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Naming the States Where Loving Will Be Recognized: On Tea Leaves, Horizontal Federalism, and Same-Sex Marriage

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NAIMING THE STATES WHERE *LOVING* WILL BE
RECOGNIZED: ON TEA LEAVES, HORIZONTAL
FEDERALISM, AND SAME-SEX MARRIAGE

MARK STRASSER*

INTRODUCTION

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INTRODUCTION

In *United States v. Windsor*,¹ the United States Supreme Court struck down a provision of the Defense of Marriage Act (“DOMA”)² that precluded the federal government from affording legal recognition to same-sex marriages valid in the states.³ After that opinion was issued, several circuit courts held that the right to marry a same-sex partner is protected by the Federal Constitution,⁴ although the Sixth Circuit upheld the constitutionality of same-sex marriage bans.⁵ The United States Supreme Court granted certiorari to address whether the Fourteenth Amendment protects same-sex marriage,⁶ and has

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1. 133 S. Ct. 2675 (2013).

2. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

3. *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”). The statute thereby struck down was 1 U.S.C. § 7 (2012).

4. See *Latta v. Otter*, 771 F.3d 456, 464 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015); *Baskin v. Bogan*, 766 F.3d 648, 649 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

5. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

6. *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015).

issued an opinion declaring that same-sex marriage bans violate federal constitutional guarantees.⁷

The Supreme Court framed two distinct issues when agreeing to review the constitutionality of state same-sex marriage bans: whether states must license marriages between members of the same sex, and whether states must recognize same-sex marriages validly celebrated elsewhere.⁸ By doing so, the Court might seem to have to have left some “room for play in the joints”⁹—the Court could offer what might be thought a compromise position by holding that states need not permit same-sex marriages to be celebrated locally but must recognize such marriages if validly celebrated elsewhere. This Article addresses why the Court was very unlikely to adopt that view, and some of the implications that would have followed were the Court to have so held.

Part I of this Article discusses some of the differing bases upon which the Court might have held that the Federal Constitution protects the right to marry a same-sex partner. Part II discusses interstate recognition of marriage practices and why the Court was unlikely to hold that states must recognize same-sex marriages validly celebrated elsewhere, but need not allow them to be celebrated locally. The Article concludes with a discussion of some of the differing positions that the Court might have taken and some of the implications of those positions.

I. THE RIGHT TO MARRY A SAME-SEX PARTNER

Several circuit courts addressed whether the right to marry a same-sex partner is protected by the United States Constitution.¹⁰ The Sixth Circuit was the only circuit to issue an opinion upholding state same-sex marriage bans,¹¹ and the Court granted certiorari to review that opinion.¹² Yet, the virtual unanimity in result among

7. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

8. *DeBoer*, 135 S. Ct. at 1040 (“1) Does the Fourteenth Amendment require a state to license marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?”).

9. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (citing *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

10. *See supra* notes 4–5.

11. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

12. *DeBoer*, 135 S. Ct. at 1040.

the circuits should not be permitted to mask that the circuit courts have offered very different analyses of why state same-sex marriages bans fail to pass muster.

A. *The Right to Marry*

The United States Supreme Court has long recognized that the right to marry implicates a fundamental interest.¹³ In *Loving v. Virginia*,¹⁴ the Court examined Virginia's interracial marriage ban, holding that the Virginia anti-miscegenation laws "deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."¹⁵ Although that was not the only respect in which the Virginia statutory scheme violated constitutional guarantees,¹⁶ *Loving* has come to stand for the proposition that the right to marry is a fundamental interest protected by the Fourteenth Amendment.¹⁷

In *Zablocki v. Redhail*,¹⁸ the Court fleshed out some of the reasons that marriage is protected as a fundamental interest.¹⁹ At issue was the constitutionality of a law limiting the marriage rights of indigent non-custodial fathers.²⁰ Basically, "no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order,"²¹ and no order could be obtained if the fathers "either lack[ed] the financial means to meet their support obligations or [could not] prove that their children [would] not become public charges."²²

The Court explained that certain individuals "will never be able to obtain the necessary court order . . ."²³ The fact that some individuals would never be able to marry, however, did not establish the

13. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

14. 383 U.S. 1 (1967).

15. *Id.* at 12.

16. See *infra* notes 51–54 and accompanying text (discussing the Court's holding that the Virginia laws violated equal protection guarantees).

17. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (noting that the "leading decision of this Court on the right to marry is *Loving v. Virginia*").

18. 434 U.S. 374 (1978).

19. *Id.* at 383–85.

20. *Id.* at 375 n.1 ("Wisconsin Stat. § 245.10 provides in pertinent part: '(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order.'").

21. *Id.* at 387.

22. *Id.*

23. *Id.*

restriction's unconstitutionality, because such a statute would be upheld if "supported by sufficiently important state interests and is closely tailored to effectuate only those interests."²⁴ The Court proceeded to examine whether the state's interests were sufficiently important and whether the statute was sufficiently closely tailored to promote those interests.²⁵

Unlike the Virginia statutory scheme at issue in *Loving* that was motivated by "invidious racial discrimination,"²⁶ the Wisconsin statute at issue in *Zablocki* was motivated to achieve legitimate ends²⁷—Wisconsin was seeking to promote the welfare of its children.²⁸ Further, by inducing fathers to pay child support, the state might thereby reduce the number of children dependent upon the state for support.²⁹ Those rationales were legitimate and, possibly, substantial.³⁰ Because the statute was not sufficiently closely tailored to achieve those ends,³¹ however, the state could not "justify the statute's broad infringement on the right to marry."³²

The *Zablocki* Court noted that "the right to marry is of fundamental importance for all individuals,"³³ and that this right "is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."³⁴ Treating the right to marry as so

24. *Zablocki*, 434 U.S. at 388 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977)).

25. *Id.* at 388–91.

26. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

27. *Zablocki*, 434 U.S. at 388 ("We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.").

28. *Id.* ("Appellant asserts that . . . the welfare of the out-of-custody children is protected.").

29. *Id.* at 389 ("[A]ppellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior children and that those children will not become public charges . . .").

30. Cf. *id.* at 388 ("We may accept for present purposes that these are legitimate and substantial interests . . ."); see also JoLynn M. Schlichting, Note, *Minnesota's Proposed Same-Sex Marriage Amendment: A Flamingly Unconstitutional Violation of Full Faith and Credit, Due Process, and Equal Protection*, 31 WM. MITCHELL L. REV. 1649, 1670 (2005) (noting that the statute implicated "legitimate and substantial state interests").

31. See *Zablocki*, 434 U.S. at 390 ("[T]he challenged provisions . . . are grossly underinclusive . . . The statutory classification is substantially overinclusive as well."); see also Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 970 (1997) (discussing "the *Zablocki* Court's finding that the marriage regulations were both significantly underinclusive and overinclusive").

32. *Zablocki*, 434 U.S. at 389.

33. *Id.* at 384.

34. *Id.*

important makes eminent sense in light of how other rights involving family interests are treated.

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, . . . [because] 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.³⁵

Members of the LGBT community are engaging in a variety of decisions involving family matters ranging from whether to have or raise children to how such children should be raised.³⁶ The *Zablocki* rationale would seem to have great import for the burden that states must bear insofar as they wish to prohibit same-sex marriage—otherwise, the states would be in the position of recognizing that members of the LGBT community have various rights to “procreation, childbirth, child rearing, and family relationships”³⁷ but “not with respect to the decision to enter the relationship that is the foundation of the family in our society.”³⁸ Recognizing that families involving same-sex partners and their children have many of the same interests as do families involving different-sex partners and their children, some circuit courts have suggested that same-sex marriage bans implicate the fundamental right to marry and do not pass constitutional muster.³⁹

In *Turner v. Safley*, the Supreme Court considered a prison marriage regulation that “permit[ted] an inmate to marry only with the permission of the superintendent of the prison, and provide[d] that such approval should be given only ‘when there are compelling reasons

35. *Id.* at 386.

36. Cf. William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1949 (2012) (“LGBT persons form lasting romantic relationships and raise children, with all the joys and problems straight couples have.”).

37. *Zablocki*, 434 U.S. at 386.

38. *Id.*

39. Cf. *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir.), *cert. denied*, 135 S. Ct. 286 (2014) (“Virginia’s same-sex marriage bans impermissibly infringe on its citizens’ fundamental right to marry”); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (“We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

to do so.”⁴⁰ When striking down the regulation,⁴¹ the Court articulated several of the interests implicated in marriage. Marriage is an “expression[] of emotional support and public commitment.”⁴² For many, marriage has “spiritual significance; . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”⁴³ Marriage often involves a sexual component—“most . . . marriages are formed in the expectation that they ultimately will be fully consummated.”⁴⁴ In addition, there is a practical component, because “marital status often is a precondition to the receipt of government benefits”⁴⁵

The important attributes of marriage discussed in *Turner* focused on the relationship between the adults. When holding that same-sex marriage bans are unconstitutional, the Tenth Circuit recognized that the ruling would have important implications for the children raised by same-sex couples,⁴⁶ but also acknowledged the importance of marriage for adults who have no wish to have or raise children.⁴⁷ The Tenth Circuit noted that the United States Supreme Court treated “the fundamental right to marry as separate from the right to procreate,”⁴⁸ citing *Turner* for support.⁴⁹ Whether because of the importance of marriage for the children who might be raised or because of its significance for the adults in the relationship, the reasons that marriage implicates a fundamental interest for different-sex couples also support its implicating a fundamental interest for same-sex couples.⁵⁰

B. Equal Protection

Much of the *Loving* opinion involved why Virginia’s anti-miscegenation law violated equal protection guarantees.⁵¹ The Court

40. *Turner v. Safley*, 482 U.S. 78, 82 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000b–2000bb (citation omitted).

41. *Id.* at 97 (“[T]he marriage regulation does not withstand scrutiny.”).

42. *Id.* at 95.

43. *Id.* at 96.

44. *Id.*

45. *Id.*

46. *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) (noting that “childrearing, a liberty closely related to the right to marry, is one exercised by same-sex and opposite-sex couples alike”).

47. *See id.* at 1220.

48. *Id.* at 1210.

49. *See id.* at 1211.

50. *See* Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophisticated Rhetoric*, 69 BROOK. L. REV. 1003, 1020 (2004) (“Given that all of these interests are also implicated for same-sex couples and the right to marry is of fundamental importance for all individuals, the right to marry a same-sex partner should be held to be constitutionally protected . . .”).

51. *Loving v. Virginia*, 388 U.S. 1, 1–12 (1967). The due process argument was found on only one page. *Id.* at 12.

explained: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”⁵² Marriage laws are unsupportable on such a basis—“restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”⁵³

Loving suggests that marriage bans may be struck down if animus-based.⁵⁴ The *Windsor* Court suggested that DOMA was passed in order to burden members of the LGBT community and for that reason, among others, was constitutionally infirm.⁵⁵ “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”⁵⁶ When holding the federal statute unconstitutional, the Court explained that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁵⁷ Here, the Court did not make clear the level of scrutiny that it was employing.⁵⁸

Circuit courts addressing the constitutionality of same-sex marriage bans under equal protection guarantees have employed differing levels of scrutiny. The Seventh Circuit suggested that same-sex marriage bans violate equal protection guarantees even using the rational basis test.⁵⁹ The Ninth Circuit struck down same-sex marriage bans as a violation of equal protection guarantees using heightened scrutiny.⁶⁰

52. *Id.* at 11.

53. *Id.* at 12.

54. *Id.* at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination . . .”).

55. See *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013).

56. *Id.* at 2693.

57. *Id.* at 2696.

58. *Id.* at 2706 (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”).

59. *Baskin v. Bogan*, 766 F.3d 648, 665 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (“At the very least, ‘a [discriminatory] law must bear a rational relationship to a legitimate governmental purpose.’ Indiana’s ban flunks this undemanding test.”) (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). *But see DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015) (upholding same-sex marriage bans under rational basis review).

60. *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015) (“We hold that the Idaho and Nevada laws at issue violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry

Arguably, state same-sex marriage bans violate both due process and equal protection guarantees.⁶¹ The *Windsor* Court foreshadowed some of the considerations that were mentioned when the *Obergefell* Court issued an opinion concerning the constitutionality of same-sex marriage bans, although other considerations were noticeably absent.⁶² For example, the *Windsor* Court noted that “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”⁶³ The Court interpreted Congress’s motivation behind the passage of DOMA to be animus⁶⁴—the “avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who [would] enter into same-sex marriages”⁶⁵ Precluding same-sex couples from marrying “diminish[es] the stability and predictability of basic personal relations”⁶⁶ and, further, “demeans the couple”⁶⁷ A same-sex marriage ban “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”⁶⁸ Further, such a prohibition “instructs . . . all persons with whom same-sex couples interact, including their own children, that their [relationship] is less worthy than [those] of others.”⁶⁹

In addition, the *Windsor* Court noted some of the practical effects of the refusal to recognize same-sex marriages, including that prohibiting such unions “prevents same-sex married couples from obtaining government . . . benefits they would otherwise receive.”⁷⁰ Indeed, such laws may bring “financial harm to children of same-sex couples.”⁷¹

persons of the opposite sex, and do not satisfy the heightened scrutiny standard we adopted in *SmithKline*.”) (citing *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014)).

61. Mark Strasser, *Let Me Count the Ways: The Unconstitutionality of Same-Sex Marriage Bans*, 27 *BYU J. PUB. L.* 301, 302 (2013) (“The analysis here suggests that same-sex-marriage bans violate both equal-protection and due-process guarantees.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015) (“[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

62. See *Windsor*, 133 S. Ct. at 2693–94.

63. *Id.* (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

64. See *id.*

65. *Id.*

66. *Id.* at 2694.

67. *Id.*

68. *Windsor*, 133 S. Ct. at 2694.

69. *Id.* at 2696.

70. *Id.* at 2694.

71. *Id.* at 2695.

The *Obergefell* Court suggested that state same-sex marriage bans violate federal equal protection guarantees.⁷² Further, some of the points made in *Windsor* were reiterated in *Obergefell*, for example, that same-sex marriage bans are harmful and demeaning to same-sex couples and their children.⁷³ The Court did not attribute animus to those supporting same-sex marriage bans, however, instead suggesting that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises”⁷⁴

Not all of *Windsor* focused on equal protection and due process protections. Some of the opinion focused on federalism concerns,⁷⁵ and Chief Justice Roberts implied that *Windsor* was basically a federalism opinion.⁷⁶ Such an interpretation, however, was undermined by the opinion itself, for example, when the majority suggested that it was “unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”⁷⁷ The basis of the Court’s decision involved something “quite apart from principles of federalism.”⁷⁸

The DOMA section at issue was constitutionally offensive for non-federalism reasons—“DOMA . . . violates basic due process and equal protection principles applicable to the Federal Government.”⁷⁹ Nonetheless, federalism concerns were discussed in *Windsor* and it appeared that federalism concerns might play an important role in *Obergefell*—when granting certiorari to decide the constitutionality of same-sex marriage bans, the Supreme Court directed that another issue also be briefed, namely, whether the refusal to recognize same-sex marriages validly celebrated elsewhere itself violates constitutional guarantees.⁸⁰

72. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

73. *Id.* at 2602 (“But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”); *see also id.* at 2606 (“April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children . . .”).

74. *Id.* at 2602.

75. *See Windsor*, 133 S. Ct. at 2691–93.

76. *Id.* at 2697 (Roberts, C.J., dissenting) (“The dominant theme of the majority opinion is that the Federal Government’s intrusion into an area ‘central to state domestic relations law applicable to its residents and citizens’ is sufficiently ‘unusual’ to set off alarm bells. I think . . . it . . . undeniable that [the Court’s] judgment is based on federalism.”) (internal citation omitted).

77. *Id.* at 2692 (majority opinion).

78. *Id.*

79. *Id.* at 2693.

80. *DeBoer v. Snyder*, 135 S. Ct. 1040, 1040 (2015) (“Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their

II. INTERSTATE MARRIAGE RECOGNITION

Marriage is governed by state rather than federal law.⁸¹ Traditionally, marriage regulations among the states have differed on a few different bases, including age and consanguinity,⁸² which means that individuals precluded by law from marrying in one state might be able to marry in another. If a couple domiciled in one state marries in another state in accord with local law and then returns home, the domicile may need to decide whether to recognize that marriage.⁸³

A. Differing Marriage Scenarios

Many types of marriages are recognized throughout the United States.⁸⁴ Individuals living in one state may marry in another and feel confident that their marriages will be recognized at home.⁸⁵ Some types of marriage, however, are permitted in some states and not in others, and a question that sometimes arises is whether a marriage valid where celebrated will be treated as valid by other states.⁸⁶ Traditionally, the answer to that question has depended in part upon the law of the domicile at the time of the marriage.⁸⁷

marriage was lawfully licensed and performed out-of-state?”). The *Obergefell* Court spent relatively little time when addressing this issue. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

81. *Boggs v. Boggs*, 520 U.S. 833, 850 (1997) (“[D]omestic relations law is primarily an area of state concern . . .”) (citing *In re Marriage of Campa*, 152 Cal. Rptr. 362, 367–68 (Ct. App. 1979)).

82. See Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 354 (2005) (“Marriage laws of states often differ in particulars such as age and consanguinity rules.”).

83. Cf. Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 353 (1998) (“A state might decide to recognize all nonincestuous, nonbigamous marriages that were valid in the state of celebration, even if some of those marriages could not be legally celebrated within the domicile.”).

84. See *infra* notes 204–05 and accompanying text.

85. See Mark Strasser, *Windsor, Federalism, and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1, 8 (2013), <http://harvardjlg.com/2013/11/windsor-federalism-and-the-future-of-marriage-litigation> [<http://perma.cc/4T4B-S4YP>] (“[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.’”) (quoting RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 283 (1971)).

86. Cf. *id.* at 7 (discussing Congress’s decision to pass DOMA after Hawaii began recognizing same-sex marriages in 1993).

87. *Id.* (“It has long been understood that a domicile can refuse to recognize a marriage of its domiciliaries if they seek to circumvent the domicile’s law by temporarily going to a different state and celebrating their marriage in accord with the latter state’s law.”).

Consider the following scenarios:

1. A and B are domiciled in State S and marry there in accord with local law.
2. A and B are domiciled in State S. They are precluded by local law from marrying, so they go to State T, marry in accord with local law, and then return to their domicile to live.
3. A and B are domiciled in State T, where they marry in accord with local law. A few years later, an excellent employment opportunity presents itself in State S. A and B move to State S to take advantage of the opportunity. Regrettably, State S does not permit individuals like A and B to intermarry.

In the first scenario in which a couple marries in accord with the domicile's law and remains there, the marriage is valid.⁸⁸ The individuals have married in accord with local law and have the reasonable expectation that their marriage is and will remain valid.⁸⁹ Even were the domicile's marriage laws to change subsequently, the marriage would still have been contracted legally at the time of its creation and the state might well be required to recognize that marriage, notwithstanding that relevantly similar couples could not celebrate such a marriage in the state once the marriage regulations had changed.⁹⁰

Suppose that a state refused to recognize certain marriages contracted in other states, even though those marriages could be celebrated locally. It is difficult to imagine what important public policy could justify such a refusal to recognize those out-of-state marriages except, perhaps, for economic protectionism.⁹¹ Such a refusal would be quite unlikely to pass constitutional muster, assuming that no

88. See Strasser, *supra* note 83, at 346 ("Consider a marriage that is celebrated in the state where both parties are domiciled and where they intend to make their home. This would be the paradigmatic example of a valid marriage, assuming that the marriage is valid according to the law of that state.").

89. See *id.* at 349–52.

90. See *Caspar v. Snyder*, 77 F. Supp.3d 616, 620 (2015) (holding that Michigan had to recognize same-sex marriages celebrated in accord with local law).

91. Economic protectionism would likely not win the day as a justification. See Andrew J. Brege, Comment, *Michigan's Waste Problems: How Expansion of the Bottle Bill and Other Options Could Help Michigan Defeat the Dormant Commerce Clause and Out-of-State Waste*, 23 T.M. COOLEY L. REV. 303, 316 (2006) ("[I]t is well documented that economic protectionism is not a valid justification for enacting legislation.").

other marital restrictions were implicated,⁹² if only because of Dormant Commerce Clause concerns.⁹³

In the second scenario, a couple celebrates a marriage elsewhere precisely because the domicile prohibits the marriage. In this kind of case, the couple may well be consciously evading local law⁹⁴ and may be thought not to have a reasonable expectation that their marriage will be recognized.⁹⁵ Traditionally, in this kind of case, the domicile may, but need not, recognize the marriage validly celebrated elsewhere.⁹⁶

In the third kind of scenario in which the couple marries in accord with the domicile's law and then later moves to another state, the couple will not have consciously evaded their domicile's law but will instead have acted in accordance with it. Traditionally, when the couple marries with the intention of staying within the domicile

92. Suppose that the parties were considered too young to contract a marriage. *See* MINN. STAT. ANN. § 517.02 (West 2015) ("Every person who has attained the full age of 18 years is capable in law of contracting into a civil marriage, if otherwise competent. A person of the full age of 16 years may, with the consent of the person's legal custodial parents, guardian, or the court, as provided in section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, the person's application for a license and consent for civil marriage of a minor form is approved by the judge of the district court of the county in which the person resides." In that event, the reason for the marriage non-recognition would be the ages rather than the sexes of the parties.)

93. *Cf.* Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 57 (1998) (suggesting that in the hypothetical posed here the state would be saying "we refuse to recognize this marriage because it is not ours"). It is perhaps because it would be so difficult to imagine the legitimate basis upon which such recognition could be denied that the *Obergefell* Court said that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

94. The Lovings were convicted of violating Virginia's evasion statute. *See* *Loving v. Virginia*, 388 U.S. 1, 4 (1967) ("The Lovings were convicted of violating § 20-58 of the Virginia Code: '*Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.'").

95. *See* Mark Strasser, *An Analysis of the Federal Constitutional Right to Same-Sex Marriage*, 19 CONST. COMMENT. 761, 773 (2002) (reviewing ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002) (noting that a couple who evaded the domicile's marriage law "is least likely to be thought to have had a reasonable and justified expectation that their marriage would be recognized").

96. Mark Strasser, *What If DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT'L L.J. 249, 254 (2010) ("A domicile could choose to recognize a marriage that was valid where celebrated but prohibited locally, but does not have to do so.").

rather than, for example, moving immediately after the celebration of the marriage,⁹⁷ the marriage's validity is determined in light of the law of the domicile at the time of the marriage.⁹⁸

B. *The Lessons of Loving*

Loving was important because it made clear that state marriage regulations implicate both due process⁹⁹ and equal protection concerns.¹⁰⁰ Yet another aspect of the *Loving* opinion meriting consideration involves an approach that the Court not only did not use but did not even mention in the opinion, namely, the claim that the Lovings' marriage had to be recognized because it was valid where celebrated.¹⁰¹

Mildred Jeter and Richard Loving, an interracial couple,¹⁰² were Virginia residents¹⁰³ who were barred from marrying by local law.¹⁰⁴ They celebrated their marriage in the District of Columbia, where their marrying was permitted.¹⁰⁵ They then went back to Virginia to live.¹⁰⁶ The Lovings were charged with and pled guilty to violating Virginia's interracial marriage prohibition.¹⁰⁷ The trial court sentenced each to a year in jail, but suspended the sentences on the condition that the Lovings not be in Virginia together for twenty-five years.¹⁰⁸ Had the United States Supreme Court not invalidated that decision, the Lovings would not have been able to go to Virginia together to visit family and friends.¹⁰⁹

97. Strasser, *supra* note 85, at 17 (“[I]f parties plan to move immediately after their wedding to a different state, the marriage would have to be in accord with the law of the state where the couple intended to live . . .”).

98. See Strasser, *supra* note 96, at 249 (“[T]he law of the domicile at the time of a marriage’s celebration has long been understood to determine the validity of that marriage . . .”).

99. *Loving*, 388 U.S. at 12; see also *supra* notes 12–15 and accompanying text.

100. *Loving*, 388 U.S. at 11–12; see also *supra* text accompanying notes 51–53.

101. See *Loving*, 388 U.S. at 2 (“Mildred Jeter . . . and Richard Loving . . . were married in the District of Columbia pursuant to its laws.”).

102. *Id.* (discussing “Mildred Jeter, a Negro woman, and Richard Loving, a white man”).

103. *Id.* (discussing “two residents of Virginia, Mildred Jeter . . . and Richard Loving”).

104. *Id.* at 4 (discussing the “comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages”).

105. *Id.* at 2.

106. *Id.* (“Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County.”).

107. *Loving*, 388 U.S. at 3 (“[A] grand jury issued an indictment charging the Lovings with violating Virginia’s ban on interracial marriages.”).

108. *Id.* (“On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years.”).

109. Cf. John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 *HOW*.

At least one question raised by this chronology of events is why the *Loving* Court did not simply say that the marriage had to be recognized by Virginia because it was validly celebrated in the District of Columbia. One possible explanation is that if Virginia had been permitted to prohibit such marriages locally, it could also have refused to recognize its domiciliaries' marriages even if celebrated in a different state in accord with local law.¹¹⁰ A different explanation is that the Court wanted to issue a robust ruling and thereby strike a blow for marriage equality.¹¹¹ The Court would not have wanted to rest the opinion on Virginia's being required to recognize marriages validly celebrated elsewhere,¹¹² because such a decision would have left open whether states could refuse to permit such marriages to be celebrated locally. Indeed, some commentators read *Loving* to be *implicitly* ruling that the marriage had to be recognized because validly celebrated elsewhere and, in addition, *explicitly* stating that interracial marriages could not be prohibited locally.¹¹³

A little over a decade before *Loving* was decided, the Supreme Court had the opportunity in *Naim v. Naim*¹¹⁴ to uphold the validity of an interracial marriage celebrated in accord with local law, notwithstanding Virginia's refusal to recognize the marriage.¹¹⁵ Rather than avail itself of the opportunity to hold that the marriage had to be recognized because validly celebrated elsewhere, the Court instead

L.J. 15, 38–39 (2007) (“For the Lovings, the Supreme Court’s ruling paved the way for them to return to their families and friends in their home state of Virginia.”).

110. A separate issue is whether a state must recognize a marriage validly celebrated in a sister *domiciliary* state. See Mark Strasser, *What’s Next After Windsor?* 6 ELON L. REV. 387, 397 (2014) (“Arguably, the right to travel precludes a state from refusing to recognize a marriage that is valid in a sister domicile.”).

111. Cf. Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385, 1390 (2013) (“Perhaps the single most important and influential equality ruling regarding family law is *Loving v. Virginia*, in which the Supreme Court invalidated the Virginia anti-miscegenation law that barred interracial marriage.”).

112. Some scholars contend that a marriage celebrated in a sister state must be recognized throughout the United States. See, e.g., Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 4 (2005) (suggesting that “states might be constitutionally obligated to recognize marriages that are valid where celebrated”).

113. Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377, 413 (2012) (“Because the Lovings left Virginia to marry in Washington D.C. and returned to Virginia after a short period, the marriage was ‘evasive’ but otherwise unexceptionable as a marriage of two people of childbearing age. While the overriding principle of the Court’s holding in *Loving* was racial equality, thus requiring a sweeping mandate on the basis of individual rights of all persons in the United States, its subtext was necessarily federalism. Its racial meaning overwhelmed its meaning for *marriage federalism*.”).

114. *Naim v. Naim*, 87 S.E.2d 749, 750, *vacated*, 350 U.S. 891 (1955), *and adhered to* 90 S.E.2d 849 (1956).

115. See *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam).

suggested that the challenge to Virginia's anti-miscegenation statute was "devoid of a properly presented federal question"¹¹⁶ The *Naim* litigation was somewhat complicated, however, because it involved two appeals to the United States Supreme Court,¹¹⁷ and consideration of those two cases (as well as the actions by the Virginia Supreme Court) will illustrate some of the complexities involved in adopting rules for interstate marriage recognition.

C. *Naim v. Naim*

Ruby Elaine Naim sought to end her marriage to her husband Han Say Naim,¹¹⁸ alleging that he had committed adultery¹¹⁹ and that their marriage was in violation of Virginia's Racial Integrity Act.¹²⁰ Even if it had been true that Han had committed adultery,¹²¹ Ruby might not have been able to secure a divorce on that basis¹²² if indeed she also had committed adultery.¹²³ Rather than decide whether one or both parties had committed adultery, the trial court instead annulled the marriage because the parties were precluded from marrying each other on account of their respective races.¹²⁴ Han Say Naim appealed the decision to the Virginia Supreme Court, challenging the power of the trial court to grant an annulment on that basis.¹²⁵

The Virginia Supreme Court provided the background information as follows:

116. *Id.*

117. *See Naim*, 350 U.S. at 891 (1955); *Naim*, 350 U.S. at 985 (1956).

118. Mr. Naim's name is rendered in multiple ways in case law: as "Han Say Naim" in some and "Ham Say Naim" in others. For clarity, he will be referred to as "Han Say Naim" or simply "Han" herein.

119. Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 119 (1998) ("Ruby Elaine Naim, a white woman, sought a divorce on the grounds of adultery.").

120. *Id.* at 131 ("Ruby Elaine Naim sought to end the marriage either under the aegis of the Racial Integrity Act, or through absolute divorce.").

121. *See id.* (discussing "her allegation that [Han] Say Naim committed adultery in November of 1952").

122. *Cf. Donaldson v. Donaldson*, 27 Va. Cir. 327, 331 (1992) ("Under the doctrine of recrimination, if both parties are guilty of adultery, both are barred from using adultery as a ground for divorce.") (citing *Surbey v. Surbey*, 5 Va. App. 119 (1987)).

123. Dorr, *supra* note 119, at 131 ("Ruby, however, appears to have engaged in marital impropriety herself.").

124. *Id.* at 119 ("Choosing not to rule on the divorce action, Kellam granted Ruby Elaine Naim an annulment . . .").

125. *Naim v. Naim*, 87 S.E.2d, 749, 751 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *and adhered to* 90 S.E.2d 849 (1956) ("The first assignment of error charges that the trial court was constitutionally without the power to annul the marriage on the basis of race . . .").

The suit was brought by the appellee, who is a white person, duly domiciled in Virginia. The appellant is a Chinese and was a non-resident of the State at the time of the institution of the suit. On June 26, 1952, they left Virginia to be married in North Carolina. They were married in that State and immediately returned to Norfolk, Virginia, where they lived together as husband and wife. It is conceded that they left Virginia to be married in North Carolina for the purpose of evading the Virginia law which forbade their marriage.¹²⁶

The court then focused on “whether the statute in question is beyond the power of the State to enact under the Due Process and Equal Protection clauses of the Fourteenth Amendment,”¹²⁷ arguing that the Virginia statute was compatible with Fourteenth Amendment protections.¹²⁸ Allegedly, the Fourteenth Amendment does not “prohibit the State from enacting legislation to preserve the racial integrity of its citizens”¹²⁹ and does not “den[y] the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.”¹³⁰ The court continued, “We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.”¹³¹

When the *Loving* Court discussed why the Virginia statute was unconstitutional, it referred to the justifications, offered by the *Naim* court,¹³² to help establish that the Virginia laws were “designed to maintain White Supremacy.”¹³³ However, the part of the *Naim* decision that is the focus of concern here is the court’s description of the parties’ connection to Virginia.

When describing the relationships between Virginia and the parties, the *Naim* court explained that “[t]he suit was brought by the appellee [Ruby], who is a white person, duly domiciled in Virginia. The appellant [Han] is a Chinese and was a non-resident of

126. *Id.* at 750.

127. *Id.* at 751.

128. *See id.* at 752 (citing *State v. Gibson*, 36 Ind. 389, 402–03 (1871)).

129. *Id.* at 756.

130. *Id.*

131. *Naim*, 87 S.E.2d at 756.

132. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“In *Naim*, the state court concluded 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,’ obviously an endorsement of the doctrine of White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.”) (citing *Naim*, 87 S.E.2d at 756).

133. *Id.* at 11.

the State at the time of the institution of the suit.”¹³⁴ Here, the court seemed to be explaining why Virginia had jurisdiction over the *divorce*, because the party seeking the divorce was domiciled in the state.¹³⁵

Yet, the court did not confine its comments to establishing the jurisdictional basis for granting the divorce, because it also discussed the circumstances surrounding the marriage, namely, that the parties “left Virginia to be married in North Carolina . . . and immediately returned to Norfolk, Virginia, where they lived together as husband and wife.”¹³⁶ Here, the Virginia Supreme Court implied, accurately, that Han and Ruby were intentionally going to North Carolina to marry, because they knew that they were barred by Virginia law from marrying.¹³⁷

What may have caused some confusion for members of the United States Supreme Court was the language chosen by the Virginia Supreme Court to describe the connections between the state and the parties. The court mentioned that Ruby was domiciled in Virginia at the time of the divorce.¹³⁸ Rather than say that Ruby was domiciled in Virginia prior to the marriage, however, the court instead merely pointed out that the couple was in Virginia immediately before marrying in North Carolina.¹³⁹ The United States Supreme Court might have remanded to try to ascertain whether the Virginia court’s mentioning domicile at the time of divorce but not at the time of the marriage indicated that the couple’s connection to the state at the time of the marriage was somewhat tenuous.

Suppose, for example, that Ruby and Han had planned to move to North Carolina where their marriage was legal. In that event, they would have been marrying in accord with the law of the domicile at the time of the marriage. Even if they changed their minds after having lived in North Carolina for a while and then moved back to Virginia, it might still be argued that they had married in accord with the law of their domicile at the time of the marriage.¹⁴⁰

134. *Naim*, 87 S.E.2d at 750.

135. See *Williams v. North Carolina*, 317 U.S. 287, 298–99 (1942) (“Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”).

136. *Naim*, 87 S.E.2d at 750.

137. See *Dorr*, *supra* note 119, at 129 (“Informed that Virginia barred interracial marriage, the two drove to Elizabeth City, North Carolina on June 26, 1952 to be married: consciously attempting to evade the Racial Integrity Act.”).

138. *Naim*, 87 S.E.2d at 750.

139. *Id.*

140. Cf. *State v. Ross*, 76 N.C. 242, 247 (1877) (upholding validity of interracial marriage celebrated in accord with the law of the domicile, South Carolina, even though the couple was now living in North Carolina where their marriage could not be celebrated).

The claim here is not that the Naims had planned on staying in North Carolina, especially given that they immediately returned to Virginia after the wedding,¹⁴¹ but merely that the United States Supreme Court might have been seeking some clarification regarding where the parties intended to live as a married couple.

When the Virginia Supreme Court decision was appealed, the United States Supreme Court vacated the decision and remanded:

The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems.¹⁴²

Here, the Court at least seems to be wondering whether the parties were domiciled in Virginia at the time of their marriage, as the Court is seeking clarification with respect to "the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina"¹⁴³ On remand, the Virginia Supreme Court did not offer any additional information about the parties' domicile at the time of the marriage,¹⁴⁴ merely reiterating that the couple "had gone to North Carolina to be married for the purpose of evading the Virginia law which forbade their marriage, were married in North Carolina and immediately returned to and lived in Virginia as husband and wife."¹⁴⁵ This time, however, when the Virginia Supreme Court decision was again appealed, the United States Supreme Court wrote: "The decision of the Supreme Court of Appeals of Virginia . . . in response to our order . . . leaves the case devoid of a properly presented federal question."¹⁴⁶

Commentators discussing *Naim* tend not to focus on the United States Supreme Court's initial remand and then the Court's subsequent failure to seek additional information when the Virginia court

141. *Naim*, 87 S.E.2d at 750.

142. *Naim v. Naim*, 350 U.S. 891, 891 (1955) (per curiam) (citing *Rescue Army v. Mun. Court*, 331 U.S. 549, 584 (1947)).

143. *Id.*

144. Rebecca Schoff, Note, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627, 638 (2009) ("The Virginia Supreme Court then 'refused to comply with the Court's instructions; they denied that the record was unclear and that state law permitted returning final decisions to trial courts in order to gather additional evidence.'") (quoting Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 449 (2005)).

145. *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956).

146. *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) (citations omitted).

did not provide what was requested.¹⁴⁷ Instead, the commentators discuss why the Court might have refrained from addressing whether Virginia’s anti-miscegenation statute violated equal protection guarantees, suggesting that the Court was unwilling to take on interracial marriage bans on the heels of having just struck down segregation in the schools in *Brown v. Board of Education*.¹⁴⁸ The Court’s unwillingness to address the equal protection issues raised by interracial marriage bans has been sharply criticized.¹⁴⁹ The focus here is not on whether the *Naim* Court should have struck down the Virginia anti-miscegenation statutes on equal protection or due process grounds

147. See *infra* notes 148–49 and accompanying text (discussing the secondary literature addressing *Naim*).

148. 347 U.S. 483 (1954); see Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, The Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1124–25 (2006) (“Fearing that the South would not accept a decision striking such a strong emotional chord so soon after the original *Brown* decision, the Court balked, allowing the vile ban on interracial marriage to persist for a dozen more years.”); Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 527 (2012) (“It would seem as though the commentators are correct in observing that the main reason why the Court waited so long was that it feared the consequences of a second major decision—a second bombshell—coming on the heels of *Brown*.”); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 821–22 (2011) (“The Justices dodged *Naim* not because they thought that Jim Crow marriage laws were legally or logically distinct from Jim Crow education laws. Instead, the Court feared that invalidating anti-miscegenation laws so closely on the heels of *Brown* would compromise the validity of the school desegregation decisions because opposition to interracial marriage was so widespread.”); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 449 (2005) (“A majority of the Justices apparently preferred being humiliated at the hands of truculent state jurists to further stoking the fires of racial controversy ignited by *Brown*.”); Conor O’Mahony, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 217 (2014) (“In *Naim v. Naim*, the Supreme Court declined to grant review of a decision of the Supreme Court of Virginia upholding such legislation, even though it seemed to clearly contravene the principles that were at the heart of the Court’s decision in *Brown v. Board of Education* in 1954.”). Indeed, the Virginia court sought to distinguish the constitutional issues implicated in segregated public schools from the constitutional issues implicated by interracial marriage bans. See *Naim v. Naim*, 87 S.E.2d 749, 754–55 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *and adhered to* 90 S.E.2d 849 (1956).

149. See Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 47 (2011) (“If the Equal Protection Clause truly prohibits states from banning interracial marriage, then the Court’s decision in *Naim v. Naim* to dismiss the constitutional challenge to state anti-miscegenation laws by concocting a jurisdictional defect was not only cowardly but lawless.”); Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 478 (2012) (discussing “the Court’s disgraceful and widely condemned decision to duck the issue of interracial marriage when it first presented itself in *Naim v. Naim*”). However, some commentators seem to take a more charitable view of the Court’s action. See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 157 (2007) (“The most famous example is *Naim v. Naim*, in which the Court refused to rule on the constitutionality of a ban on racial intermarriage, largely because it feared that its ruling would provoke outrage, in a way that might diminish the Court’s own authority.”).

as the *Loving* Court did a little over a decade later,¹⁵⁰ but on the Court's ostensible concern the first time the case was remanded.

When asking for more information about Virginia's relationship to the parties at the time of the marriage, the Court *might* have been seeking to find out whether either of the parties had been domiciled in Virginia at the time of the marriage.¹⁵¹ Whether the parties were North Carolina rather than Virginia domiciliaries would *not* have affected whether anti-miscegenation statutes themselves violate due process and equal protection guarantees.¹⁵² However, if the couple had been domiciled in a different state, married, and had then moved to Virginia, there would have been a different ground to strike down the refusal to recognize an interracial marriage without striking down the anti-miscegenation laws themselves, namely, that a marriage valid in a sister domiciliary state had to be recognized as valid even if such a marriage could not be celebrated in the forum.¹⁵³

D. Horizontal Federalism

States have long been forced to determine the conditions under which they will recognize marriages validly celebrated elsewhere.¹⁵⁴ Traditionally, those decisions were decided under state law rather than Fourteenth Amendment guarantees.¹⁵⁵ When addressing the constitutionality of same-sex marriage bans, the Court could have held that the Fourteenth Amendment does not require states to permit same-sex marriages to be celebrated but nonetheless does require states to recognize same-sex marriages if validly celebrated elsewhere.¹⁵⁶ There are important reasons, however, that the Court was unlikely to do so.¹⁵⁷

150. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

151. See Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75, 79 (2007) ("The Court might instead have believed that the important issue was whether either of the parties was domiciled in Virginia when the marriage was contracted in North Carolina.").

152. See *Loving*, 388 U.S. at 12 ("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."); *id.* ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.").

153. See *State v. Ross*, 76 N.C. 242, 247 (1877) (upholding interracial marriage valid in a sister domiciliary state at the time of its celebration without striking down the state anti-miscegenation statute).

154. See Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!*, 2012 CARDOZO L. REV. DE NOVO 155, 161 (2012).

155. See *id.* ("These rules of interstate marriage recognition were not dictated by constitutional mandates, but grew, instead, out of the common law principle of comity—respect for the actions of sister states.").

156. See *infra* note 188 and accompanying text.

157. See *infra* notes 187–88 and accompanying text.

Several commentators have discussed horizontal federalism,¹⁵⁸ which focuses on “the relationship of the states to each other.”¹⁵⁹ One commentator has suggested that horizontal federalism might be understood “as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.”¹⁶⁰ If limiting the out-of-state effects of in-state decisions is the overriding goal, however, then one might expect that the Constitution would reduce or eliminate friction between the states by severely limiting the extra-territorial effects of state laws.¹⁶¹

One way to cash out this friction-reducing approach is to suggest that states have little or no obligation to respect sister state sovereignty insofar as respecting another state’s sovereignty would undermine the sovereignty of the forum.¹⁶² Such an approach might be justified by noting that each state would seem to have “an equivalently strong claim to operate without interference from the others.”¹⁶³

Yet, friction reduction may not be particularly easy to achieve in the context of interstate marriage recognition. Consider two states, one (Y) recognizing a particular kind of marriage and the other (N) not recognizing it. Friction would be reduced for N were that state

158. See, e.g., David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982–1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1583 (1998); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 289 (2003); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 406 (2006); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 263 (2005).

159. Steve Sanders, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 106 (2014); see also Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59, 110 (2014) (describing horizontal federalism as focusing on “the proper allocation of power between the states”).

160. Erbsen, *supra* note 158, at 503; see also Gerken & Holtzblatt, *supra* note 158, at 81 (“In horizontal federalism, . . . worries about the interstate frictions run so deep that some even think that preventing friction is part of the very definition of horizontal federalism.”).

161. Cf. Mark D. Rosen, *“Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 731 (2007) (“The primary aspect of federalism these constitutional principles help determine is the nature of interstate relations—what is generally termed ‘horizontal’ federalism As a result of these constitutional principles, some extraterritorial state regulations unquestionably, and quite properly, are constitutionally impermissible.”).

162. See Alan M. Trammell, *Toil and Trouble: How the Erie Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3277 (2014) (“[W]ith regard to horizontal federalism, though, one state has only the most minimal obligation to respect a sister state’s sovereignty.”).

163. Erbsen, *supra* note 158, at 508.

not forced to recognize certain marriages the state believes contrary to public policy. Yet, when Y recognizes a marriage, the state does not merely seek to create a status that will only be recognized within the state. On the contrary, it seeks to create a status that will be recognized in other states too, so permitting N not to recognize such marriages will *increase* friction in Y.¹⁶⁴

Horizontal federalism doctrine is not particularly helpful in the context of interstate marriage recognition—it is simply unclear which policies will reduce friction between the states. Deference to the policies of each state will reduce friction in the objecting states but increase it in those states recognizing the unions at issue. A policy of non-deference will increase friction in the objecting states but reduce it in those states affording recognition.

Not all commentators view friction as an unmitigated evil¹⁶⁵—a state's being forced to confront a different state's practices may bring about beneficial change.¹⁶⁶ But whether one views friction as something to be avoided or, instead, as something to be channeled, one still will not have much guidance when attempting to decide whether State Y or State N should be forced to bear the burdens associated with the particular interstate marriage recognition practice adopted.¹⁶⁷

Although not particularly helpful in providing a rationale for deciding which state should be forced to bear the burdens associated with states having differing positions regarding which marriages should be recognized, horizontal federalism does offer the following suggestion: whatever criterion is used for determining which state's policy should trump, that criterion should be based on some quality other than statehood itself,¹⁶⁸ as no state would have a more privileged position than any other by virtue of being a state.¹⁶⁹ A number

164. Cf. Gerken & Holtzblatt, *supra* note 158, at 78 (“The conventional worry in horizontal federalism, with its focus on territoriality and sovereignty, is that states that favor marriage equality will impose that preference on states that don’t. But it might be just as important to a state to have the same-sex marriages it has blessed recognized outside of its territory.”).

165. *See id.* at 97 (“We need to think about how to harness friction rather than eliminate it.”).

166. *See id.* (“As more states began to marry same-sex couples and those couples began to move, same-sex marriage became a reality for everyday Americans, even those residing outside of blue enclaves. We cannot tell, of course, whether this day-to-day exposure has helped further the cause of marriage equality. But one suspects it might have.”).

167. A separate issue involves the burdens posed by non-recognition on individual families. *See United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013).

168. *See Erbsen, supra* note 158, at 508 (“[T]here is no clearly discernible basis for assessing how the Constitution allocates most powers among the states because the text grants power en masse to the states as a whole.”).

169. Cf. *id.* (“Each state has an equivalently strong claim to exercise collectively held powers absent a context-specific restraint.”).

of possible criteria suggest themselves, for example, the domicile's law might be given priority over the law of a non-domicile, the law of the domicile at the time of the marriage might be given priority over the law of a subsequent domicile, etc.¹⁷⁰

E. Traditional Practices

Traditionally, merely because a marriage could not be celebrated within the domicile would not mean that the domicile would refuse to recognize it if validly celebrated elsewhere.¹⁷¹ Whether the marriage would be recognized would depend upon a number of factors including the degree to which the marriage was thought to violate public policy.¹⁷² The factors that were weighed in the domicile's determination of whether to recognize such a marriage, however, did not include Fourteenth Amendment guarantees.¹⁷³

The *First* and *Second Restatements of the Conflict of Laws* set out some parameters with respect to interstate marriage recognition.¹⁷⁴ Both *Restatements* suggest that a marriage valid in the domicile at the time of the marriage should be recognized in other non-domiciliary states.¹⁷⁵ In addition, both *Restatements* suggest that a marriage valid in the domicile at the time of the marriage should be treated as valid throughout the United States,¹⁷⁶ as long as a narrowly defined exception is not met.¹⁷⁷

170. See *infra* notes 187–97 and accompanying text.

171. Strasser, *supra* note 96, at 252 (“[T]he fact that the domicile *could* refuse to recognize a marriage that was prohibited locally but validly celebrated elsewhere does not mean the domicile *would* refuse to recognize such a marriage.”).

172. Cf. Anthony Dominic D’Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 942 (1995) (“If Illinois does not have a statute or judicial rule explicitly barring recognition, Illinois courts would have to determine whether recognizing the marriage would violate a strong public policy of the state of Illinois. If Illinois had such a policy, Illinois courts would not have to recognize the marriage.”)

173. See *supra* note 153 and accompanying text.

174. See Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1, 7 (2000).

175. See *id.* at 10 (“Suppose that Vermont were to recognize same-sex marriages and that a Vermonter were to marry her female partner. Suppose further that this same-sex couple travelled to another state to honeymoon. If that second state subscribed to the recognition position articulated in either the *First* or *Second Restatements*, that second state would recognize the marriage, because the couple’s domicile (Vermont) recognizes the union.”).

176. See Strasser, *supra* note 83, at 341 (“[B]oth Restatements, properly understood, require that subsequent domiciliary states recognize those marriages valid in the states of celebration and domicile at the time of the marriage.”).

177. See Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 291 (1997) (noting that bigamous and certain incestuous marriages are viewed as exceptions not subject to this rule).

Yet, the practices described in the *First* and *Second Restatements* have not thus far been held to be constitutionally required,¹⁷⁸ and the Court has never made clear, for example, whether a subsequent domicile is constitutionally required to recognize a marriage valid in a sister domicile at the time of the marriage's celebration.¹⁷⁹ The case law includes suggestive comments, for example, the *Loughran* Court explained that "[m]arriages 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."¹⁸⁰ The articulated exception—such marriages would not be valid if the law declared them void—referred to the law of the domicile at the time of the marriage.¹⁸¹ That said, however, the *Loughran* Court seemed to be describing choice-of-law practices,¹⁸² and the Court might have had to address whether the Fourteenth Amendment has implications for marriage recognition over and above the constraints imposed on the states with respect to which marriages must be recognized when celebrated within the state.

F. Fourteenth Amendment Guarantees

In *Obergefell*, the Court addressed whether same-sex marriage bans violate Fourteenth Amendment guarantees,¹⁸³ and whether same-sex marriages validly celebrated in one state must be recognized in other states.¹⁸⁴ Because the Court held that same-sex marriage bans

178. Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL'Y 301, 327 (2003) ("It is simply unclear whether the Constitution requires that such marriages [those valid in the domicile at the time of the marriage] be recognized in all of the states.").

179. See Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV'T L. REV. 613, 630 (2012) ("[T]he U.S. Supreme Court has not yet addressed whether subsequent domiciles have the power to refuse to recognize marriages that had been valid in a sister domicile at the time of the marriage's celebration.").

180. *Loughran v. Loughran*, 292 U.S. 216, 223 (1934) (citing *Meister v. Moore*, 96 U.S. 76 (1877)).

181. See Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 332 (1998) ("When the *Loughran* Court was discussing the statute declaring the marriage void, the Court was referring to the statute of the *domicile*.").

182. See Strasser, *supra* note 178, at 326–27 ("Yet, the *Loughran* court [sic] did not suggest that marriages valid in the states of celebration and domicile at the time of the marriage would have to be recognized in every other jurisdiction as a constitutional matter . . .").

183. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

184. See *id.* at 2608 ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

themselves violate Fourteenth Amendment guarantees, states cannot refuse to recognize same-sex marriages validly celebrated in other states.¹⁸⁵

Suppose that the *Obergefell* Court had adopted a different approach. Holding that states must recognize same-sex marriages validly celebrated elsewhere would not have entailed that states had to permit such marriages to be celebrated within the states,¹⁸⁶ so the Court could have adopted the valid-where-celebrated approach as a kind of compromise. Such a compromise would have been difficult to strike, however, without undermining what the Court has already suggested about same-sex marriage,¹⁸⁷ and without having important implications for federalism more generally.¹⁸⁸

The Fourteenth Amendment reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁸⁹

The Fourteenth Amendment provides three different *possible* bases—privileges and immunities, equal protection, and due process guarantees—upon which the Court might hold that although states may refuse to recognize a same-sex marriage celebrated locally (e.g., in a religious ceremony), they must recognize such marriages if validly celebrated elsewhere. The rationales that might be employed under these differing guarantees overlap to some extent.

The right to travel is included within privileges and immunities guarantees,¹⁹⁰ which means that the Court could have focused on

185. *See id.*

186. *Cf.* *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (recognizing interracial marriage validly celebrated elsewhere even though such marriages could not be celebrated within the state).

187. *Cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (“The differentiation demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects”) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

188. *See id.* at 2691 (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons [citing *Loving v. Virginia*, 388 U.S. 1 (1967)], but, subject to those guarantees, ‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’”) (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

189. U.S. CONST. amend. XIV, § 1.

190. *See* Lide E. Paterno, Note, *Federalism, Due Process, and Equal Protection: Stereoscopic Synergy in Bond and Windsor*, 100 VA. L. REV. 1819, 1837 (2014) (“[I]n *Saenz v. Roe*, the majority located the right to interstate travel in the Privileges and Immunities Clause”).

whether right to travel guarantees are implicated when states refuse to recognize certain marriages. Arguably, right to travel guarantees protect marriages valid in the domicile at the time of the marriage.¹⁹¹ To say that one must surrender one's marriage as the price of emigrating to a new state is to impose a heavy burden upon emigrating to that state.¹⁹²

Some commentators have argued, in addition, that the right to travel should be understood to protect any marriages valid in the state of celebration.¹⁹³ Whether that understanding is correct depends in part on whether individuals have a legitimate expectation that a marriage celebrated in another state within their own country will be recognized in their domicile,¹⁹⁴ even when their domicile prohibits such marriages.

Due process guarantees may implicate marriage recognition in two distinct ways:

1. Marriage is a fundamental interest and statutes must be narrowly tailored to promote a compelling state interest to justify overriding that interest.¹⁹⁵ If the state cannot meet its burden, then the state must recognize the marriages when celebrated locally.
2. Due process guarantees might also be thought to serve another role, namely, to require states to recognize a marriage validly celebrated within another domiciliary state or, perhaps, another celebratory state.¹⁹⁶ Here, due process protects the liberty interest acquired by virtue of having celebrated a marriage in accord with the law

191. See Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 554 (2000).

192. See Strasser, *supra* note 61, at 315 ("One issue that might be raised is whether the latter state could refuse to recognize this couple's marriage, i.e., the price of moving to the new state would be the surrender of their marriage.").

193. See Singer, *supra* note 112, at 46 ("Only a rule that requires recognition of marriages that are valid where celebrated will avoid the problem of inconsistent obligations, promote interstate commerce and the right to travel, and treat same sex couples as equal persons before the law.").

194. Cf. Sanders, *supra* note 159, at 100 (suggesting that the place of celebration rule "confirms the parties' expectations") (quoting WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 398 (3d ed. 2002)).

195. See *United States v. Windsor*, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting).

196. See Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1424 (2012) ("[A]n individual who legally marries in her state of domicile, and then migrates to another state that becomes her new domicile, has a significant liberty interest under the Fourteenth Amendment's Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law.").

of the state of celebration, even if that liberty interest is not thought sufficiently fundamental to be ranked as fundamental.¹⁹⁷

If the Court were to have adopted the approach whereby marrying in another state creates a *significant* liberty interest, the Court would have had to explain why the implicated liberty interest in one's having married in another state is not itself *fundamental*. Further, if the Court were to start down this road, it might have to address a related issue. When one state claims to have a compelling interest in not recognizing certain marriages but other states recognize such marriages without suffering dire consequences, can it really be plausibly maintained that the former state has a compelling interest in not recognizing such marriages?

It should be noted that the difficulty suggested here does not disappear now that the Court has issued a decision on the merits with respect to whether federal guarantees protect the right to marry a same-sex partner. If one state recognizes first cousin marriages and another does not, the latter state may be hard-pressed to explain what compelling interests are served by that prohibition in light of the non-disastrous experience of the former state.

Equal protection guarantees might also be viewed as two-pronged:

1. They might provide the basis upon which same-sex marriage bans are struck down as a general matter. Thus, the Virginia anti-miscegenation statutes were struck down because they violated equal protection guarantees.¹⁹⁸
2. Equal protection guarantees might also operate in a more limited way. When a state is willing to recognize certain but not other marriages celebrated elsewhere but prohibited locally, there should be some legitimate basis upon which these recognition policies are based. Absent some recognizable justification, the state may be inferred to be acting arbitrarily.

Consider a state that recognizes any marriage celebrated in a sister state with the sole exception that this state refuses to recognize a same-sex marriage validly celebrated elsewhere.¹⁹⁹ Bracket

197. *But cf.* *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”).

198. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

199. *See* S.D. CODIFIED LAWS § 25-1-38 (2015) (“Any marriage contracted outside the jurisdiction of this state, except a marriage contracted between two persons of the same

ing same-sex marriages, this state recognizes various marriages, regardless of how much such marriages are thought to violate public policy and thus are prohibited in the domicile. One might wonder what special state interests would justify singling out same-sex marriages for non-recognition. If no such justification can be offered, then the court might infer that animus or improper purpose is motivating the non-recognition.²⁰⁰

CONCLUSION

When the *Obergefell* Court held that same-sex marriage bans themselves violate constitutional guarantees, it was unsurprising for the Court to hold, in addition, that states must recognize such marriages if validly celebrated elsewhere. The Court did not need to address the conditions, if any, under which marriages prohibited locally must nonetheless be recognized if celebrated in accord with the law of another state.

Were the Court to have held that states may prohibit same-sex marriages without violating federal constitutional guarantees, the Court would have had to suggest that there was a sufficiently important reason justifying such a ban. Such a holding, however, would have contradicted much of the tenor of *Windsor*.²⁰¹ Were the Court in addition to have suggested that states could not refuse to recognize same-sex marriages if validly celebrated elsewhere, the Court would then have had to specify why the interests justifying the refusal to recognize such marriages when celebrated within the state were not sufficiently compelling to justify the refusal to recognize them when celebrated elsewhere. When doing so, the Court would have had to keep in mind how its analysis would affect interstate recognition based on other classifications about which states disagree, e.g., marriage restrictions based on consanguinity or affinity. In addition, the Court might have needed to address the background conditions under which such unions would have to be recognized, e.g., whenever valid where celebrated or only if valid in the domicile at the time of the marriage. Such a holding would invite a general analysis concerning which marriages, validly celebrated somewhere in the country, would have to be recognized throughout the country and, perhaps, whether the validity of a marriage is established according

gender, which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state.”), *invalidated by Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862 (S.D. 2015).

200. *Cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

201. *Cf.* *Strasser*, *supra* note 83, at 381, 383.

to the law of the domicile or according to the law of the state of celebration or according to some other rule.

Traditionally, marriage is a matter of state rather than federal law.²⁰² Current constitutional jurisprudence does not make clear, however, which state law determines validity.²⁰³ Although this is an important issue that should be addressed, it applies to more than same-sex marriages and the Court was understandably reluctant to announce a general rule regarding interstate recognition of marriages.

Currently, states differ about the age of consent,²⁰⁴ and the prohibited degrees of consanguinity and affinity,²⁰⁵ although they agree about many matters. Judging from current practices, there would not be a wholesale change in marriage laws were the state of celebration rule adopted. Nonetheless, the Court would have to offer some account of how its holdings fit into the current federalism jurisprudence.

By holding that same-sex marriage bans themselves violate constitutional guarantees, the Court did not need to fully address interstate marriage recognition issues, just as the Court did not focus on those issues in either *Naim* or *Loving*. That said, now that same-sex marriage has been taken off the table, confusions about the

202. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

203. See Strasser, *supra* note 83, at 340.

204. Compare ALA. CODE § 30-1-4 (2015) (“A person under the age of 16 years is incapable of contracting marriage.”), with W. VA. CODE ANN. § 48-2-301 (West 2015).

- (a) The age of consent for marriage for both the male and the female is eighteen years of age. A person under the age of eighteen lacks the capacity to contract a marriage without the consent required by this section.
- (b) The clerk of the county commission may issue a marriage license to an applicant who is under the age of eighteen but sixteen years of age or older if the clerk obtains a valid written consent from the applicant’s parents or legal guardian.
- (c) Upon order of a circuit judge, the clerk of the county commission may issue a marriage license to an applicant who is under the age of sixteen, if the clerk obtains a valid written consent from the applicant’s parents or legal guardian. A circuit judge of the county in which the application for a marriage license is filed may order the clerk of the county commission to issue a license to an applicant under the age of sixteen if, in the court’s discretion, the issuance of a license is in the best interest of the applicant and if consent is given by the parents or guardian.

Id. § 48-2-301.

205. Compare IND.CODE ANN. § 31-11-8-3 (West 2015) (“A marriage is void if the parties to the marriage are more closely related than second cousins. However, a marriage is not void if: (1) the marriage was solemnized after September 1, 1977; (2) the parties to the marriage are first cousins; and (3) both of the parties were at least sixty-five (65) years of age when the marriage was solemnized.”), with ARK. CODE ANN. § 9-11-106(a) (West 2015) (“All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, and between aunts and nephews, and between first cousins are declared to be incestuous and absolutely void.”).

constitutional parameters of interstate marriage recognition remain. Those issues deserve discussion and resolution, although it was understandable that the *Obergefell* Court did not want to enter into that thicket, because doing so would have undermined both what the Court has already suggested about constitutional protection of same-sex unions in particular and what has been said about state control of domestic relations as a general matter.