religion merely because legitimate state interests might thereby be promoted, the Court was not implying that those precepts had to be in accord with the tenets of some established religion. On the contrary, as was demonstrated in Frazee v. Illinois Department of Employment Security, precepts need not be found in the formal dogma of an established religious denomination in order to be given constitutional weight.

At issue in Frazee was the plaintiff’s sincere religious belief that he should not work on Sunday. However, Frazee was not a member of an established religious group or sect, and his beliefs about work on Sunday did not spring from the teachings of a particular religious group or body. The Court explained that the lack of connection between an organized religion and Frazee (or his beliefs) was not fatal, rejecting the “notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.”13 Because his religious belief was sincere, it was entitled to protection.

It is simply unclear whether the kinds of protections recognized in Sherbert, Thomas, and Frazee are still recognized today. In the meantime, the Court has decided Employment Division of the Department of Human Resources of Oregon v. Smith, in which Oregon’s statute prohibiting the use of controlled substances was challenged as a violation of the Free Exercise Clause. While the state would have been violating religious guarantees had it been targeting the use of peyote precisely because it was used for sacramental purposes, there was no evidence that Oregon was targeting religious practice. The Court explained that the Free Exercise Clause does not

“require exemptions from a generally applicable criminal law,”¹⁴ and seemed tempted to limit the force of the Clause’s protections to the unemployment benefit context.

According to the Smith Court, the Free Exercise guarantees afforded by the Constitution are not particularly robust. For example, the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).”¹⁵ However, the Court offered a possible loophole whereby the otherwise tepid protections afforded by the Free Exercise Clause might be stronger, namely, those hybrid situations implicating Free Exercise and other protected interests. It is not at all clear, however, that the hybrid loophole would be of much help to those seeking an exemption from recognizing LGBT families, since that loophole would seem more likely to be invoked to require the recognition of same-sex marriages as it would be to justify individual refusals to assist in the celebration of such marriages.

As constitutional matters stand currently, free exercise protections are tepid at best. While the United States Constitution would preclude the clergy from being forced to perform a same-sex ceremony contrary to faith, it would be highly unlikely that the Court would find similar constitutional protections for a justice of the peace — the more controversial issue involves the conditions, if any, under which a civil servant should be afforded an exemption by statute from performing his civil duty when fulfilling that duty would contravene his religious beliefs.

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¹⁵. Id. at 879.
B. Creating an Exemption for Those with Religious Objections to Same-Sex Marriage

When trying to figure out whether to create an exemption so that those objecting to LGBT families would not have to provide assistance to or associate with such families, a number of factors might be taken into account, for example, the importance of the implicated interests and the rationale for making the particular exemption at issue. A less obvious consideration might involve the implications, if any, of providing an exemption with respect to this group but no others. Contrary to what commentators might have one believe, creation of an exemption for conscience with respect to the treatment of members of the LGBT community will not be virtually cost-free. On the contrary, creating such an exemption so that individuals in the workplace would be free to refuse to perform their normal duties for those in “religiously objectionable” relationships would create a whole host of difficulties that would inure to the detriment not only of those immediately affected but to society as a whole.

Suppose that a state enacted a statute to protect those who did not want to officiate at a same-sex marriage. First, it should be noted, such a provision would not be necessary to protect clergy refusing to celebrate marriages contrary to faith, because they could not be forced to celebrate such marriages even without such a statutory exemption. However, such a provision might be necessary for public officials, e.g., town clerks or justices of the peace, seeking to avoid helping same-sex couples who wished to marry. Under such a statute, two individuals of the same sex presenting themselves before a justice of the peace might be told that although the state permitted same-sex marriages, the couple would have to find someone to perform the ceremony who did not have religious objections to the union.

It might seem that affording such an exemption would not impose any burden on the LGBT community. There are many individuals who can perform same-sex unions, so permitting particular individuals to refuse as a matter of conscience to help such couples
need not create an insurmountable stumbling block for those couples wishing to marry. Further, the state might require that a conscientious objector refer a couple to someone willing to perform the ceremony or, perhaps, might require that a sign be posted outside an office directing the couple to the appropriate place.

Some commentators suggest that a state can minimize the difficulty imposed by current public officials who wish to be exempted from performing same-sex ceremonies by simply hiring individuals who are willing to perform the ceremony. Yet, there are a few reasons that this might not prove to be the best approach. At a time when states and localities are facing difficult economic times, many might suggest that it would not be the best use of funds to hire an additional person so that same-sex marriages might be performed. Especially if this is occurring in a location where same-sex couples are not particularly welcome, imposing an additional financial burden on local budgets might only exacerbate existing negative attitudes toward the LGBT community.

A separate question would involve the mechanics of such a position, even were it to be adopted. It would be unsurprising were local governments to try to conserve resources, for example, by sharing an individual willing to perform such marriages with neighboring localities. One might imagine an individual who is riding circuit, performing a marriage in one place on one day and then somewhere else hundreds of miles away a week later. Same-sex couples might have to wait longer than other couples, although it would probably be argued that this would be a small price to pay for the benefit of not forcing individuals to violate their own sincerely held religious convictions.

Yet, it would be inaccurate to think that the only drawback of this proposal for same-sex couples is that they might have to wait a little longer to marry. Consider how town clerk hiring might work. Those arguing for exemptions are not merely suggesting that those individuals already in their positions should be permitted to remain in their positions without having to provide assistance to those wishing to have such ceremonies performed. On the contrary, exemption proponents would presumably argue that just as individuals should not be fired for their religious views, they should
also not be denied employment because of their religious views. Indeed, it would not be difficult to imagine that there would be statutes prohibiting public employers from asking about religious views or, perhaps, the willingness to serve particular kinds of couples. But this might mean that hiring an additional person would not afford same-sex couples access to the institution of marriage, because the additional person hired might also object to performing such marriages.

Consider the prospective employee who is denied a job after admitting that she would indeed have difficulties providing services for same-sex couples. She might reasonably wonder whether the reason that she had not been hired was because of her religious beliefs. Further, it would not be surprising if employers would be rather hesitant to ask such questions if only to avoid the appearance of discriminating. Thus, depending upon how the protections for conscience were written, neither prospective employers nor prospective employees would be likely to be exploring religious views in the way that would be required for the “hire an additional person” proposal to be successful.

Suppose that someone were hired and that this person was willing to assist same-sex couples. One might imagine the signs that might be posted—“Different-sex couples here” and “All couples here” or, perhaps, “All couples, including same-sex couples, here.” In such a scenario, the same office might be able to handle all couples who met the local marriage requirements, although there is something disquieting about the image of several couples standing in one line while no one stands in the other.

Exemption proponents might suggest that such an image should not be disquieting. After all, when one goes to the airport to get tickets, there might be two lines, one for preferred customers and the other for the non-preferred customers. While the state’s offering such an analogy with regard to marriage would have its own problems (for example, if preferred customers are those who use the service more often), there are separate problems with the state’s saying that it prefers certain legal marriages over others.

Suppose that a couple were to come to a town clerk’s office and see two signs: “Single-race couples here,” and “All couples, includ-
ing interracial couples, here.” The difficulties associated with such signs would not suddenly disappear were there an accompanying explanation that one of the clerks had religious objections to facilitating interracial marriages. The suggestion that certain individuals be assigned or hired to serve same-sex couples so that others would not have to do so conjures up images of a repudiated, discriminatory past, although here the differentiating factor is sexual orientation rather than race.

The above scenario assumes that the same-sex couple might have to wait in a different line, but would ultimately be served by the same office. Yet, that need not be true—a particular office might be staffed by individuals only willing to help different-sex couples who wished to marry. If so, a sign might be posted indicating that same-sex couples would have to go to a different office, city, or county to marry. Yet, one must wonder how far couples in certain parts of the country would have to travel before they could find a public official to marry them.

Some commentators imply that being forced to go to another town or county or, perhaps, waiting additional days because one does not wish to make a match approved by the town clerk is simply one of the prices that same-sex couples have to pay to live in a country that respects religious freedom. Yet, this is a misleading characterization of the debate. Respect for religious freedom militates in favor of the recognition of same-sex marriage, because same-sex couples, like different-sex couples, may marry for religious reasons among others. Ironically, some of the commentators trumpeting the importance of religious liberty when arguing for a conscience exemption argue against rather than for same-sex marriage, notwithstanding the religious liberty interests implicated in the latter. Whether or not the recognition of same-sex marriage is constitutionally required, one might expect that those proclaiming the importance of religious liberty would be less selective with respect to the times that they would proclaim its importance.

Those championing religious liberty tend not to emphasize that the arguments offered to justify providing an exemption with respect to assisting individuals in same-sex relationships would also support providing more generalized exemptions, both respect to
the kinds of settings in which such exemptions might be invoked and with respect to the groups against whom such exemptions might be invoked. The ease with which these exemptions might be expanded counsels against permitting them.

C. The Expansion of Exemptions

Some commentators suggest that states should enact statutes affording exemptions so that those with religious objections to LGBT relationships would not have to promote those relationships, just as states already afford exemptions to those who have religious objections to performing abortions. While these commentators are correct that the experience with abortion exemptions should be examined, they are incorrect that our experience with such legislation suggests that we have an easy compromise within reach. Those recommending using healthcare exemptions as a model for other kinds of exemptions tend not to emphasize that legislation affording exemptions for those who wish to be excused as a matter of conscience from performing abortions have not been limited to those seeking exemption from performing that particular procedure. Rather, there has been a tendency to expand those exemptions to sterilization or, perhaps, to any medical procedure.

That there has been this expansion should not be surprising. The rationale supporting an exemption for abortion—individuals should not be forced to violate their religious convictions in order to keep a job—might seem equally compelling whether one is discussing abortion, sterilization, or other medical procedures. But this suggests that exemptions for those not wishing to promote same-sex marriage might well expand into other areas. Indeed, it seems underappreciated how easily such an exemption could cover most areas of one’s social existence. Presumably, individuals who morally disapproved of LGBT families might refuse to serve such families in stores, banks, and restaurants, etcetera. Indeed, it is not clear how this exemption would be cabined.

While conscience clause exemptions involving the LGBT community are analogous to healthcare exemptions in that both in-
volve a refusal as a matter of conscience to perform a particular procedure, such as an abortion or a marriage ceremony, there is an important way in which these exemptions are disanalogous. The doctor does not refuse to perform an abortion for members of one particular group but perform it quite willingly for others but, instead, refuses to perform abortions more generally. What is at issue here is a refusal to provide a particular service (without which a person would be unable to marry) for members of a particular group. The analog would be for a doctor to refuse to provide a particular healthcare service not as a general matter but only when members of one particular community sought that service.

Consider the Mississippi conscience exemption. “A healthcare provider has the right not to participate, and no healthcare provider shall be required to participate in a healthcare service that violates his or her conscience.” However, the Mississippi subsection makes quite clear that a healthcare provider is not thereby permitted “to refuse to participate in a healthcare service regarding a patient because of the patient’s race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.” Mississippi seems to recognize one of the potential difficulties of exemptions, namely, that they can be used to target specific groups.

Some commentators have correctly noted that there must be limits placed on the degree to which burdens can be placed on same-sex couples who wish to marry, e.g., that a public official could not refuse to marry such a couple in a state permitting such marriages if such a refusal would result in the couple’s being forced to travel hundreds of miles to find someone who would marry them. Part of the justification for limiting that burden involves the importance of the right involved.

Certainly, it makes sense to consider how burdensome it would be for such exemptions to be created. One of the reasons that the Loving Court struck down Virginia’s anti-miscegenation statute was that it involved the fundamental right to marry. By the same token,

17. Id.
the Zablocki Court noted that “the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,” explaining that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” 18 Given the centrality of marriage, permitting that right to be unduly burdened would be especially undermining of the dignity and equality of members of the LGBT community.

Yet, were it permissible to have public officials refuse to assist same-sex couples in their attempt to marry, then there presumably would be no objection to permitting public officials to refuse to assist LGBT families in most kinds of interactions which, after all, do not implicate fundamental interests. Further, if public officials were allowed to refuse to assist LGBT families in most areas of life, then private businesses open to the public would presumably also be afforded such an exemption. After all, private individuals have sincere religious beliefs as well, and it would seem difficult to justify according respect for the religious beliefs of public officials but refusing to do so for private individuals having dealings with the general public.

Creating such an open-ended exemption permitting individuals to be excused from providing services to LGBT families in particular would be a public policy disaster and might implicate constitutional protections as well. Affording this exemption to those objecting to serving LGBT families but not affording an exemption to others with analogous objections to other groups would seem to have “the peculiar property of imposing a broad and undifferentiated disability on a single named group,” 19 which might make it seem “inexplicable by anything but animus toward the class it affects.” 20 But Colorado’s imposing a broad disability solely on mem-

20. Id.
bers of the LGBT community was struck down by the Court in *Romer v. Evans*, which suggests that the kind of exemption envisioned here might also be constitutionally suspect.

**D. The Expansion of the Classes against Whom the Exemption Might Be Employed**

Same-sex couples might rightly ask why they are the only group subject to the exemption, since public officials might have religious qualms about assisting a variety of types of couples, such as interracial, interreligious, or intergenerational couples. Officials might have religious objections to facilitating marriages where the parties could not produce children through their union, e.g., the elderly or any couple including at least one member who is infertile or incapable for whatever reason of engaging in coital reproduction. In addition, officials might have religious objections to helping those of other faiths who, after all, might be viewed as espousing incorrect views about the nature of God and humankind.

Indeed, the list might be expanded in a different way. Suppose that someone felt a religious or moral calling to promote the full equality of a variety of racial and sexual minorities. Suppose further that this person sincerely interpreted that calling to require her not to aid those who seemed committed to undermining that equality, that is, the individual might refuse to help those who were viewed as not having sufficiently egalitarian views. Such an individual might refuse to facilitate the marriage of two individuals who appeared to have very conservative views. In short, depending upon which religious or moral beliefs were permitted to be the basis of an exemption, it is difficult to see where the list of sincere objectors might stop.

Recently, a Louisiana justice of the peace, Kenneth Bardwell, told an interracial couple that he did not approve of their marrying so that they would have to get someone else to officiate. Those who argue that individuals must be permitted to refuse to perform
same-sex ceremonies because tolerance should not be transformed into approval should explain whether this means that the state should never adopt a position of approval with respect to marriages or, instead, whether there are certain marriages that the state should merely tolerate but other marriages of which the state must approve. Would Bardwell’s position have been acceptable had he claimed to have had religious objections to the union?

The question here does not involve a constitutional analysis regarding which marriages must be recognized by the state. Rather, at issue here is which legally recognized marriages should be subject to an exemption so that a public official with sincere religious reservations about such unions would be entitled to refuse to facilitate their celebration without penalty.

States might well have some difficulty in justifying their selectively respecting the religious liberty of their justices of the peace and town clerks by affording them an exemption with respect to same-sex relationships but not other “religiiously offensive” relationships. Further, were the state to expand the exemption, it seems likely that public officials would take advantage of that expansion and refuse to help other “religiously objectionable” couples who wished to formalize their relationships.

Consider the defender of the public official objecting to performing a same-sex marriage. Such an official might not bear any animus toward same-sex couples—he might merely have a sincere religious belief that he should not assist them. Yet, at least two points might be made. First, the fact that the objector bears no animus, even if established, would hardly negate all of the harm, dignitary and otherwise, that might be caused by the refusal. Second, the same claim about a lack of animus might be made by officials claiming to have religious qualms about performing a variety of ceremonies. Bardwell claimed not to be acting out of animus; he simply said that he would not perform the marriage because he believed that such marriages were bad for children. One might imagine someone else defending his refusal to perform an interracial marriage by denying that he harbored any animus and instead asserting that this was simply a matter of religious conviction.
Bardwell’s having attempted to justify his refusal to perform an interracial marriage by citing his concerns about the children who might be born to such a union underscores some of the respects in which the current desire not to help same-sex couples marry may be analogous to the former (and, for some, current) desire not to help interracial couples marry. Indeed, analogous arguments have been offered to justify the state’s refusal to recognize interracial unions and same-sex unions. Courts upholding state anti-miscegenation laws would sometimes base their decisions on the view that the children born of such unions were inferior to the children born in intra-racial unions. So, too, some claim that children will not fare well when raised by same-sex parents, evidence to the contrary notwithstanding. Further, analogous arguments invoking God’s Will have been used to justify prohibiting recognition of interracial and same-sex marriages.21

That there might be a whole host of marriages subject to this exemption would not alone establish that such an exemption should not be created. Nonetheless, it might give one pause for both practical and theoretical reasons. Presumably, very few of any of the commentators would wish to return to the day in which burdens could be placed on an individual seeking to marry someone of another race.

States have a compelling interest in eradicating discrimination on a variety of bases, including race, religion, gender, and orientation. This interest must be taken into account when deciding whether the religious liberty of the objecting public official should win the day.

Some commentators make clear that they believe an exemption permitting individuals not to support same-sex marriage is appropriate, at least in part, because of the (alleged) wrongness of

21. *Cf.* Loving v. Virginia, 388 U.S. 1, 3 (1967) (noting that the trial court stated, “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”).
same-sex marriage. According to this view, there is a good way to
distinguish among differing claims of conscience with regard to re-
usals to promote certain kinds of unions, namely, that in the case
of same-sex marriage, but not the others, the qualms of conscience
are based in moral fact. Those advocating such a position seem un-
worried that it requires the state to leave its perch of neutrality
among religions, since the position involves an assessment of which
claims of conscience are correct. The United States Constitution
precludes the state from evaluating the truth of religious claims.22
The state should not be in the position of deciding whether to grant
an exemption based on the theological correctness of the objector’s
position. That is precisely the kind of judgment that the Establish-
ment Clause prevents the state from making.

Perhaps if there were unanimity among the various religious de-
nominations that certain marriages were immoral, then the state could
claim to be neutral among religious views while affording an ex-
emption of conscience, although a separate question would be
whether affording such an exemption would be neutral between
religion and non-religion.23 In any event, there is no unanimity
among religious groups about the immorality of same-sex mar-
riage and, indeed, some religious denominations recognize such
unions.

Some commentators would not object to creating a generalized
 exemption permitting public officials to refuse to marry any cou-
ples whose union would violate that official’s religious precepts. Yet,
it would be difficult to justify affording an exemption for performing
marriages but not for other types of services that the objector had
sincere, religious reservations about providing. Such an expansion
would impose too great a cost on society as a general matter—
anyone who had any sort of religious (or, perhaps, moral) qualms
about dealing with anyone else could thereby be excused and soci-
ety could become increasingly balkanized. Respect and tolerance
for the religious and non-religious alike is more likely to be un-

government neutrality requirement).
derminded than promoted if these kinds of exemptions for conscience are enacted.

E. Conclusion

It is quite tempting to suggest that individuals should not be asked to violate their consciences, and that the state should seek to accommodate sincere, religious beliefs if that accommodation can be done without imposing too great a burden on others. Yet, there are a wide range of religious beliefs that are sincerely held, and many of these can arguably be accommodated without imposing too great a burden.

The state may well put itself in an untenable position once it starts traveling down this road of accommodating such beliefs in the public sector. On the one hand, the state must be quite careful not to put itself in the position of endorsing certain religious views over others, and thus should not be suggesting that one might rightly have religious reservations about performing certain (legally recognized) marriage ceremonies but not others. On the other hand, the state may be putting itself in an impossible position if it must always avoid giving religious offense to anyone and, for example, decides to afford an exemption for any sincerely held religious belief regardless of the content of that belief.

Commentators suggest that legislatures should afford an exemption to those who for religious reasons do not wish to serve members of the LGBT community, likening such exemptions to those already provided in the context of healthcare. Yet, the existing jurisprudence on healthcare exemptions suggests that such an exemption, once offered, might be difficult to cabin both with respect to the kinds of services subject to the exemption and to the groups of “objectionable” people who need not be served. All too often, commentators fail to note an important difference between the compared exemptions—healthcare exemptions permit those with religious qualms about performing particular services to refrain from providing them but they do not permit individuals to dis-
criminate against a particular class of persons by providing certain services for some groups of individuals but not others.

Religious views should be taken seriously, but the suggestion that those with sincere qualms should be permitted to refuse to serve members of the LGBT community must be rethought. Such a policy if enacted into law will either create or reinforce second-class citizenship for members of the LGBT community or, if generalized, increase the balkanization and intolerance that is already undergoing a resurgence in this country. Creation of the proposed exemption will lead to less tolerance and respect for everyone, a result that furthers the interests of neither the religious nor the non-religious. While sincere religious views should not be dismissed, they also should not be allowed to bring about such harm to minorities in particular or to society as a whole.

F. Final Thoughts

The United States Supreme Court should hold that same-sex marriage is protected by the United States Constitution. The reasons that the right to marry is fundamental apply with equal force to same-sex and different-sex couples. Same-sex couples, like different-sex couples, have children to protect and support, and families to love and cherish. Indeed, society benefits in the same ways whether the partners marrying are of the same sex or of different sexes. As a matter of equal protection, the refusal to recognize same-sex marriage violates constitutional guarantees, because neither this classification on the basis of sex nor this discrimination on the basis of sexual orientation has adequate justification.

The Federal Defense of Marriage Act should be repealed or struck down. Even if it does not offend equal protection and privacy guarantees, there are other bases upon which it is constitutionally suspect and, further, the Act is unwise as a matter of public policy. Without the Federal DOMA, some (but not other) of the state DOMAs would have to be modified. The state DOMAs, even if constitutional, should be construed narrowly as a matter of public policy.
Historically, almost all marriages valid in the domicile at the
time of celebration would be recognized in all of the states, and
the very narrow exceptions to this rule do not apply to most same-
sex marriages. However, the United States Supreme Court has never
been made clear whether as a constitutional matter marriages valid
in a sister domiciliary state at the time of celebration must be rec-
cognized throughout the nation. The Court may soon be forced to
decide this, either with respect to same-sex marriages or other kinds
of marriages recognized in one state but not in another. Much will
hang on what the Court says. If the right to travel does not include
the right to remain married when one crosses state borders, that
right is much less robust than has been recognized for more than
a century.

Religious liberty should of course be respected, which is one of
the reasons that same-sex marriage should rather than should not
be recognized. Yet, building an exemption into law to protect pub-
lic officials with religious reservations about LGBT families in par-
ticular would implicate constitutional concerns, and building a
generalized exemption into law would make our country even more
balkanized than it is today.

One element of the same-sex marriage controversy that has been
underappreciated is that the law simply cannot be cabined in the
way that many seem to think. Reading equal protection guarantees
to be inapplicable on the basis of orientation weakens these guar-
antees for everyone. Weakening privacy guarantees so that LGBT fam-
ilies are not protected weakens those rights for everyone.

Many commentators worry about the plight of the American
family, but no one is helped when states make it harder for mem-
bers of the LGBT community to raise their children or love and
support their families. Indeed, by claiming to want to support fam-
ilies but instead acting in ways that harm all families, many same-
sex marriage opponents not only impugn their own credibility but
undermine the causes they champion. Currently, all types of fam-
ilies face great difficulties, and there simply is no justification for
imposing unnecessary and unwarranted burdens on members of
the LGBT community to the detriment of all.
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Supreme Court

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Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371 (1978), 187
Ballard, United States v., 322 U.S. 78 (1944), 218
Craig v. Boren, 429 U.S. 190 (1976), 156
Crandall v. State, 73 U.S. (6 Wallace) 35 (1867), 187
Davis v. Davis, 305 U.S. 32 (1938), 71
Dunn v. Blumstein, 405 U.S. 330 (1972), 189
Estin v. Estin, 334 U.S. 541 (1948), 55, 88, 89
Fauntleroy v. Lum, 210 U.S. 230 (1908), 70
Griswold v. Connecticut, 381 U.S. 479 (1965), 117, 126, 140
Hilton v. Guyot, 159 U.S. 113 (1895), 53
Huntington v. Attrill, 146 U.S. 657 (1892), 177
Johnson v. Muelberger, 340 U.S. 581 (1951), 55
Loughran v. Loughran, 292 U.S. 216 (1934), 195
Loving v. Virginia, 388 U.S. 1 (1967), 33, 37, 84, 118, 120–122, 125, 127, 129, 139, 142, 143, 159, 164, 166–171, 192, 213, 217

Magnolia Petroleum Company v. Hunt, 320 U.S. 430 (1943), 70

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), 149

Maynard v. Hill, 125 U.S. 190 (1888), 196

McLaughlin v. Florida, 379 U.S. 184 (1964), 143, 158

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), 188

Milwaukee County v. M. E. White Company, 296 U.S. 268 (1935), 55, 89


Nevada v. Hall, 440 U.S. 410 (1979), 89

Pace v. Alabama, 106 U.S. 583 (1883), 165

Pacific Employers Insurance Company v. Industrial Accident Commission, 306 U.S. 493 (1939), 90


Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), 161

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), 140

Poe v. Ullman, 367 U.S. 497 (1961), 127

Reed v. Reed, 404 U.S. 71 (1971), 156

Roe v. Wade, 410 U.S. 113 (1973), 118, 140


Rose v. Rose, 481 U.S. 619 (1987), 75

Saenz v. Roe, 526 U.S. 489 (1999), 190

Shapiro v. Thompson, 394 U.S. 618 (1969), 190

Sherbert v. Verner, 374 U.S. 398 (1963), 205

Sherrr v. Sherrr, 334 U.S. 343 (1948), 90

Sosna v. Iowa, 419 U.S. 393 (1975), 191–192

Stanley v. Illinois, 405 U.S. 645 (1972), 122

Sugarman v. Dougall, 413 U.S. 634 (1973), 149

Toomer v. Witsell, 334 U.S. 385 (1948), 187–188
Turner v. Safley, 482 U.S. 78 (1987), 123, 139
United States v. (see name of opposing party)
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), 76, 152
Virginia, United States v., 518 U.S. 515 (1996), 160
Ward v. Maryland, 79 U.S. (12 Wallace) 418 (1870), 187
Yazell, United States v., 382 U.S. 341 (1966), 75

Circuit Courts

Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007), 87, 92–97, 112
Golinski, In re, 587 F.3d 901 (9th Cir. 2009), 77
Levenson, In re, 560 F.3d 1145 (9th Cir. 2009), 78
Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006), 72

District Courts

Ex parte (see name of party)
In re (see name of party)
Kandu, In re, 315 B.R. 123 (Bankr. W.D. Wash. 2004), 77, 78
Kinney, Ex parte, 14 F. Cas. 602 (E.D. Va. 1879), 191, 198
Perry v. Schwarzenegger, 2010 WL 3025614 (N.D. Cal.), 119, 194
Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), 72

**State Courts**

A.J.C., People ex rel. 88 P.3d 599 (Colo. 2004), 111
Adoption of Swanson, In re, 623 A.2d 1095 (Del. 1993), 98
Alaska Civil Liberties Union v. Municipality of Anchorage, 122 P.3d 781 (Alaska 2005), 99
Andersen v. King County, 138 P.3d 963 (Wash. 2006), 136
Baehr v. Miike, 1999 Haw. LEXIS 391 (Haw. 1999), 62
Barrett v. Delmore, 54 N.E.2d 789 (Ohio 1944), 99
Bell, State v., 66 Tenn. (7 Baxt.) 9 (1872), 49, 184
Bicknell, In re, 771 N.E.2d 846 (Ohio 2002), 20
Carswell, State v., 871 N.E.2d 547 (Ohio 2007), 17
City of Cleveland v. Knipp, 2005 WL 1017620 (Ohio Mun. 2005), 24
Conaway v. Deane, 932 A.2d 571 (Md. 2007), 139, 168
Cutshall, State v., 15 S.E. 261 (N.C. 1892), 178
Delaney v. First National Bank in Albuquerque, 386 P.2d 711 (N.M. 1963), 100
Ezeonu, People v., 588 N.Y.S.2d 116 (1992), 45
Forum for Equality PAC v. McKeithen, 893 So.2d 715 (La. 2005), 10
Ghassemi v. Ghassemi, 998 So.2d 731 (La. App. 2008), 49
Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006), 135, 164
Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. (16 Tyng) 157 (1819), 182
Inhabitants of West Cambridge v. Inhabitants of Lexington, 18 Mass. (1 Pick) 506 (1823), 176
Kennedy, State v., 76 N.C. 251 (1877), 183
Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008), 142, 154, 155
Lewis v. Harris, 908 A.2d 196 (N.J. 2006), 138
Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), 27–30
McIntosh, State v., 2005 WL 1940099 (Ohio Ct. Com. Pl. 2005), 12, 20
Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006), 87, 103–113
Naim v. Naim, 87 S.E.2d 749 (Va. 1955), 121
Osoinach v. Watkins, 180 So. 577 (Ala. 1938), 51
Pearson v. Pearson, 51 Cal. 120 (1875), 184
Pennegar v. State, 10 S.W. 305 (Tenn. 1889), 50, 177–178
People ex rel. (see name of party)
People v. (see name of opposing party)
Perez v. Lippold, 198 P.2d 17 (Cal. 1948), 169
Rogers v. Parrish, 923 A.2d 607 (Vt. 2007), 109
Ross, State v., 76 N.C. 242 (1877), 46, 185
Scott v. State, 39 Ga. 321 (1869), 183
Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451 (Ariz. App. 2003), 128
State v. (see name of opposing party)
Sutton v. Warren, 51 Mass. (10 Met.) 451 (1845), 48
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), 130, 144
Williams, State v., 683 N.E.2d 1126 (Ohio 1997), 22
Wood v. Commonwealth ex rel. Grayson, 2005 WL 1258921 (Ky. Cir. Ct.), 26
Index

Abortion, 118, 119, 140, 212, 213
Adoption, 13–14, 87–88, 91–97, 107, 125, 133, 134, 136, 138, 165
adult, 97–101
child, 13–14, 87–88, 91–97, 100–113, 130, 131, 133, 144, 165
second-parent, 91–97, 107, 133, 136, 165
stepparent, 13–14
Adoption of Adult Anonymous, In re, 98
Adoption of Swanson, In re, 99
Adultery, 57, 58, 126, 127, 131, 158, 176, 180–181, 196
Alaska Civil Liberties Union v. Municipality of Anchorage, 6
Alienage, 150, 151, 156
American Law Institute, 1, 27–30
Andersen v. King County, 136–138
Animus, 59, 76, 86, 148, 150, 152–153, 193, 214, 216
Approximation of marriage, 21
Baehr v. Lewin, 5, 62, 157–160
Baehr v. Miike, 62
Baker v. General Motors Corporation, 73, 90
Baker v. State, 160
Baldwin v. Fish & Game Commission of Montana, 187
Ballard, United States v., 218
Bardwell, Kenneth, 215–217
Barrett v. Delmore, 99
Bell, State v., 49, 184
Bestiality, 126
Bicknell, In re, 20
Bowers v. Hardwick, 125–126, 151–152
Calogero, Chief Justice Pascal, 9–10
Carey v. Population Services, 140
Carswell, State v., 17
Celebration, state of, 36–37, 40, 43–45, 53–54, 84, 221
best interests, 13, 102, 112, 144
custody, 14, 87–88, 102–113, 139
support, 12–13, 91, 103, 121–123, 220, 221
Choice of law, 35–53
Citizens for Equal Protection, Incorporated v. Bruning, 10
City of Cleveland v. Knipp, 24
City of Cleveland v. Voies, 23
Civil servant, 207
Civil unions, 4, 7, 16, 18, 24, 27, 80–83, 107–108, 129, 144, 201
Classes, 148–174, 189, 201, 215
suspect, 147–154, 156, 165, 171, 173
quasi-suspect, 148–174
Cleburne v. Cleburne Living Center, 148
Clergy, 207, 208
Cohabitation, 22–23, 27, 110, 159, 180
Comity, 33–59, 88–90, 175, 177, 186
Common-law marriage, 20–21, 29
Conaway v. Deane, 138–143, 168
Conscience, 201–221
Conscientious objector, 202–203, 209
Contraception, 116–119, 140
Covenant marriage, 57
Craig v. Boren, 156
Crandall v. State, 187
Davis v. Davis, 71
Defense of Marriage Act, 56, 59, 61–86, 87, 104–107, 112, 220
federal, 56, 59, 61–86, 87, 104–107, 220
state, 3–32, 84–85, 167–168, 220
Delaney v. First National Bank in Albuquerque, 100
grounds, 57–58, 90
no-fault, 57
Domestic partnerships, 7, 16–18, 29–30, 73, 143
Domestic violence, 16–17, 19, 22, 23
Domicile, 33–59, 64, 80, 83, 175–187, 190–198, 221
Draft, 202–204
Due process, 51, 77, 115-146, 151, 153, 171, 186
Dunn v. Blumstein, 189
Eisenstadt v. Baird, 117, 140
Employment Division of the Department of Human Resources of Oregon v. Smith, 206–207
<table>
<thead>
<tr>
<th>Term</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishment Clause</td>
<td>203, 218</td>
</tr>
<tr>
<td>Estin v. Estin</td>
<td>55, 88, 89</td>
</tr>
<tr>
<td>Evasion</td>
<td>183–184</td>
</tr>
<tr>
<td>Ex parte (see name of party)</td>
<td></td>
</tr>
<tr>
<td>Ezeonu, People v.</td>
<td>45</td>
</tr>
<tr>
<td>Fairness</td>
<td>3, 32, 203</td>
</tr>
<tr>
<td>Fauntleroy v. Lum</td>
<td>70</td>
</tr>
<tr>
<td>Finstuen v. Crutcher</td>
<td>87, 92–97, 112</td>
</tr>
<tr>
<td>Fornication</td>
<td>127, 158, 165</td>
</tr>
<tr>
<td>Forum for Equality PAC v.</td>
<td>McKeithen, 10</td>
</tr>
<tr>
<td>Frazee v. Illinois Department of Employment Security</td>
<td>206</td>
</tr>
<tr>
<td>Free Exercise</td>
<td>204–207</td>
</tr>
<tr>
<td>Full faith and credit</td>
<td>55, 57, 61–86, 87–113, 196</td>
</tr>
<tr>
<td>Fundamental rights</td>
<td>10, 27, 116–120, 199</td>
</tr>
<tr>
<td>Gender (see sex)</td>
<td>171</td>
</tr>
<tr>
<td>Ghassemi v. Ghassemi</td>
<td>49</td>
</tr>
<tr>
<td>Gill v. Office of Personnel Management</td>
<td>74, 85</td>
</tr>
<tr>
<td>Gillette v. United States</td>
<td>202</td>
</tr>
<tr>
<td>God’s Will</td>
<td>217</td>
</tr>
<tr>
<td>Golinski, In re</td>
<td>77</td>
</tr>
<tr>
<td>Goodridge v. Department of Public Health</td>
<td>27, 132–133, 171</td>
</tr>
<tr>
<td>Griswold v. Connecticut</td>
<td>117, 126, 140</td>
</tr>
<tr>
<td>Harlan, Justice John</td>
<td>127</td>
</tr>
<tr>
<td>Healthcare exemptions</td>
<td>212, 219</td>
</tr>
<tr>
<td>Heen, Judge Walter</td>
<td>158, 160</td>
</tr>
<tr>
<td>Hernandez v. Robles</td>
<td>135–136, 164–167</td>
</tr>
<tr>
<td>Hilton v. Guyot</td>
<td>53</td>
</tr>
<tr>
<td>Home state</td>
<td>38, 104, 110–111, 184</td>
</tr>
<tr>
<td>Huntington v. Attrill</td>
<td>177</td>
</tr>
<tr>
<td>Hybrid rights</td>
<td>207</td>
</tr>
<tr>
<td>Illegitimacy</td>
<td>150, 151, 156</td>
</tr>
<tr>
<td>In re (see name of party)</td>
<td></td>
</tr>
<tr>
<td>Incest (see Marriage, incestuous)</td>
<td></td>
</tr>
<tr>
<td>Incidents</td>
<td>1, 8–12, 14, 15, 29, 112</td>
</tr>
<tr>
<td>adoption</td>
<td>6, 8, 13, 14, 29, 30, 76, 87, 91–93, 97–101, 107, 125, 133, 134, 136, 138, 165</td>
</tr>
<tr>
<td>Infliction of emotional distress</td>
<td>22</td>
</tr>
<tr>
<td>Inhabitants of Medway v.</td>
<td>Inhabitants of Needham, 182</td>
</tr>
<tr>
<td>Inhabitants of West Cambridge v. Inhabitants of Lexington, 176</td>
<td></td>
</tr>
</tbody>
</table>
Inheritance, 11, 87, 97–102, 180
Insurance, 7, 11, 14, 24, 27, 30, 39, 77–78, 90, 92
Interracial marriage (see Marriage, interracial)
Intestacy, 100
Johnson, Justice Denise, 163
Johnson v. Muelberger, 55
Justice of the peace, 64, 65, 207, 208, 215
Kandu, In re, 77, 78
Kaye, Chief Judge Judith, 135, 167
Kennedy, State v., 183
Kerrigan v. Commissioner of Public Health, 142, 154, 155
Kinney, Ex parte, 191, 198
Law of nations test, 48
Levenson, In re, 78
Lewis v. Harris, 138
Loughran v. Loughran, 195
Loving v. Virginia, 33, 37, 84, 118, 120–122, 125, 127, 129, 139, 142, 143, 159, 164, 166–171, 192, 213, 217
Magnolia Petroleum Company v. Hunt, 70
Marital property, 38–39, 43, 196
first cousin, 33, 48, 49, 56, 131, 132
incestuous, 36, 37, 45, 47–49, 52–54, 178, 185, 186, 195
indigent, 121, 141, 188
infertile, 215
intergenerational, 215
interreligious, 215
polygamous, 36–37, 45–48, 52–55, 178, 185, 186, 195
prohibited, 37, 49, 52, 179–182
void, 37–40, 47–51, 159, 182, 191, 195, 198
Marriage amendments, 3–32
Alaska, 5–7
Georgia, 65–66,
Hawaii, 4–7, 62
Kentucky, 17–18, 26
Louisiana, 9–10, 215
Mississippi, 6–7
Nebraska, 10, 26
Nevada, 7
Ohio, 12, 16–26
Marriage Cases, In re, 143–144, 168–171
Marshall, Justice Thurgood, 192
Marvin v. Marvin, 27–30
Massachusetts v. United States Department of Health and Human Services, 79, 85
Massachusetts Board of Retirement v. Murgia, 149
Maynard v. Hill, 196
McIntosh, State v., 12, 20
McLaughlin v. Florida, 143, 158
Medical decision-making, 16
Memorial Hospital v. Maricopa County, 188–189
Meretricious, 28
Miller-Jenkins v. Miller-Jenkins, 87, 103–113
Milwaukee County v. M. E. White Company, 55, 89
Mississippi University for Women v. Hogan, 150, 172–173
Mitchell v. Helms, 218
Morrison v. Sadler, 133–134
Naim v. Naim, 121
Nevada v. Hall, 89
No-fault divorce (see Divorce, no-fault)
Non-marital couples (see Cohabitation)
O’Connor, Justice Sandra Day, 101, 153, 154
Open adoption, 93
Opportunity costs, 1, 4, 6, 113, 133
Osoinach v. Watkins, 51
Pace v. Alabama, 165
Pacific Employers Insurance Company v. Industrial Accident Commission, 90
Palimony, 28–30
Palko v. Connecticut, 119
Parent, 13–14, 33, 87–113, 122–125, 130–133, 144, 165, 176
functional, 107–108, 112
obligations, 12–13
rights, 12–14, 87–113, 122–125, 140–142, 145
Presumption of parenthood, 13, 66
Parental Kidnapping Prevention Act (PKPA), 103–107
Paugh v. Hanks, 22
Pearson v. Pearson, 184
Pennegar v. State, 50, 177–178
People ex rel. (see name of party)
People v. (see name of opposing party)
Perez v. Lippold, 169
Perry v. Schwarzenegger, 119, 194
Personnel Administrator of Massachusetts v. Feeney, 161
Peterson, State v., 19
Planned Parenthood of Southeastern Pennsylvania v. Casey, 140
Poe v. Ullman, 127
Polygamy (see Marriage, polygamous)
Powell, Justice Lewis, 124
Privacy, 115–146, 214, 220, 221
Privileges and Immunities, 175–199
Procreation, 116, 122–125, 129–131, 134–140, 144, 214
exception for full faith and credit purposes, 67–68, 73, 89–91
Public official (see Civil servant)
Reed v. Reed, 156
Relocation, 109, 110
Restatement of the Conflicts of Law, 35, 41
First, 35–41, 45
Second, 41–45
Rights, 6–8, 10, 12–14, 18–29, 36, 51–53, 65–69, 79–84, 87–113, 115–146, 157, 179, 187, 192, 196, 199, 206, 221
fundamental, 10, 27, 115–146, 179, 187, 193, 197, 199, 213–214, 220
Roe v. Wade, 118, 140
Rogers v. Parrish, 109
Romer v. Evans, 86, 152, 193, 214–215
Rose v. Rose, 75
Ross, State v., 46, 185
Saenz v. Roe, 190
Scalia, Justice Antonin, 86, 126
Scott v. State, 183
strict, 22, 62, 116, 148, 150, 151, 154, 155, 158, 159, 161, 163, 168, 171
intermediate, 151, 153, 156, 168
heightened rational basis, 153
Second-parent adoption (see Adoption, second-parent)
Severable, 84
Sex, 6, 15–16, 21, 26, 63–65, 68–69, 74, 80, 82, 92, 106, 115, 119, 124–128, 132, 135, 137, 147, 151, 154–175, 201, 208, 213, 220
Shapiro v. Thompson, 190
INDEX

Sherbert v. Verner, 205
Sherrerv. Sherrer, 90
Smelt v. Orange County, 72
Sodomy, 86, 125-128,
140-141, 151-153, 193
Sosnav. Iowa, 191-192
Support, 12-13, 22-23, 25,
28-30, 43, 65, 121, 139,
220, 221
child (See Child, support)
partner, 17-21, 27-30
spouse, 22-24
Standhardt v. Superior Court
ex rel. County of Maricopa,
128-132
Stanley v. Illinois, 122
State v. (see name of opposing
party)
Statutory intent, 24-27
Steineman, State v., 16
Stepparent adoption (see
Adoption, stepparent)
Stigma, 201
Sugarman v. Dougall, 149
Sutton v. Warren, 48
Thomas v. Review Board of
Indiana Employment Se-
curity Division, 204
Thomas v. Washington Gas
Light Company, 72
Tolerance, 201, 216-218, 220
Toomer v. Witsell, 187-188
Tort, 16
Travel, 16, 33, 36, 40, 51,
55-56, 64, 83, 103,
175-199, 211, 213, 221
Turner v. Safley, 123, 139
Uniform Child Custody Juris-
diction Act (UCCJA),
103-112
Uniform Child Custody and
Jurisdiction Enforcement
Act (UCCJEA), 111-112
United States v. (see name of
opposing party)
United States Department of
Agriculture v. Moreno, 76,
152
Varnum v. Brien, 130, 144
Virginia, United States v., 160
Void marriages (see Marriage,
void)
War, 202-204
Ward v. Maryland, 187
Washington v. Glucksberg,
116, 119
Welsh v. United States, 202
Williams, State v., 22
Williams v. North Carolina
(Williams I), 55, 58, 71,
73, 196
Williams v. North Carolina
(Williams II), 55
Wills, 10
Wilson v. Ake, 72
Wood v. Commonwealth ex
rel. Grayson, 26
Yazell, United States v., 75
Zablocki v. Redhail, 121-124,
126, 128, 139, 141, 142,
214