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ARTICLES

INTERSTATE MARRIAGE RECOGNITION AND THE RIGHT TO TRAVEL

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INTRODUCTION

Historically, states limited marriage on a variety of bases—individuals were precluded from marrying because they were too young,[1] of different

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races,[2] or too closely related by blood.[3] Further, some states limited the ability of individuals to remarry if these individuals were responsible for the termination of their first marriages.[4] 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.[5]

Difficult issues involving interstate recognition arose when individuals barred from marrying within the state went elsewhere to celebrate their unions.[6] 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.[7] 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 over a weekend.[8]

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.[9] 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.

Part I of this article outlines the kinds of analyses offered by courts when determining whether the forum state would recognize a marriage that could not be celebrated locally but had nonetheless been validly celebrated

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1. *See, e.g.,* Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (minor's marriage annulled).

2. *See, e.g.,* Naim v. Naim, 87 S.E.2d 749 (Va. 1955) (racial intermarriage barred by local law).

3. *See, e.g., In re* Estate of Stiles, 391 N.E.2d 1026 (Ohio 1979) (marriage between uncle and niece void ab initio).

4. *See, e.g.,* Pennegar v. State, 10 S.W. 305 (Tenn. 1889).

5. *See, e.g.*, State v. Kennedy, 76 N.C. 251 (1877) (interracial marriage prohibited in North Carolina was permitted in South Carolina).

6. *See id*. at 252 (refusing to uphold validity of marriage legally celebrated in neighboring state because recognizing the marriage would undermine local law).

7. Garcia v. Garcia, 127 N.W. 586, 588-89 (S.D. 1910) (discussing some of the consequences of refusing to recognize a marriage).

8. *Cf.* Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 206 (2005) ("Can Utah residents get married on a weekend trip to Boston and then force Utah to recognize the marriage?").

9. *See, e.g.,* Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 270 (2006) ("New York's comity law, which reflects the State's autonomous decision to recognize virtually all marriages that are valid where they are celebrated, has led to recognition of marriages that the State's own law does not permit.").

elsewhere. Part II discusses some of the federal constitutional constraints on the forum state's ability to refuse recognition of a marriage validly celebrated in a sister state. This article concludes by suggesting that federal constitutional guarantees should be understood as requiring states to recognize a marriage validly celebrated in a sister domiciliary state unless the forum state can articulate important or, perhaps, compelling reasons to justify the refusal to recognize such unions. This likely means that same-sex marriages validly celebrated in certain states must be recognized in other states even if such marriages could not be contracted in those forum states.

I. INTERSTATE RECOGNITION PRACTICES

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 may be related by blood and still be permitted to marry.[10] States also differ with respect to the age at which individuals can marry.[11] Before 1967 when the

10. Some states expressly prohibit marriage between first cousins. ALASKA STAT. § 25.05.021 (2008); ARIZ. REV. STAT. ANN. § 25-101(A) (2009); ARK. CODE ANN. § 9-11-106(a) (2009); COLO. REV. STAT. § 14-2-110(1) (2009); 750 ILL. COMP. STAT. 5/212(a)(4) (2009); IOWA CODE § 595.19(1)(c) (2009); KAN. STAT. ANN. § 23-102 (2008); KY. REV. STAT. ANN. § 402.010(1) (LexisNexis 2009); LA. CIV. CODE ANN. art. 90 (2010); ME. REV. STAT. ANN. tit. 19-A, § 701(2)(A) (2009); MICH. COMP. LAWS §§ 551.3-.4 (2009); MINN. STAT. § 517.03(a)(3) (2010); MISS. CODE ANN. § 93-1-1(1) (2009); MO. REV. STAT. § 451.20 (2010); MONT. CODE ANN. § 40-1-401(1)(b) (2009); NEV. REV. STAT. § 122.020(1) (2007); N.H. REV. STAT. ANN. § 457:2 (2009); N.C. GEN. STAT. § 51-3 (2009) (if double first cousins); N.D. CENT. CODE § 14-03-03(5) (2009); OHIO REV. CODE ANN. § 3101.01(A) (LexisNexis 2009); OKLA. STAT. tit. 43, § 2 (2010); OR. REV. STAT. § 106.020(2) (2009); 23 PA. CONS. STAT. ANN. § 1304(e) (West 2009); S.D. CODIFIED LAWS § 25-1-6 (2009); WASH. REV. CODE § 26.04.020(1)-(2) (2010); W. VA. CODE § 48-2-302(a) (2009); WIS. STAT. § 765.03(1) (2009). Other states include no express limitation. ALA. CODE § 13A-13-3 (2009); CAL. FAM. CODE § 2200 (West 2010); CONN. GEN. STAT. § 46b-21 (2009); FLA. STAT. § 741.21 (2010); GA. CODE ANN. § 19-3-3 (2009); HAW. REV. STAT. § 572-1(1) (2009); IDAHO CODE ANN. § 32-205 (2009); MD. CODE ANN., FAM. LAW § 2-202 (LexisNexis 2009); MASS. GEN. LAWS ch. 207, §§ 1-2 (2009); NEB. REV. STAT. § 28-702 (2009); N.Y. DOM. REL. LAW § 5 (McKinney 2010); R.I. GEN. LAWS §§ 15-1-1 to -2 (2008); S.C. CODE ANN. § 20-1-10 (2009); TENN. CODE ANN. § 36-3-101 (2009); TEX. FAM. CODE ANN. § 6.201 (Vernon 2009); VA. CODE ANN. § 20-38.1 (2009).

11. *Compare* ARIZ. REV. STAT. ANN. § 25-102(A) (2007) ("Persons under eighteen years of age shall not marry without the consent of the parent or guardian having custody of such person. Persons under sixteen years of age shall not marry without the consent of the parent or guardian having custody of that person and the approval of any superior court judge in the state.") *and* ARK. CODE ANN. § 9-11-208(d) (2009) ("No license shall be issued to persons to marry unless and until the female shall attain the age of sixteen (16) years and the male the age of seventeen (17) years and then only by written consent by a parent or guardian until the male shall have attained the age of eighteen (18) years and the female the age of eighteen (18) years.") *with* MD. CODE ANN., FAM. LAW § 2-301(a) (LexisNexis 2006) ("An individual 16 or 17 years old may not marry unless: (1) the individual has the consent of a parent or guardian and the parent or guardian swears that the individual is at least 16 years old; or (2) if the individual does not have the consent of a parent or guardian, either

Supreme Court struck down antimiscegenation laws as violating federal constitutional guarantees,[12] states also differed with respect to whether interracial couples could marry.[13] 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.[14] 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 was celebrated.

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

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.[15] That such a marriage could not be contracted locally, however, did not mean that the marriage could not be contracted elsewhere.[16] Indeed, it is not at all

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party to be married gives the clerk a certificate from a licensed physician or certified nurse practitioner stating that the physician or nurse practitioner has examined the woman to be married and has found that she is pregnant or has given birth to a child.") *and id.* § 2-301(b) ("An individual 15 years old may not marry unless: (1) the individual has the consent of a parent or guardian; and (2) either party to be married gives the clerk a certificate from a licensed physician or certified nurse practitioner stating that the physician or nurse practitioner has examined the woman to be married and has found that she is pregnant or has given birth to a child.") *and* N.H. REV. STAT. ANN. § 457:4 (2007) ("No male below the age of 14 years and no female below the age of 13 years shall be capable of contracting a valid marriage, and all marriages contracted by such persons shall be null and void.") *and* OHIO REV. CODE ANN. § 3101.01(A) (LexisNexis 2008) ("Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage.").

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

13. *See id*. at 4 ("Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.").

14. *See*, *e.g.,* Inhabitants of W. Cambridge v. Inhabitants of Lexington, 18 Mass. (1 Pick.) 506, 515 (1823) (discussing the limitation imposed on an individual found to have committed adultery during his first marriage).

15. *Id*. at 508 ("[B]y the laws of this Commonwealth, the marriage of the guilty party, after a divorce *a vinculo* for the cause of adultery, if contracted within this State, would be unlawful and void"). Other states might impose a waiting period on individuals who had divorced without regard to fault. *See* WIS. STAT. § 765.03(2) (2009) ("It is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until 6 months after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of 6 months from the date of the granting of judgment of divorce shall be void.").

16. *See, e.g., Inhabitants of W. Cambridge*, 18 Mass. (1 Pick) at 510 ("One, therefore, who is the guilty cause of a divorce, which by our law disables him from contracting another marriage, may lawfully marry again in a state where no such disability is attached to the offence."). *See also* Dickson v. Dickson's Heirs, 9 Tenn. (1 Yer.) 110 (1826) (woman who

clear how a state could preclude someone who had changed domiciles from remarrying, even if the state had a desire to do so.[17] As the United States Supreme Court has explained, "Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."[18]

Judgments including remarriage limitations have usually, but not always, been viewed as having no extraterritorial effect,[19] 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

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had been barred in Kentucky from remarrying because she had abandoned her husband was nonetheless found to have had a valid marriage with her second husband in Tennessee).

17. Smith v. Smith, 28 N.W. 296, 299 (Neb. 1886) ("The statutes of a state, . . . necessarily are passed for the residents of the state, as such statutes can have no extra territorial effect."); Green v. McDowell, 242 S.W. 168, 172 (Mo. Ct. App. 1922) ("[A] statute prohibiting remarriage within a certain period after a divorce is granted has no extraterritorial effect."); *In re* Cooke's Estate, 85 N.Y.S.2d 104, 106 (1948) ("The prohibition on remarriage contained in the Domestic Relations Law has no extraterritorial effect, and marriage in violation thereof recognized as valid where contracted is accorded full recognition in our courts."); Carter v. Carter, 191 S.W.2d 451, 452 (Tenn. Ct. App. 1944) ("It is elementary that legislation can have no extraterritorial effect. It is binding only within the limits of the sovereignty enacting it.").

A different issue is posed if a court delays the final divorce decree for a particular period, thereby making the person ineligible to remarry until the divorce decree is final. *See, e.g.,* State v. Grengs, 33 N.W.2d 248, 250 (Wis. 1948) ("At the time of the purported marriage between Gordon Grengs and Clara Stoltz in Iowa on July 14, 1947, she was in contemplation of law still married to Paul Stoltz, because it was then still within a year of the time when the judgment of divorce was entered in county court for Polk county in the action between Clara Stoltz and Paul Stoltz on May 15, 1947. Under and by reason of the express provision therein-'That this judgment of divorce insofar as it affects the status of the parties shall not become effective until the expiration of one year from May 15, 1947, being the date of entry hereof',-there was no absolute divorce when the judgment was entered on May 15, 1947.). *See also* Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) ("[T]he Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages.").

18. Huntington v. Attrill, 146 U.S. 657, 669 (1892).

19. *See, e.g.,* Van Storch v. Griffin, 71 Pa. 240, 244 (1872) ("The decree that it shall not be lawful for her to marry again until her husband, from whom she was divorced, shall be actually dead, agreeably to the statute of New York, though it may be valid and binding on her in that state, can have no extra-territorial effect. She was as free to marry in this state as if no such decree had been made."); *In re* Estate of Peart, 97 N.Y.S.2d 879, 882 (N.Y. App. Div. 1950) ("[A] final decree and a prohibition against another marriage by either party for a limited period which, by the weight of authority in this country would have no extraterritorial effect."); Harvey v. State, 238 P. 862, 863-64 (Okla. Crim. App. 1925) ("It is generally held that the inhibition in a decree of divorce has no extraterritorial effect, and is enforceable only in the state where the decree is granted, and that outside of such state the marriage is generally treated as valid, although there is some division in the authorities.").

been precluded from remarrying.[20] 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 may not be recognized by the domicile[21] because evasive marriages not only violate local public policy but also involve an attempt to defraud the state.[22]

While many of the reported cases involved individuals domiciled in one state who had crossed state lines to evade local law,[23] courts have sometimes

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20. *Inhabitants of W. Cambridge*, 18 Mass. (1 Pick) at 510 ("Whether a person so marrying and returning into this State to live with his second wife, his former wife still living, would be protected from the penalties of the statute against polygamy, is a different question."). S*ee also* Marshall v. Marshall, 48 How. Pr. 57, 63 (N.Y. Sup.Ct. 1874) ("We do not now discuss the question whether, if the plaintiff had removed to Pennsylvania, and become a *bona fide* citizen of that state, and whilst so residing there, had contracted marriage, and after such marriage had returned to this state, we should have been compelled to acknowledge the legality and validity of the act. That issue is not before us, and upon it no opinion is expressed."), *rev'd on other grounds*; *In re Estate of Peart*, 97 N.Y.S.2d at 882 ("[I]t is entirely appropriate for a State to provide by law (decision or statute) that if, in violation of a provision in one of its decrees for divorce, a party affected marries in another State, that marriage will be treated as void in the State granting the decree and the offender may be punished criminally therefor in that State.")

21. *See, e.g.,* Williams v. Oates, 27 N.C. (5 Ired.) 535 (1845) (refusing to recognize a marriage of North Carolina domiciliaries contracted in South Carolina to evade local law); Pennegar v. State, 10 S.W. 305, 308 (Tenn. 1889) ("[C]onfining ourselves to the facts of this case, we hold that where citizens of this state withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the salutary statute in question, passed in pursuance of a determined policy of the state, in the interest of public morals, peace, and good order of society, such parties, upon their return to this state, and cohabiting as man and wife, are liable to indictment in the courts of this state for lewdness."); *Harvey*, 238 P. at 863-64 ("It is generally held that the inhibition in a decree of divorce has no extraterritorial effect, and is enforceable only in the state where the decree is granted, and that outside of such state the marriage is generally treated as valid, although there is some division in the authorities. Where, however, the parties leave the state of their domicile and go into another state and marry, for the purpose of evading the law of the state of domicile, and forthwith return to the state of domicile, the marriage is generally held void in the state of domicile.").

22. *See In re* Stull's Estate, 39 A. 16, 18 (Pa. 1898) ("The foregoing reasoning is satisfactory to us. It invokes practically three distinct ideas, to wit: (1) That the foreign marriage is contrary to the positive statute of the domicile; (2) that it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and (3) it was contracted for the express purpose of evading the positive law of the domicile, and is therefore to be regarded as a fraud upon the government and people of the domiciliary residence."). *See also In re* Wood's Estate, 69 P. 900, 903 (Cal. 1902) ("Such conduct has been held by courts of some jurisdictions to be a fraud upon the law of their domicile, and therefore not to be countenanced.").

23. *See Pennegar*, 10 S.W. at 305; *Williams*, 27 N.C. (5 Ired.) at 535; Stull's Estate, 39 A. at 16; Osoinach v. Watkins, 180 So. 577 (Ala. 1938); Estate of Mortenson, 316 P.2d 1106 (Ariz. 1957); Williams v. McKeene, 193 Ill. App. 615 (1915); Beddow v. Beddow, 257 S.W.2d 45 (Ky. Ct. App. 1952); Stevenson v. Gray, 56 Ky. (17 B. Mon.) 193 (1856);

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,[24] although much of the opinion supported the proposition that the state should not have plenary power in this regard.

The *Pennegar* court noted that 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.[25]

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."[26] However, there are exceptions to that rule: (1) "marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries,"[27] 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."[28] Basically, the court in *Pennegar* suggested that it was in the interest of both society and the individuals

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Harrison v. State, 22 Md. 468 (1864); *In re* Takahashi's Estate, 129 P.2d 217 (Mont. 1942); State v. Hand, 126 N.W. 1002 (Neb. 1910); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958); State v. Kennedy, 76 N.C. 251 (1877); Loving v. Commonwealth, 147 S.E.2d 78 (Va. 1966); Naim v. Naim, 87 S.E.2d 749 (Va. 1955); Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).

24. 10 S.W. at 306 (claiming that the "legislature has, beyond all possible question, the power to enact 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 statutes, when they come or return to the state; and some of the states have in terms legislated on the subject."). *See also* Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 366 (Va. 1939) ("One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders. Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law."); *Osoinach*, 180 So. at 581 ("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.").

25. *Pennegar*, 10 S.W. at 306.

26. *Id.*

27. *Id.*

28. *Id.*

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,[29] where incest is understood to apply only to marriages in the direct line of consanguinity or to marriages between siblings.[30] 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.[31] 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."[32]

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 pronounced public policy of the particular state,"[33] 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, noting that "where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile."[34] For example, a couple failing to meet all

29. *Id.* ("To the first class belong those which involve polygamy and incest.").

30. *Id.* ("[I]n the sense in which the term 'incest' is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters.").

31. *See e.g.,* State v. Cutshall, 15 S.E. 261, 262 (N.C. 1892).

32. *Id. See also* Stevenson v. Gray, 56 Ky. (17 B. Mon.) 193, 208 (1856) ("But with respect to incestuous marriages, the exception holds good with respect to such only as being manifestly contrary to the law of nature, and subversive of the good order of society, are alike condemned by the common sentiment of all civilized, or at least of all Christian nations. As between lineal ascendants and descendants, this condemnation practically considered makes no discrimination founded on nearness or remoteness of degree, but in the collateral line it goes no farther than to prohibit marriages between brothers and sisters.").

33. *Pennegar*, 10 S.W. at 306.

34. *Id.*

of the formal requirements with respect to getting a marriage license, but having met the other marriage requirements may be held to have a valid marriage.[35] As the Indiana Supreme Court explained, whether there is a valid marriage should not depend "upon any mere matters of form or ceremony."[36]

Even where the focus was not merely on the formal but, instead, on the more substantive marriage requirements, the exception as written was overbroad. The *Pennegar* court explained that:

> 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.[37]

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.

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35. *See e.g.,* De Potty v. De Potty, 295 S.W.2d 330, 331 (Ark. 1956) (upholding marriage despite the lack of an Arkansas marriage license); *In re* Estate of Farraj, 2009 WL 997481, *1 (N.Y. Sur. April 14, 2009). The statutory requirements for a valid marriage differ in New York and New Jersey. Under the laws of New Jersey, a marriage is void without a state issued marriage license. N.J. STAT. ANN. § 37:1-10 (West 2002) ("[N]o marriage . . . shall be valid unless the contracting parties shall have obtained a marriage license . . . and failure in any case to comply . . . shall render the purported marriage absolutely void.") Although a marriage license is also required under New York's law, N.Y. DOM. REL. LAW § 13 (McKinney 1999), a marriage is not void for failure to obtain a marriage license if the marriage was solemnized. *Id.* § 25 ("Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized . . . ."). *See also* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 266-67 (2003) ("Other legal prerequisites to marriage - such as the requirement of a marriage license issued only after obtaining copies of the parties' birth certificates; the results of blood tests to screen for venereal disease and later AIDS; the affidavit that the parties were not related within the prohibited degrees; the consent of parents, if necessary; the lapse of seventy-two hours between issuance of the license and performance of the ceremony; a duly qualified and registered celebrant; three witnesses to the ceremony; and an act of marriage executed at the ceremony and signed by the parties, the celebrant and the witnesses were considered by the jurisprudence as merely directory. Therefore, the failure to comply with any such 'formalities' did not affect the validity of the parties' marriage." (footnotes omitted)).

36. Teter v. Teter, 101 Ind. 129, 136 (1885).

37. *See Pennegar*, 10 S.W. at 306. *See also* Garcia v. Garcia, 127 N.W. 586, 589 (S.D. 1910) ("The consequences of declaring a marriage void ab initio and annulling the same are very serious. Its effect is to bastardize innocent children, deprive them of their inheritance, and to make the parties whose marriage was legal and valid in the state where contracted criminally liable in this state, and subject to exceedingly severe penalties.").

Certainly, one possibility was to require legislatures to make their intentions clear[38]—they would have to say not only that certain marriages would be void if parties attempted to celebrate them within the state but also that such marriages would be void even if validly celebrated in another domicile.[39] 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 recognize 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."[40] However, rather than simply assuming that this meant that such marriages would be recognized, the court decided that it therefore had the duty of determining whether the state would recognize the marriage.[41]

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[42] and whether innocent parties would suffer if the marriage were recognized.[43] 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."[44] The *Pennegar* court announced that Tennessee would not recognize marriages celebrated elsewhere which were entered into to avoid the limitations

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38. *Cf.* Putnam v. Putnam, 25 Mass. (8 Pick.) 433, 435 (1829) ("If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explicitly enact, that marriages contracted within another State, which if entered into here would be void, shall have no force within this Commonwealth.").

39. Several states have announced that they will not recognize a same-sex marriage even if validly celebrated in another domicile. *See*, *e.g.*, ALASKA STAT. § 25.05.013(a) (2008); ARK. CODE ANN. § 9-11-208(b) (2009); GA. CODE ANN. § 19-3-3.1(b) (2004); KY. REV. STAT. ANN. § 402.045(1) (LexisNexis 1999); OHIO REV. CODE ANN. § 3101.01(C)(2) (LexisNexis 2008); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); TEX. FAM. CODE ANN. § 6.204(c) (Vernon 2006); VA. CODE ANN. § 20-45.2 (2008).

40. *Pennegar*, 10 S.W. at 307.

41. *Id.* (suggesting that the court would determine "whether the marriage in the other state is valid or void when the parties come into this state.").

42. *Id.* (noting that the state criminalized attempts to enter into interracial marriages). *See also* Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970) ("The fact that a marriage in violation of these statutes has been made a felony is indicative of the pronounced convictions of the people of this State in regard to such marriage.").

43. *Pennegar*, 10 S.W. at 308.

44. *Id.*

imposed in Tennessee on individuals committing adulterous behavior during a prior marriage.[45] 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,[46] but also that the new couple might be subject to criminal penalty because they were living together without benefit of (a recognized) marriage.[47]

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 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 that child were legitimate, that is, only if the validity of that marriage were recognized.[48] In this 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.[49] 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

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45. *Id. See also In re* Stull's Estate, 39 A. 16, 17 (Pa. 1898) ("But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals and contrary to public policy, leave their domicile, and enter another, for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional, and the great weight of authority is against the validity of such a marriage in the place of their domicile.").

46. *Stull's Estate*, 39 A. at 19-20 (discussing various cases in which a marriage was held invalid and the alleged spouse was not entitled to inherit).

47. *Pennegar*, 10 S.W. at 308.

48. *See* Inhabitants of W. Cambridge v. Inhabitants of Lexington, 18 Mass. (1 Pick.) 506, 511 (1823) ("[I]t is [the guilty husband's] descendants only upon whom the present question can operate, and it would be a harsh measure towards them to deny them the privileges and character of legitimate children, when, under the laws of the State where they were born, they would be recognized as such."); Van Voorhis v. Brintnall, 86 N.Y. 18, 38 (1881) ("Our conclusion is, that as the marriage in question was valid in Connecticut, the appellant Rose Van Voorhis is a legitimate child of Barker, and as such entitled to share in the estate of the testator.").

49. *See, e.g.*, Succession of Caballero, 24 La. Ann. 573, 573 (1872) (individual established domicile in Spain and then came back to Louisiana where he died).

before.[50] 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,[51] and the validity of the marriage would have depended upon how the forum treated evasive marriages.[52] 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.[53] However, an exception has 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.[54] 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.

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50. This is basically what happened in *Newman v. Kimbrough*. 59 S.W. 1061 (Tenn. Ct. App. 1900).

51. *See* Williams v. Clark County Dist. Attorney, 50 P.3d 536, 542 (Nev. 2002) ("[O]nce a legal domicile is fixed, the fact of living elsewhere, the intention to remain in the other residence and the intention to abandon the former domicile must all exist before the legal domicile can change.").

52. For example, Wisconsin refuses to recognize its domiciliaries' marriages, valid elsewhere, if those marriages could not have been celebrated locally. WIS. STAT. § 765.04(1) (2009) ("If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.").

53. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934) ("A marriage which is against the law of the state of domicil 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 domicil, (c) marriage between persons of different races where such marriages are at the domicil regarded as odious, (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) ("Validity of Marriage: (1) The 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. (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

54. *See Newman*, 59 S.W. at 1064 (holding that the marriage would not be recognized even though there had been no evasive marriage). The couple had had the immediate intention of returning to Tennessee upon the celebration of their marriage, even though that marriage could not have been celebrated in Tennessee. *Id*.

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.[55] 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."[56] 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.[57] 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."[58]

Other courts focused on the issue of such marriages, that is, the children produced in the marriage, to yield the opposite policy. For example, in upholding that state's interracial marriage ban, the Georgia Supreme Court suggested that the "amalgamation of the races is not only unnatural, but is always productive of deplorable results . . . [since] the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race."[59] This was thought to be a reason to refuse to recognize such marriages.[60]

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55. 16 Mass. (16 Tyng) 157, 157 (1819).

56. *Id.* at 158-59.

57. *Cf. id.* ("[I]t 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.").

58. *Id.* at 159.

59. Scott v. State, 39 Ga. 321, 323 (1869).

60. *See* Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) ("We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. 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. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius."). *See also* Loving v. Virginia, 388 U.S. 1, 7-8 (1967) (discussing the state's claim that the question of constitutionality of Virginia's interracial marriage ban would thus become whether there was any rational basis for a State to treat interracial marriages different from other marriages. "On this question, the State argues, the

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.[61] They then immediately returned to North Carolina to live.[62] The state's 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."[63]

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.[64] Instead, the couple would have married and lived elsewhere. There would have been no attempt by the couple to circumvent the domicile's law by marrying elsewhere and then returning to the domicile to live as a married couple. The validity of such a marriage might be recognized precisely because the couple had never lived together in the forum,[65] and likely would not have been recognized had the couple tried to return to the state as a married couple.[66]

At least two different issues might be implicated in many of the marriage 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, a couple precluded from marrying by the state's antimiscegenation law might decide to become domiciled in a state where their marriage would be permitted. Their decision to

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scientific evidence is substantially in doubt [whether the children of such marriages are inferior to the children of other marriages] and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.").

61. 76 N.C. 251, 251 (1877).

62. *Id.*

63. *Id.* at 253. *See also* Naim v. Naim , 90 S.E.2d 849, 850 (Va. 1956) (upholding the invalidity of an interracial marriage celebrated in accord with local law in North Carolina by a Virginia domiciliary who returned to Virginia with her husband immediately after the marriage).

64. *See e.g.,* Succession of Caballero, 24 La. Ann. 573, 573 (1872) (allowing daughter of interracial couple to inherit in the state where her father and mother had never lived as an interracial married couple).

65. *See* Whittington v. McCaskill, 61 So. 236, 237 (Fla. 1913) ("Since the marriage was valid in the state of Kansas, where it was consummated and where the parties continued to reside until the death of the wife, we are of the opinion that neither our Constitution nor the statutes, referred to above, have any applicability thereto.").

66. *Cf. id*. at 236 ("Neither Grooms nor Elizabeth Anderson resided or was in this state at the time of their marriage; nor did they reside therein subsequent thereto. Neither does it appear that she removed from Florida for the purpose of contracting such marriage, or with the intent to evade our statute.").

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.[67]

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 that had validly established their union in Utah, and then moved to California where they were precluded by law from marrying.[68] 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."[69]

Yet, 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* the Tennessee Supreme Court refused to recognize the validity of an interracial marriage validly celebrated in Mississippi,[70] reasoning:

> Extending the rule to the width asked for by the defendant, and 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 none of these are more revolting, more to be avoided, or more unnatural than the case before us.[71]

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67. *Cf. Ex parte* Kinney, 14 F. Cas. 602, 608 (C.C.E.D. Va. 1879) (No. 7,825) ("A citizen of Virginia may go to the federal District of Columbia, or to the federal territory of Utah, and be married there [to his partner of a different race] in conformity to the local laws, and may remain there as a resident and citizen with impunity.").

68. 51 Cal. 120, 121 (1875).

69. *Id.* at 125. *See also* People v. Godines, 62 P.2d 787, 788 (Cal. Dist. Ct. App. 1936) ("[I]t seems clear that a misrepresentation by a Filipino that he is a Spaniard is a fraud that touches a vital spot in the marriage relation and constitutes, therefore, a cause for annulment. We should add that the marriage in question took place in New Mexico, where it was valid, and hence of itself the ethnological status of the parties was not a ground of annulment.").

70. 66 Tenn. 9, 10 (1872).

71. *Id.* at 11.

The *Bell* court's reasoning was disappointing in a few respects. The court never made clear in the opinion where the couple was domiciled when the parties had contracted the marriage, instead merely noting that they had been married in Mississippi.[72] One does not find out until *Pennegar v. State*, decided seventeen years later, that the couple had been domiciled in Mississippi at the time of the marriage.[73] Even so, the *Pennegar* court failed to mention whether the couple had lived in Mississippi as a married couple for awhile or, instead, had intended to move to Tennessee immediately after the celebration of the marriage. If the latter were true, for example, because the couple had decided that they wanted to marry and then make a new life for themselves in a new place, then the validity of the marriage would appropriately have been decided in light of Tennessee law, since the law of the domicile immediately following the marriage could be used to determine the validity of a marriage.[74] Thus, it is difficult to tell whether *Bell* was forging new ground by subjecting a non-polygamous, non-incestuous marriage to the law of a later-acquired domicile or was merely employing the relatively noncontroversial practice of using the law of the domicile where the couple would live immediately after the marriage to determine the validity of the union.

Another disappointing feature of the *Bell* opinion was in the court's likening interracial marriage to polygamous and incestuous marriages. This comparison was misleading in a very important respect. Polygamous and incestuous marriages were not recognized because of a widely established exception to the general rule regarding these kinds of marriages in particular,[75] rather than because of their degree of offensiveness. Yet, the analogy between interracial marriages and polygamous or incestuous marriages broke down precisely because there was general agreement that incestuous and polygamous marriages need not be recognized by other jurisdictions, but no agreement with respect to whether interracial marriages would be recognized.[76] The existing jurisprudence did not allow a state to refuse to recognize an interracial marriage

72. *Id.* at 9.

73. Pennegar v. State, 10 S.W. 305, 307 (Tenn. 1889) ("[I]n *State v. Bell* . . . this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage.") (citation omitted).

74. *See supra* notes 41-45 and accompanying text.

75. *See* Stevens v. Stevens, 136 N.E. 785, 786 (Ill. 1922) ("The status of citizens of a state in respect to the marriage relation is fixed and determined by the law of that state, but marriages of citizens of one state celebrated in another state, which would be valid there, are generally recognized as fixing the status in the state of the domicile with certain exceptions, such as marriages which are incestuous, according to the generally recognized belief of Christian nations, polygamous, or which are declared by positive law to have no validity in the state of the domicile.")

76. *See* Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. (16 Tyng) 157, 159 (1819) (noting the differences between recognizing interracial marriages and incestuous or polygamous marriages).

validly celebrated in a sister domicile.[77] Further, as much if not more deference is arguably owed to a non-polygamous, non-incestuous marriage celebrated in a sister domiciliary state as is owed to a marriage celebrated in a foreign nation.[78]

Bell is helpfully contrasted with a North Carolina case, *State v. Ross*.[79] At issue was whether the interracial marriage of a former domiciliary would be recognized.[80] The North Carolina Supreme Court 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."[81] The State Attorney General adopted the line offered by the *Bell* court, namely, that:

> incestuous and polygamous marriages although lawful in the country in which they are contracted, will not be recognized in other States in which such marriages are deemed immoral and are prohibited . . . [and] that a marriage between persons of different races is as unnatural and as revolting as an incestuous one, and is declared void by the law of North Carolina. [82]

However, the *Ross* court distinguished between interracial marriages on the one hand, and polygamous or incestuous marriages on the other. "It is impossible to identify this case with that of an incestuous or polygamous marriage . . ."[83] because it "cannot be said to be the common sentiment of the civilized and Christian world" that the interracial marriage should not be recognized.[84]

When recognizing this marriage, 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."[85] Because North Carolina's

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77. *See id.* at 159-61 (discussing why an interracial marriage validly celebrated elsewhere should be recognized).

78. *See* Bank of Augusta v. Earle, 38 U.S. 519, 590 (1839) ("The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations.").

79. 76 N.C. 242 (1877).

80. *Id.* at 243.

81. *Id.* at 245.

82. *Id.*

83. *Id.* at 247.

84. *Id.* at 246.

85. State v. Kennedy, 76 N.C. 251, 253 (1877). *See also* Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 865 (1878) ("Whenever the question has arisen in the southern states, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a state where such marriages are not prohibited, is void in the state of the

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.[86]

As a general matter, states are free to refuse to recognize an evasive marriage that violates an important public policy of the domicile, and are also free to refuse to recognize a polygamous or incestuous marriage validly celebrated elsewhere.[87] 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 comity[88] or good public policy,[89] whereas other courts have implied that any marriage as disfavored as polygamous or incestuous marriages would also be subject to non-recognition.[90]

Those states deciding whether to accord recognition to the marriage celebrated in another domicile did not feel constrained by federal constitutional

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domicile, and when they go to another state temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this state."); *In re* Takahashi's Estate, 129 P.2d 217, 220 (Mont. 1942) ("It is the policy of our law that there shall be no marriage between white persons and Japanese. To make that policy effective such marriage within the state is forbidden; and our own residents are not permitted to circumvent the law by marriage outside the state. Such marriage our law declares to be null and void and of no avail within the state."); First Nat'l Bank v. N.D. Workmen's Comp. Bureau, 68 N.W.2d 661, 663 (N.D. 1955) ("A state has the prerogative to regulate by legislation the marital status of its own citizens domiciled therein to the extent of prohibiting certain marriages upon the ground of public policy and may give effect to such prohibition in nullifying a marriage performed in violation thereof though solemnized in another state.").

86. *Kennedy*, 76 N.C. at 253.

87. Stevens v. Stevens, 136 N.E. 785, 786 (Ill. 1922) ("[M]arriages of citizens of one state celebrated in another state, which would be valid there, are generally recognized as fixing the status in the state of the domicile with certain exceptions, such as marriages which are incestuous; according to the generally recognized belief of Christian nations, polygamous, or which are declared by positive law to have no validity in the state of the domicile.").

88. *See Ross*, 76 N.C. at 247 ("We are under obligations of comity to our sister States. We are compelled to say that this marriage being valid in the State where the parties were *bona fide* domiciled at the time of the contract must be regarded as subsisting after their immigration here.").

89. *See* Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. (16 Tyng) 157, 160-61 (1819) ("The exception in favor of marriages so contracted must be founded on principles of policy, . . . to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief, which would result from the loose state, in which people so situated would live.").

90. State v. Bell, 66 Tenn. 9, 11 (1872) ("Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us. . . . [T]he contract of marriage is a stable and sound contract, of natural as well as municipal law. This is neither.").

guarantees. Such states did not believe that the refusal to allow such unions to be celebrated locally implicated equal protection or due process guarantees[91] or that the refusal to recognize a marriage validly celebrated in a sister state implicated right-to-travel guarantees.[92] However, it is simply false to think that states have as much discretion to formulate their marriage policies as countries do,[93] and these equal protection, due process, and right-to-travel guarantees must be examined.

II. FEDERAL LIMITATIONS ON INTERSTATE MARRIAGE RECOGNITION PRACTICES

Prohibitions on marriage that had once been thought permissibly enacted by the states have now been recognized as violating constitutional guarantees.[94] Arguably, current same-sex marriage bans violate federal equal protection and due process guarantees.[95] However, the focus of this article is not on whether states are precluded from prohibiting same-sex marriages, but merely on whether states are constitutionally precluded from refusing to recognize same-sex marriages validly celebrated in a sister domiciliary state.

Currently, several states permit same-sex marriages to be celebrated locally,[96] and other jurisdictions recognize such marriages if validly celebrated elsewhere, even though such marriages cannot be celebrated locally.[97]

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91. *See* Frasher v. State, 3 Tex. Ct. App. 263, 277 (1877) ("Civilized society has the power of self-preservation, and, marriage being the foundation of such society, most of the states in which the negro forms an element of any note have enacted laws inhibiting intermarriage between the white and black races. And the courts, as a general rule, have sustained the constitutionality of such statutes.").

92. *See e.g.,* Lonas v. State, 50 Tenn. (3 Heisk.) 287, 307 (1871) ("[S]ome of the privileges and immunities intended to be guaranteed to the citizen . . . [are] not herein enumerated [but the] . . . right of intermarriage among the races is, in the opinion of the Court, not one of them.").

93. For the claim that states are no more limited in their control of marriage than are countries, *see Ex parte* Kinney, 14 F. Cas. 602, 605 (C.C.E.D. Va. 1879) (No. 7,825) ("If Virginia were in the midocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the national constitution.").

94. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down an antimiscegenation statute); Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a statute limiting marriage on the basis of indigence).

95. Matthew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 49 (2005) ("The exclusion of same-sex couples from marriage could never have withstood equal protection or due process analysis fairly applied.").

96. *See* Kristen Mack, *2010 Census Lets Gays Check 'Husband or Wife' Couples Offered choice for First Time in Attempt to Note Change in U.S. Households,* ORLANDO SENTINEL, Feb. 22, 2010, at A4 (listing some of the states that permit same-sex marriages to be performed).

97. *See e.g.,* Denise Richardson, *Same-Sex Couples Here Say: Change N.Y.'s Marriage Law*, DAILY STAR, June 19, 2009, at 1 ("But same-sex marriages aren't legal in New York, though the state does recognize marriages conducted in other states."); Kim Landers, *'Remarkable' Gay Marriage Win for Iowa*, AUSTRALIAN BROADCASTING CORPORATION

However, many jurisdictions have not only precluded the local celebration of such marriages, but have also refused to recognize such marriages even when these marriages are valid according to the law of the domicile at the time of celebration.[98]

A. Right-to-Travel Jurisprudence

The Court has long recognized that the United States Constitution guarantees the right to travel. The Privileges and Immunities Clause[99] "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."[100] As the Supreme Court made clear in *Crandall v. State*, a state may not impose a tax on individuals simply for passing though the state.[101] 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 immigrate to a new state.[102] The Privileges and Immunities Clause

> gives … the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[103]

(ABC) NEWS, May 10, 2009, at 1("[I]n Washington DC the city council has agreed to recognise [sic] same sex marriages in other states.").

98. *See supra* note 40.

99. The Privileges and Immunities Clause is contained in Article IV. U.S. CONST. art. IV, § 2 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."). The Privileges or Immunities Clause is contained in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). It is simply unclear whether the Privileges and Immunities Clause (the Comity Clause) offers more protections than the Privileges or Immunities Clause and, if so, what those additional protections are. Mark Strasser, *The Privileges of National Citizenship: On* Saenz*, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 565 (2000) ("Many of those interpreting the Comity Clause as guaranteeing only equality rights have nonetheless interpreted the Fourteenth Amendment's Privileges or Immunities Clause as protecting substantive rights, although what substantive rights the Fourteenth Amendment is supposed to protect remains contested.").

100. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870).

101. 73 U.S. (6 Wall.) 35, 49 (1867).

102. *See* Jones v. Helms, 452 U.S. 412, 417-18 (1981) ("It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution.").

103. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868), *rev'd on other grounds*.

Two caveats must be issued, however. States can discriminate between residents and non-residents for certain purposes.[104] If the affected interest is not very important, then right-to-travel protections may not be implicated.[105] 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,"[106] and that whatever "rights or activities may be 'fundamental' under the Privileges and Immunities Clause . . . elk hunting by nonresidents in Montana is not one of them."[107]

One of the factors the *Baldwin* Court considered important was that elk-hunting was recreational rather than a means to a livelihood.[108] Had the elk-hunters' livelihoods been involved,[109] a much different 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.[110]

Privileges and immunities protections are also implicated when important non-commercial interests are at stake. For example, at issue in *Memorial Hospital v. Maricopa County* was an Arizona durational residence requirement for the provision of free, nonemergency medical care.[111] The Court noted that "medical care is as much 'a basic necessity of life' to an indigent as

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104. *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.").

105. *See* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 378 (1978) (suggesting that elk hunting is not sufficiently important to require equal treatment of citizens and non-citizens).

106. *Id.* at 383.

107. *Id.* at 388. The Court has long interpreted the Privileges and Immunities Clause as applying to fundamental interests. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1872) ("We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental.*").

108. *Baldwin*, 436 U.S. at 388.

109. Ironically, the named plaintiff was a Montana resident whose livelihood was involved, since he was an outfitter who had a state license as a hunting guide. *Id.* at 372. While understanding that the clients of the outfitters were almost exclusively out-of-staters, the Court nonetheless analyzed the non-resident's interest at issue as recreational rather than a means to a livelihood. *Id.* at 376, 388.

110. Toomer v. Witsell, 334 U.S. 385, 389 (1948) ("Section 3379, as amended in 1947, requires payment of a license fee of $25 for each shrimp boat owned by a resident, and of $2,500 for each one owned by a non-resident."). The court stated that, "the importance of having commerce between the . . . States flow unimpeded by local barriers persuades us that State restrictions inimical to the *commerce clause* should not be approved simply because they facilitate in some measurement enforcement of a valid tax." *Id.* at 406. *See also* Mullaney v. Anderson, 342 U.S. 415, 416-20 (1952) (striking down a $50 licensing fee for non-resident commercial fishermen when there was only a $5 licensing fee for resident commercial fisherman).

111. 415 U.S. 250, 252 (1974).

welfare assistance."[112] One of the considerations articulated by the Court was whether the restriction at hand was likely to deter migration.[113] 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.[114]

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.[115] Nonetheless, where right-to-travel guarantees are implicated, the state bears a heavy burden to justify its policy.[116] 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. [117]

The Court is wise to insist that the state's interest be important, or perhaps compelling,[118] rather than merely legitimate. Many of the 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

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112. *Id.* at 259 (comparing the benefit at issue in Arizona to the benefit that had triggered privileges and immunities guaranties in *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

113. *Id.* at 257.

114. *Id.*

115. *Id.* at 256 ("Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be per se unconstitutional.").

116. *See id.* at 262 ("We turn now to the question of whether the State has shown that its durational residence requirement is 'legitimately defensible,' in that it furthers a compelling state interest." (footnotes omitted)).

117. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.").

118. *See id.* (statute burdening right to travel must promote a compelling interest to be constitutional).

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."[119] Further, the Court cautioned, it is unconstitutional to try to inhibit the immigration of citizens from other states.[120]

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.[121] 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."[122] The Court characterized this defense as involving "a fundamental misunderstanding of the law"[123] because a statute might offend right-to-travel guarantees even if the state did not intend to deter migration[124] and even if it was not established that the regulation had in fact deterred migration.[125]

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 election] is absolutely denied."[126] But this was too great a price for the state to exact. Because the right to travel "has long been recognized as a basic right under the Constitution,"[127] laws abridging that right must be examined closely.[128] The statute will have to "further a very substantial state interest"[129] and the State will have to have

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119. 415 U.S. at 263.

120. *Id.* at 263-64 ("[T]o the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible."). *See also* Edwards v. California, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) ("The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference."); *id.* at 183 (Jackson, J., concurring) ("This Court should, however, hold squarely that it is a privilege of citizenship… to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.").

121. 405 U.S. 330, 338-39 (1972).

122. *Id.* at 339.

123. *Id.*

124. *Id.*

125. *Id.* at 339-40 ("*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence."). *See also Maricopa County*, 415 U.S. at 257-58 (downplaying the role that actual deterrence plays in the right-to-travel jurisprudence).

126. *Dunn*, 405 U.S. at 341.

127. *Id.* at 338 (citing United States v. Guest, 383 U.S. 745, 758 (1966)).

128. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("[A]ny classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.").

129. *Dunn*, 405 U.S. at 343.

chosen a means that does not "unnecessarily burden or restrict constitutionally protected activity."[130] Because Tennessee had other methods by which to prevent fraud[131] and because the method chosen was not particularly well-suited to accomplish that end,[132] the durational residency requirement was struck down.[133]

The purpose behind the Privileges and Immunities Clause was to "help fuse into one Nation a collection of independent, sovereign States,"[134] 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."[135] 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.[136]

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, instead, when one had decided to relocate to that state. In dicta, the 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.[137]

Kinney involved an interracial couple domiciled in the state that had traveled to the District of Columbia to marry so that they could evade

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130. *Id.*

131. *Id.* at 346 ("Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration." (footnote omitted)).

132. *Id.* ("Since false swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting.").

133. *Id.* at 360.

134. Toomer v. Witsell, 334 U.S. 385, 395 (1948). *See also* United States v. Guest, 383 U.S. 745, 767 (1966) (Harlan, J., concurring in part and dissenting in part) ("It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union.").

135. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

136. Saenz v. Roe, 526 U.S. 489, 500 (1999).

137. 14 F. Cas. 602, 604-06 (C.C.E.D. Va. 1879) (No. 7,825).

prohibitions in the local law.[138] The *Kinney* court rejected that Virginia would be required to recognize this marriage, prohibited locally, merely because this couple had traveled to D.C. to marry.[139] 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"[140] if instead the interracial couple had been domiciled in D.C., had married there, and then had later moved to Virginia.[141] 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,"[142] that is, the right to travel would have protected them insofar as they wished to travel through the state. However, the court believed that the right would not have protected them if they had taken up residence in Virginia.[143] 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.[144]

The United States Supreme Court has suggested that marriage is the kind of right that triggers right-to-travel guarantees.[145] In *Sosna v. Iowa*, the Court examined Iowa's divorce residency requirement.[146]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.[147] For example, while states could not justify durational residence requirements by appealing to

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138. *Id.* at 606 ("[T]his marriage was not entered into here. The parties to it went to the District of Columbia for the purpose of contracting it; did there contract it, and returned to reside and cohabit together in this state.").

139. *Id.* at 608 ("But if his object in going was to evade the laws of Virginia, and if, after marriage, he returns here and remains in a condition of matrimony forbidden by our laws, the certificate of his marriage in the District or territory, in conformity to its laws, will have no other value here than as indisputable proof of his violation of our laws.").

140. *Id.* at 606.

141. *Id.*

142. *Id.*

143. *See id.*

144. Andrew Koppelman points out that *Kinney* suggests interracial couples have a right to travel through states but simply accepts at face value without analysis the court's conclusion that the right to travel would not protect a couple that had immigrated to a state. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 47-48 (2006).

145. *Cf.* Sosna v. Iowa, 419 U.S. 393, 419-20 (1975) (Marshall, J., dissenting) ("The previous decisions of this Court make it plain that the right of marital association is one of the most basic rights conferred on the individual by the State. . . . [T]he right to seek dissolution of the marital relationship [is] closely related to the right to marry. . . . [T]he right to seek dissolution of the marital relationship is of such fundamental importance that denial of this right . . . penalizes interstate travel.").

146. *Id.* at 396, 406 (majority opinion).

147. *See id.* at 406-07 (discussing the interests of the other spouse and any children of the marriage).

"budgetary or recordkeeping considerations,"[148] the interests implicated in this case were much different.[149] First, the plaintiff was not being foreclosed from getting a divorce by the one-year residency requirement.[150] On the contrary, she was merely being asked to delay the proceeding.[151] Once she had met the residency requirement, she could get a divorce and be eligible to remarry should she wish to do so.[152] 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,[153] and his interests might militate in favor of the residency requirement. Finally, the children's interests had to be considered as well.[154] Basically, the Court implied that the strength of the implicated interests justified Iowa's imposition of a residency requirement for divorce,[155] 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."[156]

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. The *Sosna* Court's finding that marriage was sufficiently fundamental to trigger such guarantees is unsurprising. As Justice Marshall noted in his *Sosna* dissent, the Court's "previous decisions . . . make it plain that the right of marital association is one of the most basic rights conferred on the individual by the State."[157] For example, the Court in *Loving v. Virginia* made clear that the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[158]

As *Sosna* illustrates, that marriage (or divorce) triggers right-to-travel guarantees does not end the analysis—a separate determination must be made on whether the state has sufficiently important interests to justify the burden that has been placed on the right to travel.[159] That said, however, the increased

148. *Id.* at 406.

149. *Id.*

150. *Id.*

151. *Id.* ("Iowa's requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time.").

152. *Id.* at 422 (Marshall, J., dissenting).

153. *Id.* at 406 (majority opinion) ("Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights.").

154. *Id.* at 406-07 ("Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support.").

155. *Id.* at 407 ("With consequences of such moment riding on a divorce decree issued by its courts, Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.").

156. *Id.* at 408.

157. *Id.* at 419 (Marshall, J., dissenting).

158. Loving v. Virginia, 388 U.S. 1, 12 (1967).

159. *See Sosna*, 419 U.S. at 406-07 (discussing the property and support interests that are implicated in the dissolution of a marriage).

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,[160] and if the burden imposed would not merely be temporary,[161] but instead would involve an absolute denial of the fundamental interest in marriage.

B. The State's Interests in Refusing to Recognize Same-Sex Marriage

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. For example, the Court in *Romer v. Evans* noted that a disadvantage imposed against members of the lesbian, gay, bisexual, transgender (LGBT) community because of animus does not promote a legitimate state interest.[162] Even more to the point, when the Court struck down Texas's same-sex sodomy law in *Lawrence v. Texas*,[163] 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 instead 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."[164] Such a comment would not make any sense as support for striking down the statute at issue unless these enduring bonds themselves had value.[165]

The claim here is not that the *Lawrence* Court recognized a right to marry a same-sex partner.[166] The Court did not strike down same-sex marriage bans and, indeed, made it quite clear that it was not addressing the constitutionality of such bans.[167] 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-

160. *See supra* notes 154-55 and accompanying text.

161. *See supra* notes 150-51 and accompanying text.

162. 517 U.S. 620, 634 (1996).

163. 539 U.S. 558 (2003).

164. *Id.* at 567.

165. *Cf. id.* at 578 ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

166. *But see id.* 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.").

167. *Id.* at 578 (majority opinion) ("[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

marital relations,[168] then it would seem that the *Lawrence* analysis has important implications for the constitutionality of same-sex marriage bans.

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 while using 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,[169] whereas the New York Court of Appeals held that the state's same-sex marriage ban survived this low-level scrutiny.[170]

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.[171] 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.

C. The Limited Nature of This Thesis

The argument made in this article is rather narrow. For example, this article is not arguing that any marriage validly celebrated in one of the states 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

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168. *See* Mark Strasser, Lawrence *and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003, 1028 (2004) ("The Court has already made clear that relationships are privileged over relations and that family matters are at the core of what due process protects.").

169. Goodridge v. Dep't of Pub. 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.").

170. Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006) ("Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses."). *But see id.* at 30 (Kaye, C.J., dissenting) ("Although the classification challenged here should be analyzed using heightened scrutiny, it does not satisfy even rational-basis review.").

171. *See In re* Marriage Cases, 183 P.3d 384, 446, 453 (Cal. 2008) (striking down same-sex marriage ban under strict scrutiny). The California holding was overruled by constitutional referendum. *See* Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009) (upholding constitutionality of referendum changing the California Constitution). *See also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 476, 482 (Conn. 2008) (striking down same-sex marriage ban under intermediate scrutiny); Varnum v. Brien, 763 N.W.2d 862, 896, 907 (Iowa 2009) (striking down same-sex marriage ban under heightened scrutiny).

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,[172] 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.[173]

This article also does not argue that the right to marry is so important that states are prohibited from imposing any limitations on who might marry whom. The United States Supreme Court has recognized both that the state has the power to determine "the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution,"[174] and that the state's power to determine who may marry whom is not unlimited.[175] This article is simply arguing that even if states are constitutionally permitted to refuse to recognize same-sex marriages, they face a heavier burden when they seek to justify their refusal to recognize a same-sex marriage validly celebrated in a sister domiciliary state.

The argument here is also to be differentiated from one suggesting that the Full Faith and Credit Clause imposes limits on the ability of a state to reject another state's laws because they are obnoxious to local policies.[176] That argument is not offered here for a few reasons. First, the Full Faith and Credit Clause[177] has been interpreted to impose more stringent requirements with respect to crediting other states' judgments than other states' laws.[178] The Court

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172. *But see* Angela P. Harris, Loving *Before and After the Law*, 76 FORDHAM L. REV. 2821, 2837 (2008) ("[P]rohibitions on same-sex marriage should be viewed as unconstitutional.").

173. If, for example, animus was the only reason that the state was refusing to recognize such unions, then its refusal would be constitutionally suspect. *See* Romer v. Evans, 517 U.S. 620, 634 (1996). Of course, if animus were the reason behind the refusal to recognize such marriages that would make the state's same-sex marriage ban itself constitutionally vulnerable.

174. Maynard v. Hill, 125 U.S. 190, 205 (1888).

175. *See* Loving v. Virginia, 388 U.S. 1, 7 (1967) (noting that the Fourteenth Amendment limits the power of the state to regulate marriage).

176. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1967 (1997) ("[T]he Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or obnoxiousness of other states' policies.").

177. U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.").

178. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232-33 (1998) ("The Full Faith and Credit Clause does not compel '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.'. . . . Regarding judgments, however, the full faith and credit obligation is exacting. A final

has explained that with respect to judgments, "the full faith and credit obligation is exacting."[179] However, the same may not be said of laws:

> [N]ot every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.[180]

Because a marriage does not involve a judgment but instead involves a status created pursuant to a law,[181] states are not obligated to give the same faith and credit to marriages from another state as they give to judgments from another state.

The second reason for excluding an analysis of the Full Faith and Credit Clause is that the Full Faith and Credit Clause explicitly authorizes Congress to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[182] While it is not at all clear that Congress had the power to pass the Defense of Marriage Act (DOMA),[183] that is not the subject of this article, and thus the constitutional issues raised by the passage of DOMA will not be addressed here.

In this article, it is merely argued that states must meet a high burden when they refuse to recognize a marriage valid in a sister domiciliary state, and that such a burden cannot be met when same-sex marriages are at issue. This conclusion is much less surprising than might first appear. For example, in *Loughran v. Loughran*, the 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."[184] 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.[185]

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judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.").

179. *Id.* at 233.

180. Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 548 (1935).

181. *See* Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 761-62 (2003) (suggesting that marriages are not judgments and hence the interstate recognition of marriages involves a conflict of laws analysis).

182. *See* U.S. CONST. art. IV, § 1.

183. *See, e.g.*, Mark Strasser, Loving *the* Romer *Out for* Baehr*: On Acts in Defense of Marriage and the Constitution,* 58 U. PITT. L. REV. 279 (1997) (arguing that DOMA is unconstitutional for several reasons).

184. 292 U.S. 216, 223 (1934) (footnote omitted).

185. *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:

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 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[186] is not replicated in the Fourteenth Amendment. Instead, section five of the Fourteenth Amendment is phrased much differently,[187] and Congress's power under this section has been construed much more narrowly than has its power under the Effects Clause.[188] 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,"[189] 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."[190]

> The mere statutory prohibition by the State of the domicile either generally of the remarriage of a divorced person, or of remarriage 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. (footnote omitted). 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 future domiciles, provided that those states will not be the domicile immediately following the marriage. *See supra* notes 54-55 and accompanying text.

186. *See* supra note 183 and accompanying text.

187. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

188. The Court has suggested that Congress' section five powers are somewhat limited. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (Congress' section five power is remedial and there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). Congress power under the Effects Clause seems more wide-ranging. Indeed, some describe it as plenary. *See* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 860 (1989) ("What does seem clear is that whatever effect the original Clause may have been intended to have, the new Congress was given plenary power to define for itself the effect due sister-state judgments, if Congress chose to legislate on the subject."); Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 324 (1998) (suggesting that the power is plenary). Others, however, suggest that the power, although very broad, is not plenary. *See* Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 832 (2004) ("Congress does not have plenary power either to dilute or expand full faith and credit beyond what the Court has delineated as the Constitution's mandate.").

189. Saenz v. Roe, 526 U.S. 489, 507 (1999). *See also* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (suggesting that Congress' authorization would not save the statute at issue from violating right-to-travel guarantees).

190. *Saenz*, 526 U.S. at 507-08.

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."[191] 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."[192] 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.'"[193] 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."[194] Thus, there are numerous 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.[195] Assuming that the domiciliary state's marriage statute passes constitutional muster, then the domicile at the time of the marriage would determine the validity of the marriage, both for that state, and for other states as well.[196] 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.

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

191. Maynard v. Hill, 125 U.S. 190, 208 (1888).

192. 317 U.S. 287, 298 (1942).

193. *Id.* at 301 (quoting Haddock v. Haddock, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting)).

194. Williams v. North Carolina, 325 U.S. 226, 230 (1945).

195. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (describing the conditions under which marriage valid in the state of celebration will be invalid if contrary to the law of the domicile); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(1) (suggesting that the validity of the marriage will be determined in light of the state with the most significant relationship to the parties and the marriage).

196. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) ("A marriage which satisfies the requirements of the state where the marriage was contracted *will everywhere be recognized* as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage *at the time of the marriage*." (emphasis added)).

right-to-travel purposes, and states have a heavy burden of justification when making citizens sacrifice their marriages as a price of immigrating 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, instead, had been domiciled elsewhere when celebrating a marriage that could not have been contracted in their own states.

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.[197] 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,"[198] 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 not be forced to sacrifice that marriage as a price of immigrating 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, which had been valid in the domicile at the time of its celebration. Indeed, the claim here is not particularly robust, since it 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.

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197. *See* Bank of Augusta v. Earle, 38 U.S. 519, 586 (1839) ("The clause of the Constitution referred to certainly never intended to give . . . the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself."). *See also Ex parte* Kinney 14 F. Cas. 602, 606 (C.C.E.D. Va. 1879) (No. 7,825) (rejecting that the right to travel required that an interracial marriage validly celebrated in another domicile had to be recognizing in Virginia if the couple immigrated, reasoning that doing so would be to treat those citizens more favorably than local citizens).

198. Toomer v. Witsell, 334 U.S. 385, 395 (1948) (footnote omitted). *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) ("[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.").

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 immigrating to the forum.[199] But the Court's jurisprudence in this area suggests that the right to immigrate has more protection than the *Kinney* court had imagined.[200] Basically, the Court has made clear that states cannot deter individuals from exercising their right to immigrate 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.

199. *Kinney*, 14 F. Cas. at 606.

200. *See supra* notes 138-45 and accompanying text.