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Let Me Count the Ways: The Unconstitutionality of Same-Sex-Marriage Bans

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*Symposium on Whether
Legalization of Same-Sex Marriage
Is Constitutionally Required—2012*

I.

CONSTITUTIONAL MANDATES FOR
SAME-SEX MARRIAGE IN
DOCTRINE AND PRACTICE

Contributing Author

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Let Me Count the Ways: The Unconstitutionality of Same-Sex-Marriage Bans

*Mark Strasser**

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I. INTRODUCTION

Same-sex-marriage bans implicate several constitutional provisions. Federal equal-protection and due-process guarantees are best understood as precluding states from prohibiting same-sex marriages. Even bracketing those protections, privileges-and-immunities guarantees require states to recognize certain same-sex marriages validly celebrated elsewhere. Furthermore, Congress has exceeded its power in passing the Federal Defense of Marriage Act (DOMA), which has implications for those states refusing to recognize same-sex marriage for any purpose. The analysis offered here examines a number of different constitutional protections including the equal-protection, due-process, and privileges-and-immunities guarantees contained within the Fourteenth Amendment as well as those provided by the Full Faith and Credit Clause.

This Article's equal-protection analysis discusses the constitutionality of same-sex-marriage bans in light of the differing tiers of scrutiny. The due process analysis explains that the societal and individual interests served by marriage are promoted whether the couple is com-

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posed of individuals of the same sex or of different sexes. The privileges-and-immunities discussion focuses on some of the respects in which states are precluded from refusing to recognize the rights of same-sex couples, congressional authorization to discriminate notwithstanding. Finally, the article discusses existing full-faith-and-credit guarantees and their implications both for DOMA and for state mini-DOMAs. This Article concludes that numerous federal constitutional guarantees are violated by the system of same-sex-marriage bans that is currently in place.

II. SAME-SEX MARRIAGE AND THE CONSTITUTION

The analysis here suggests that same-sex-marriage bans violate both equal-protection and due-process guarantees. If that is correct then it is of course true that states are precluded from refusing to recognize same-sex marriages validly celebrated in sister states. Nonetheless, right-to-travel guarantees provide additional guarantees for individuals who have celebrated same-sex marriages in their domiciles in accord with local law. Further, because Congress exceeded its powers when enacting the Defense of Marriage Act, states are constitutionally prohibited from refusing to recognize same-sex marriages for all purposes.

A. Equal Protection

The seminal marriage case is *Loving v. Virginia*¹ in which the Court struck down Virginia's anti-miscegenation law on equal-protection and due-process grounds.² Mildred Jeter and Richard Loving, Virginia domiciliaries,³ married in the District of Columbia in 1958 in accord with local law,⁴ and made their marital home in Virginia.⁵ Later that same year, they were charged with violating Virginia's anti-miscegenation laws.⁶ They pled guilty and were given a year in jail, sentence suspended on the condition that they not appear together in the state for

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

2. *Id.* at 2 ("For reasons which seem to us to reflect the central meaning of those constitutional commands [due process and equal protection], we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.").

3. *Id.* (describing the couple as "two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man").

4. *Id.* (noting that they "were married in the District of Columbia pursuant to its laws").

5. *Id.* (noting that "the Lovings . . . established their marital abode in Caroline County").

6. *Id.* at 3 (describing that "a grand jury issued an indictment charging the Lovings with

the next twenty-five years.⁷ “[T]he Lovings took up residence in the District of Columbia.”⁸ A few years later, the Lovings sought to vacate the judgment on the ground that it violated Fourteenth Amendment guarantees.⁹

Several Virginia statutes were implicated in the Lovings’ conviction and sentencing. The first statute specified that if members of an interracial couple went to another jurisdiction to marry with the intention of returning to the state, their marriage would be treated as if it had been celebrated locally and the individuals would be subject to the criminal penalty that would be applicable were they to have tried to marry within the state.¹⁰ The second statute specified that attempting to marry someone of another race was punishable by imprisonment for one to five years.¹¹ A third statute specified that interracial marriages were to be treated as void ab initio.¹²

The *Loving* Court addressed whether Virginia’s prohibiting individuals of different races from marrying violated federal equal-protection and due-process guarantees, although much of the Court’s focus was on the former.¹³ The *Loving* Court rejected Virginia’s “contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose,”¹⁴ instead requiring “the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”¹⁵

violating Virginia’s ban on interracial marriages”).

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

8. *Id.*

9. *Id.*

10. *Id.* at 4 (“If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State.”).

11. *Id.* (“If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”).

12. *Id.* at 4 n.3 (“All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.”).

13. The *Loving* decision is only thirteen pages, and the equal-protection analysis started on page seven and ended on page twelve, *see id.* at 7–12, whereas the due-process discussion was only on page page. *See id.* at 12.

14. *Id.* at 8.

15. *Id.* at 9.

Where that heavier burden of justification was required, the Court found that the Virginia statutory scheme could not pass constitutional muster.¹⁶

It is of course true that state statutes prohibiting same-sex marriage do not discriminate on the basis of race, and it is not claimed here that such statutes should trigger close scrutiny because they discriminate on that forbidden basis. But merely because such statutes do not discriminate on the basis of race does not entail that such bans should be examined with the most forgiving level of scrutiny. Indeed, it is important to remember that when *Loving* was decided, equal-protection jurisprudence was in an embryonic stage—the Court had not yet struck down sex-based classifications as violating equal-protection guarantees.¹⁷

The chronology is important to consider because, otherwise, there is a danger that Court precedents will be misunderstood. Consider *Baker v. Nelson*,¹⁸ in which the Minnesota Supreme Court considered whether *Loving* suggested that Minnesota's same-sex-marriage ban violated constitutional guarantees.

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.¹⁹

The U.S. Supreme Court refused to hear the *Baker* decision “for want of a substantial federal question,”²⁰ and some courts have considered *Baker* binding precedent with respect to the constitutionality of same-sex-marriage bans.²¹ But that is error for a few reasons. First, it might be noted that in 1956 the Court in *Naim v. Naim* refused to hear a challenge to Virginia's anti-miscegenation statute because the case

16. *Id.* at 12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

17. It was not until four years later when the Court struck down a sex-based classification in *Reed v. Reed*, 404 U.S. 71 (1971).

18. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

19. *Id.* at 187.

20. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

21. Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1449 (2012) (noting that “a number of lower courts have viewed *Baker* as a binding precedent conclusively rejecting claims seeking to establish a right to same-sex marriage under the United States Constitution”).

was “devoid of a properly presented federal question.”²² A mere eleven years later, the *Loving* Court struck down Virginia’s anti-miscegenation law.²³

What had happened in the interim? In 1964, the Court in *McLaughlin v. Florida* struck down a Florida law punishing interracial fornication and adultery more severely than intra-racial fornication and adultery, reasoning that the state’s legitimate purposes could be adequately served by laws that did not expressly distinguish on the basis of race.²⁴ The *McLaughlin* Court expressly refused to address the constitutionality of Florida’s interracial marriage ban,²⁵ although the *Loving* Court struck down such bans a mere three years later.²⁶

Just as *McLaughlin* might be thought an important change in the jurisprudence even while claiming not to be addressing the constitutionality of the Florida marriage ban, *Lawrence v. Texas* might be thought an analogous important change, because in *Lawrence* the Court struck down Texas’s criminalization of same-sex relations.²⁷ The *Lawrence* Court made eminently clear that it was not addressing the constitutionality of same-sex marriage,²⁸ although a separate issue is whether *Lawrence* has implications for the constitutionality of same-sex-marriage bans.²⁹

Another reason that the Court’s refusal to hear *Baker* should not be thought controlling is that the Court did not settle on intermediate scrutiny for sex-based classifications until 1976.³⁰ The Minnesota

22. *Naim v. Naim*, 350 U.S. 985 (1956).

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

24. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (“Florida has offered no argument that the State’s policy . . . cannot be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as § 798.05 which singles out the promiscuous interracial couple for special statutory treatment.”).

25. *Id.* at 195 (“[E]ven if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment.”).

26. *See Loving*, 388 U.S. at 1.

27. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

28. *See id.* at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

29. *See id.* at 604–05 (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.”).

30. *See Craig v. Boren*, 429 U.S. 190, 199–200 (1976) (“[T]he protection of public health and safety represents an important function of state and local governments. However, appellees’ statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal

court's analysis might have been quite different had it been in light of the heightened scrutiny afforded to sex-based classifications—the court certainly would not have simply said that while marital restrictions based on race could not pass muster, a distinction based upon the “fundamental difference in sex”³¹ surely could. While it is conceivable that a court using intermediate scrutiny would nonetheless uphold the constitutionality of a same-sex-marriage ban, the current jurisprudence requires a sex-based classification to be based on an “exceedingly persuasive justification,”³² and two state supreme courts have struck down their respective state's same-sex-marriage ban when employing intermediate scrutiny under state constitutional guarantees.³³ Not only would the Minnesota court's analysis have been different, but the U.S. Supreme Court would likely not have said that no substantial federal issue was implicated, precisely because state classifications based on sex implicate federal equal-protection guarantees.

Suppose that a case mirroring *Baker* were to reach the Minnesota Supreme Court and that court were again to find that the state's same-sex-marriage ban classified on the basis of sex.³⁴ Such a finding would not end the analysis—under the current jurisprudence, the court would then have to determine whether the “classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”³⁵ Perhaps the Minnesota court's analysis would mirror that of other state supreme courts examining same-sex-marriage bans with intermediate scrutiny and the court would find that such a ban could not pass muster. In any event, assuming that certiorari were granted, the U.S. Supreme Court would have to address several issues including whether such bans classify on the basis of sex.

protection challenge.”); *see also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex . . .” (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 n.9 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976))).

31. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

32. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citing *Hogan*, 458 U.S. at 724).

33. *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

34. Such a case is going through the Minnesota courts. *See Benson v. Alverson*, No. A11-811, 2012 WL 171399, at *7 (Minn. Ct. App. Jan. 23, 2012) (“But the district court improperly relied on *Baker* in analyzing appellants’ remaining claims; therefore, the district court erred in dismissing appellants’ equal-protection, due-process, and freedom-of-association claims on the merits at this stage in the proceedings.”).

35. *Virginia*, 518 U.S. at 533 (citing *Hogan*, 458 U.S. at 724).

Why would a court find that a same-sex-marriage ban classifies on the basis of sex? Because such a statute expressly classifies based on the genders of the parties: a man can marry a woman but not a man, and a woman can marry a man but not a woman. But, it might be argued, such statutes are designed to target orientation rather than sex. Yet, regardless of the purported target, classifying on the basis of a restricted classification suffices to trigger closer scrutiny. For example, one could not immunize a race-based classification from close review by claiming that one wished to target wealth and that one was merely using a race-based classification as a proxy for wealth.³⁶

If the fact of classifying on the basis of sex is not enough to trigger intermediate scrutiny, one might wonder what else would be required. Consider the argument offered by the Vermont Supreme Court in *Baker v. State*, namely, that the “test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law ‘can be traced to a discriminatory purpose.’”³⁷ The difficulty with the Vermont court’s analysis is that a statute that permits a man to marry a woman but not a man and a woman to marry a man but not a woman is *not* neutral on its face.

One sense of sex-neutrality requires that the employed terms not be gender-laden. If one uses a term like “man” or “woman” or “husband” or “wife,” then one is using a sex-linked term. If, instead, one uses a term like “person” or “spouse” or “veteran,” then one is using a sex-neutral term because those terms might be used to refer to a man or a woman.³⁸

The test of neutrality used by the Vermont court did not involve whether the terms themselves were gender-neutral but, instead, the effects of the statute. The court reasoned that the ban was neutral because the sexes were affected equally. But such an analysis is faulty for two distinct reasons. First, the ban was not sex-neutral in that the classification expressly employed sex-based terms. Second, to find out

36. Targeting on the basis of wealth would not trigger close scrutiny. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that poverty does not trigger close scrutiny).

37. *Baker v. State*, 744 A.2d 864, 880 (1999) (citing *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1970)).

38. Ironically, the *Baker* court failed to understand that the case it cited in support, *Feeney*, 442 U.S. 256, undercut the *Baker* analysis rather than supported it. At issue in *Feeney* were veterans’ benefits, and the *Feeney* Court explicitly pointed out that the term “veteran” was “gender-neutral,” *id.* at 267, and also that the term included “[w]omen who have served in official United States military units during wartime.” *Id.* at 268.

whether the statute was “neutral” in the sense that it affected the sexes equally, one would presumably want to know whether more women would thereby be prevented from marrying than would men. Even if one could figure out the appropriate measurement (e.g., absolute numbers, percentages, etc.), there might be some difficulty in discovering the information. One could perform surveys—would you marry your same-sex partner if you could?—but those numbers might not accurately reflect the number of people who would actually wed if given the opportunity. Regardless of whether one could figure out whether same-sex-marriage bans place a disproportionate burden on one sex, the more important difficulty is that this is simply the wrong question to ask in this case.

When the state of Virginia argued that its anti-miscegenation law passed constitutional muster, it did not claim that the statute was neutral on its face, but instead argued that the admittedly racial classification was nonetheless permissible: “the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.”³⁹ Here, Virginia at least recognized that it was classifying on the basis of race, although it erred in suggesting that “the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”⁴⁰ Basically, Virginia was arguing that because whites could marry whites but not blacks and blacks could marry blacks but not whites, the state was employing a racial classification but not invidiously. In contrast, the Vermont Supreme Court would analogously say that because whites could marry whites but not blacks and blacks could marry blacks but not whites, the state was not employing a racial classification at all.⁴¹ After all, the court would presumably reason, neither blacks nor whites were permitted to enter into an interracial marriage, so the statute was neutral on its face. Such an interpretation of neutrality had

39. *Loving v. Virginia*, 388 U.S. 1, 8 (1966).

40. *Id.*

41. Cf. Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 957 (2000) (“according to its own analysis, the *Baker* court would have to have upheld the statute at issue in *McLaughlin*”). The *Baker* court might have struck down the statutes at issue in *Loving* because Virginia’s use of allegedly “neutral” terms was nonetheless invidious in purpose and effect.

already been rejected by the Court before *Loving*.⁴²

The Vermont Supreme Court could have said that although the state was employing a sex-based classification, that classification was not invidious. But the court could only find that the classification was not invidious after having employed intermediate scrutiny. The court would not have found that such a ban passed muster under intermediate scrutiny, given its having struck down Vermont's reserving marriage benefits for different-sex couples even when employing a less demanding level of scrutiny.

A separate and additional basis for striking down a same-sex-marriage ban on equal-protection grounds is that targeting on the basis of orientation might itself trigger heightened scrutiny, a position supported by the Obama Administration.⁴³ Were that position adopted by the Court, there would be two reasons to employ the intermediate scrutiny standard: first, such bans classify on a triggering basis (sex), and second, they target on a triggering basis (orientation). There would be no need to choose one rather than the other, since each would trigger the same standard.⁴⁴

Even if a court were reluctant to hold that targeting on the basis of orientation triggers intermediate scrutiny, it might nonetheless employ a level of scrutiny more demanding than the very deferential rational basis test. In *Romer v. Evans*⁴⁵ and *Lawrence v. Texas*,⁴⁶ the U.S. Supreme Court did not use the most forgiving level of scrutiny when striking down statutes targeting on the basis of sexual orientation. It is simply

42. *Loving*, 388 U.S. at 10 (“[A]s recently as the 1964 Term, in rejecting the reasoning of that case [*Pace v. Alabama*, 106 U.S. 583 (1883)], we stated ‘*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.’” (citing *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964))).

43. See Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV'T L. REV. 613, 623 (2012) (“The Obama administration has suggested that statutes targeting on the basis of orientation should be subjected to heightened scrutiny.”).

44. When analyzing that state's same-sex-marriage ban, the California Supreme Court seemed to think that it had to choose between discrimination on the basis of sex and discrimination on the basis of orientation. *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008) (superseded by constitutional amendment as stated in *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009)) (“For purposes of determining the applicable standard of judicial review under the California equal protection clause, we conclude that discrimination on the basis of sexual orientation cannot appropriately be viewed as a subset of, or subsumed within, discrimination on the basis of sex.”). Regardless of whether the court's conclusion was correct as a general matter, the court was incorrect about the ban at issue, because the ban classified on the basis of sex and targeted on the basis of orientation.

45. *Romer v. Evans*, 517 U.S. 620 (1996).

46. *Lawrence v. Texas*, 539 U.S. 558 (2003).

unclear whether, in those cases, the Court was using a rational-basis-with-bite standard⁴⁷ or something more demanding, but in any event the Court struck down both of those state laws.

Would the Supreme Court strike down a same-sex-marriage ban using rational-basis-with-bite review? That is unclear. But it should be noted that the *Lawrence* Court struck down Texas's same-sex sodomy ban.⁴⁸ Further, two state supreme courts—using a rational-basis-with-bite standard under their own state constitutions—struck down their respective states' reservation of marriage for different-sex couples.⁴⁹ In *Baker v. State*, the Vermont Supreme Court struck down the state's reserving the benefits of marriage for different-sex couples.⁵⁰ In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts struck down that state's same-sex-marriage ban on rational-basis grounds.⁵¹

Some courts have held that same-sex-marriage bans pass muster under the most deferential form of rational basis review,⁵² although even those decisions are not without their detractors.⁵³ To understand why same-sex-marriage bans might be held to fail even deferential rational basis review, it is helpful to consider the state and individual interests promoted by marriage.

47. *Id.* at 582 (O'Connor, J., concurring in the judgment) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.")

48. *Id.* at 578–79.

49. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

50. *Baker*, 744 A.2d at 886 ("[W]e conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."). The court rejected employing the tougher heightened scrutiny test that would be triggered were the statute to be discriminating on the basis of sex. *See id.* at 880 n.13. For a discussion of why the Vermont Supreme Court's discussion of sex-based discrimination was in error, see generally Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS J. 1 (2000).

51. *Goodridge*, 798 N.E.2d at 961 ("For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.")

52. *Hernandez v. Robles*, 855 N.E.2d 1, 9, 12 (N.Y. 2006) ("[T]here is a rational basis for limiting marriage to opposite-sex couples" and "[r]ational basis scrutiny is highly indulgent towards the State's classifications.")

53. *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, which requires that the classification 'rationally further a legitimate state interest.'" (quoting *Affronti v. Crosson*, 95 N.Y.2d 713, 718 (2001))).

B. Due Process

Just as there are differing tiers of scrutiny in equal-protection analysis, there are differing tiers of scrutiny in due process analysis. But under substantive due process review, statutes are examined either with strict scrutiny or with rational basis review.⁵⁴

Relatively few interests trigger strict scrutiny,⁵⁵ although the interest in marriage is one of them.⁵⁶ At least one issue is whether same-sex-marriage bans trigger strict scrutiny because they “interfere directly and substantially with the right to marry.”⁵⁷

In *Loving*, the Court noted that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [individuals].”⁵⁸ Why is that right so important to individuals? That was spelled out more fully in later cases.⁵⁹ For example, in *Turner v. Safley*, the Court explained that there are several individual interests implicated in marriage. Marriages “are expressions of emotional support and public commitment,”⁶⁰ and have “spiritual significance.”⁶¹ Further, “marital status often is a precondition to the receipt of government benefits.”⁶² Needless to say, all of these interests are implicated whether the couple is composed of individuals of the same sex or of different sexes.

The *Loving* Court suggested that marriage is “fundamental to our

54. Consider the following:

If the interest at issue is not a fundamental right, the court applies a more flexible standard, rational basis review, which asks whether the law is rationally related to a legitimate government purpose. . . . On the other hand, if the court deems the asserted interest a fundamental right, it must apply strict scrutiny to determine whether the law in question is necessary to further a compelling government interest.

Alexis M. Etow, Comment, *No Toy for You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503, 1520 (2012) (citation omitted).

55. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (noting that the Due Process Clause does not protect “any and all important, intimate, and personal decisions”). See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977))).

56. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (discussing a “fundamental liberty protected by the Due Process Clause, the freedom to marry”).

57. *Id.* at 387.

58. *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

59. E.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987).

60. *Id.*

61. *Id.* at 96.

62. *Id.*

very existence and survival.”⁶³ Why is that so? Two very different kinds of answers may be offered. First, as the Court later explained in *Turner*,⁶⁴ marriage is important for adults. When adults thrive, society benefits as well. Second, when referring to society’s existence and survival,⁶⁵ the *Loving* Court may have been referring to the next generation. But if that was the Court’s meaning, it is not surprising that the Court spent so little time on the matter,⁶⁶ because Virginia had argued that it was prohibiting interracial marriage for the sake of the children who might be born.⁶⁷

Suppose that the Court was focusing on the next generation but did not want to appear to be second-guessing the legislative judgment that children were better off not being born into interracial homes.⁶⁸ A number of points might be made about how this argument applies in the context of same-sex couples. First, children are thriving in homes where they are being raised by same-sex couples,⁶⁹ so it is not as if same-sex couples should be prevented from marrying because they are somehow a danger to children. Indeed, a recent study⁷⁰ touted as establishing that children raised by same-sex couples do not do well⁷¹ seems better cited as reaching a different conclusion. The focus of the

63. *Loving*, 388 U.S. at 12.

64. *Turner*, 482 U.S. at 95–96.

65. *Loving*, 388 U.S. at 12.

66. Mark Strasser, Perry, *Same-Sex Marriage, and Federal Constitutional Guarantees*, 12 *ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS* 166, 166 (2011) (“[T]he *Loving* opinion nowhere even mentions children.”).

67. *Id.* (“The Court’s reticence on this subject is quite understandable when one considers Virginia’s justification for its anti-miscegenation policy, namely, that the state wanted to preclude interracial marriage for the sake of the children that might be born of such unions.”).

68. *Loving*, 388 U.S. at 8 (“[T]he State argues [that] the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”).

69. *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009) (“Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.”).

70. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 *SOC. SCI. RES.* 752 (2012).

71. See Benedict Carey, *Debate on a Study Examining Gay Parents*, *N.Y. TIMES* (June 11, 2012), <http://nyti.ms/16yhKoA> (“The study found more psychological and social problems among young adults from broken homes who had a gay parent.”); Janice Shaw Crouse, *Two Daddies Dilemma: Study Pokes Holes in Same-Sex Parenting Propaganda*, *WASH. TIMES* (June 14, 2012), <http://bit.ly/10cHwfo> (“A new study released earlier this month reinforces what social scientists have known for ages: Traditional families produce more stable children.”).

study was not in particular on those children who had been raised by same-sex parents but, instead, on those children who had a parent who, at some time in his or her life, had experienced a sexual relationship with someone of the same sex. But it is, of course, true that such a criterion does not focus on individuals raised by same-sex parents.⁷² Indeed, one of the points in the study is that children fare better in planned GLB families than in other families involving a lesbian or gay parent and that there is too little focus on the latter families.⁷³ Ironically, this study might be cited in *support* of the proposition that same-sex couples should be allowed to marry, given the recognition that “children in planned GLB families seem to fare comparatively well.”⁷⁴

Same-sex-marriage opponents seem not to realize the study’s implications, since it seems to be suggesting that by grouping the children of the planned GLB families with the children of the non-planned families, the reported average welfare of the child is *lower* than it would have been if the sample had only been composed of children in planned GLB families. But, if permitting same-sex couples to marry might mean that there would be more planned births and more thriving children, then this is an additional reason to recognize same-sex marriage.⁷⁵

Even if the data had not supported that children are doing well in stable homes headed by same-sex parents, it would not support refusing to recognize same-sex marriage. Studies show that children raised by single or divorced parents, on average, do not do as well as children raised in two-parent, low-conflict homes where there has been no divorce.⁷⁶ But, this does not mean that people who are at greater risk of

72. See Nathaniel Frank, Op-Ed, *Dad and Dad vs. Mom and Dad*, L.A. TIMES (June 13, 2012), <http://lat.ms/17eybYg> (“[O]nly a small proportion of its sample spent more than a few years living in a household headed by a same-sex couple.”).

73. See Regnerus, *supra* note 70, at 765 (“Child outcomes in stable, ‘planned’ GLB families and those that are the product of previous heterosexual unions are quite likely distinctive.”).

74. *Id.* at 766 (“While previous studies suggest that children in planned GLB families seem to fare comparatively well, their actual representativeness among all GLB families in the US may be more modest than research based on convenience samples has presumed.”).

75. Cf. W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 898 (2006) (“Children appear most likely to thrive socially, emotionally, and educationally when they are reared in an intact or adoptive family headed by a married couple.”).

76. Frank, *supra* note 72, at 15 (“Like the Regnerus paper, all these studies show is that divorce and single-parenthood raise risks for kids.”); see also Sandra Keen McGlothlin, *No More “Rag Dolls in the Corner”: A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 J.L. & FAM. STUD. 67, 85 (2008) (“[C]hildren who live in homes of elevated hostility due to divorce or separation and high conflict custody or visitation disputes are more likely to get

divorce should not be permitted to marry. Nor does it mean that they should not be permitted to raise children.

Marriage provides stability for children and adults, which is a reason that same-sex couples should also be permitted to marry.⁷⁷ Society both does and should permit both good and great parents to marry, because doing so will help the children who are being raised by those parents. Thus, merely because someone is not a great parent does not mean that the individual is not a good parent and certainly does not mean that the individual should not be allowed to raise children.

Additionally, society does and should permit individuals to marry who will not or perhaps cannot become parents, because the individuals themselves and society as a whole are helped by permitting them to marry as well. As Chief Judge Kaye pointed out in her dissent in *Hernandez v. Robles*, the “relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage.”⁷⁸ Different sex couples will continue to get married and stay married even if same-sex couples are also permitted to marry. This is not a zero-sum game—“[t]here are enough marriage licenses to go around for everyone.”⁷⁹

Yet, if same-sex-marriage bans are not benefitting different-sex couples or their families and are positively harming same-sex couples and their families,⁸⁰ then it is difficult to see how such bans can be upheld on rational basis grounds. Suppose, however, that such bans are upheld. This would mean that a state could prohibit the celebration of such marriages within that state, although a separate issue involves the conditions, if any, under which states must recognize marriages, validly celebrated elsewhere.

into serious trouble with the law.”).

77. Erwin Chemerinsky, *A Matter of Time*, 54 ORANGE CNTY. LAW., May 2012, at 16, 18 (“Children in same-sex households thus benefit from the stability marriage provides in the same way it is thought that marriage is best for raising children when there are heterosexual parents.”).

78. *Hernandez v. Robles*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting).

79. *Id.*

80. Strasser, *supra* note 66, at 167 (“It is not as if such bans make it more likely that different-sex couples will marry or remain married. Instead, such bans merely impose a burden on same-sex couples and their families without bringing about any offsetting benefits for anyone else.”).

C. Privileges and Immunities

Traditionally, the law of the domicile governs the validity of marriages.⁸¹ Members of a couple who cannot marry in their domicile will not be able to force the domicile to recognize their marriage merely because they married in a different jurisdiction one weekend where their union was permitted.⁸² Suppose, for example, a couple marries in accordance with the law of their domicile, fully expecting to remain in their domicile. They remain for several years and, perhaps, are raising children. Suppose, however, that one member of the couple receives a job offer in another state where such marriages are prohibited. One issue that might be raised is whether the latter state could refuse to recognize this couple's marriage, i.e., the price of moving to the new state would be the surrender of their marriage.

The right to travel is recognized as one of the privileges and immunities afforded constitutional protection.⁸³ This right includes not only the right to travel through states, but also the right to emigrate to a new state.⁸⁴ To justify imposing a burden on the right to travel, states must do more than merely show that they have a legitimate interest at stake and that the imposed burden is rationally related to the promotion of that interest.⁸⁵ Rather, if the right to travel is implicated, the state must have important interests at stake and the means adopted must be closely tailored to the promotion of those interests.⁸⁶

Right to travel guarantees are not triggered merely because in-staters have some benefits that out-of-staters do not. For example, a state

81. Lisa Yurwit Bergstrom & W. James Denvil, *Availability of Spousal Privileges for Same-Sex Couples*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 224, 241 (2011) ("Federal and state courts agree that the law of the couple's state of domicile governs the validity of the marriage.").

82. Strasser, *supra* note 43, at 628 ("[T]he domicile at the time of the marriage . . . determine[s] the marriage's validity, notwithstanding that the marriage was valid where celebrated").

83. *See Saenz v. Roe*, 526 U.S. 489, 502–04 (1999).

84. *Id.* at 500 ("The 'right to travel' discussed in our cases embraces at least three different components. It 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.").

85. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("[W]e reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification.").

86. *See id.* ("But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.").

can give preferential treatment to in-staters with respect to recreational hunting.⁸⁷ The Court has made clear that the interest at issue must be sufficiently “fundamental”⁸⁸ to trigger the relevant protections. But “fundamental” for right to travel purposes is not equivalent to “fundamental” for due process purposes. For example, although there is no fundamental right to public assistance, public assistance benefits are sufficiently fundamental for right to travel purposes to trigger the relevant protections.⁸⁹ Additionally, there is no fundamental right to nonemergency medical care, although the right to receive such care is sufficiently fundamental to trigger right to travel protections.⁹⁰

One of the criteria used to determine whether an interest is sufficiently fundamental involves whether its denial is “apt to deter migration.”⁹¹ Yet, being forced to surrender one’s marriage at the border would certainly be a travel deterrent,⁹² and it is hard to see how the Court could suggest that one’s marriage is not a sufficiently fundamental interest to trigger right to travel protections.

Even so, states could still refuse to recognize marriages validly celebrated in other domiciles if the implicated interests were sufficiently strong and if the denial was sufficiently closely tailored to the promotion of those interests. But states have not yet asserted particularly compelling interests that are actually promoted by the refusal to recognize same-sex-marriage bans.⁹³

Even if it were true that the equal-protection and due-process guarantees offered no protection to same-sex marriages, those marriages validly celebrated in the domicile are protected by privileges-and-immunities guarantees. A separate issue involves whether individuals were actually domiciled in the state where they married, but that

87. See *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 378–88 (1978).

88. *Id.* at 388.

89. See *Saenz*, 526 U.S. at 500; *Shapiro*, 394 U.S. at 634.

90. See *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 269 (1974).

91. *Id.* at 257.

92. Cf. Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 508–09 (1995) (discussing “conditioning the right to enter or reenter the state on the individual’s consent to invalidation of the marriage compels the individual to surrender one constitutionally protected right, marriage, in return for another, travel”).

93. See *Hernandez v. Robles*, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting) (“Although a number of interests have been proffered in support of the challenged classification at issue, none is rationally furthered by the exclusion of same-sex couples from marriage.”).

is an issue that courts must address at other times too⁹⁴ and, thus, is no bar to the analysis here.

D. Full Faith and Credit

The Full Faith and Credit Clause imposes certain limitations on the states, although Congress has been authorized to modify full-faith-and-credit guarantees under certain conditions. Even if one ignores equal-protection guarantees, there is reason to think that Congress exceeded its authority when passing the Defense of Marriage Act, which will have implications for a variety of states.

The Full Faith and Credit Clause specifies:

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.⁹⁵

There is some controversy over whether this Clause only authorizes Congress to increase the credit due to acts, records, and juridical proceedings or whether it also authorizes Congress to decrease the credit that is due.⁹⁶ Regardless of how that debate is resolved, there are other reasons to believe that Congress exceeded its authority when passing the full-faith-and-credit provision of DOMA.⁹⁷ That provision reads:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial

94. See *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (“As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.”).

95. U.S. CONST. art IV, § 1.

96. See *Thomas v. Wash. Gas Light Co.* 448 U.S. 261, 272 n.18 (1980) (“[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.”).

97. DOMA contains two provisions; the provision specifying which marriages will be recognized for federal purposes reads:

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

1 U.S.C. § 7 (2012).

proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁹⁸

When authorizing states to ignore same-sex marriages celebrated in sister states, Congress is not merely promoting federalism by authorizing states to refuse to recognize any marriage that they deem contrary to local policy. Instead, Congress is picking out one kind of marriage in particular and subjecting it to unique burdens. Even if Congress has the power to decrease the full-faith-and-credit guarantees, it must do so via general laws. If picking out one type of valid marriage for adverse treatment passes the generality requirement, then the term general has no meaning.⁹⁹

Another issue to be explored is the effect of the DOMA full-faith-and-credit provision. Although a justification for its passage was that domiciles would not be forced to recognize their domiciliaries' same-sex marriages celebrated elsewhere,¹⁰⁰ domiciles would not have been forced to recognize these marriages even without DOMA. Suppose, for example, that Ohio same-sex domiciliaries go to Iowa, marry, and then return demanding that their marriage be recognized. Because Ohio is the domicile at the time of the marriage, it can refuse to recognize the Iowa union even without DOMA. Therefore, DOMA does not give the domicile at the time of the marriage a power that it does not have already.¹⁰¹

Perhaps DOMA gives subsequent domiciles or non-domiciles the power not to recognize a marriage validly celebrated elsewhere,¹⁰² although even that conclusion may not be warranted. Basically, DOMA

98. 28 U.S.C. § 1738C.

99. See Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 299 (1997) ("The term 'general' has no force if DOMA is sufficiently general to meet the relevant standard.").

100. See Krista Stone-Manista, *Parents in Illinois Are Parents in Oklahoma Too: An Argument for Mandatory Interstate Recognition of Same-Sex Adoptions*, 19 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 137, 146-47 (2010).

101. See Strasser, *supra* note 43, at 629 ("As the Ohio treatment of first cousin and niece marriages illustrates, domiciles already had the power to refuse to recognize those marriages of their domiciliaries that contravened local law, even if those marriages were validly celebrated elsewhere.").

102. Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 371 (2002) ("DOMA *might* be thought to give a subsequent domicile the power to refuse to recognize a marriage which had been validly celebrated in a sister domicile years earlier or, perhaps, to give a non-domiciliary state the power to refuse to recognize

says that full-faith-and-credit guarantees do not require the recognition of same-sex marriages validly celebrated elsewhere. But, a different question is whether such marriages must be recognized because of other guarantees, e.g., privileges and immunities. The Court has already made clear that Congress does not have the power to authorize states to violate privileges-and-immunities guarantees. “[T]he Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States.”¹⁰³

The U.S. Supreme Court has never authoritatively construed the DOMA full-faith-and-credit provision, so its reach is unclear.¹⁰⁴ One possible interpretation of the law is that it not only applies to the same-sex marriages celebrated elsewhere but to divorce judgments as well.¹⁰⁵ This would mean that if a same-sex couple were to divorce in one state and if the divorce judgment included a property division, then courts in a sister state would be authorized by DOMA to refuse to honor that property division.¹⁰⁶ Bracketing the public policy implications of permitting individuals to avoid their court-imposed obligations by simply moving to a forum that refuses to enforce the obligation, a separate point is that absent the federal DOMA, states would not be permitted to ignore judgments validly issued in a sister state.¹⁰⁷

a same-sex marriage validly celebrated elsewhere.”).

103. *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

104. See Mark D. Rosen, *Congress’s Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT’L L.J. 7, 31 (2010) (discussing different possible interpretations of DOMA).

105. Nick Tarasen, Comment, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585, 1620 (2011) (“DOMA, by its plain text, entitles hostile states to completely ignore a state-of-celebration divorce (and, potentially, any downstream judgments) as ‘arising from’ a same-sex marriage.”).

106. See Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 267 (2006) (“To the extent that a claim in the second state requires acceptance of its legal basis under the law of a state permitting same-sex legal relationships (e.g., that the claimant is entitled to a decree of dissolution, for a division of property, for support, and the like), it will not be entertained if the second state follows, in whatever form, a DOMA-type policy.”).

107. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (“So, when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.”).

Suppose then that the DOMA full-faith-and-credit provision is either struck down¹⁰⁸ or repealed.¹⁰⁹ In that event, states would no longer be authorized by Congress to refuse to give full faith and credit to divorce judgments validly issued in other states. While it is unclear whether Congress has the power to authorize states to refuse to credit judgments validly issued in other states, it is clear that, absent such authorization, states must give full faith and credit to judgments validly issued in sister states.¹¹⁰ This means that state mini-DOMAs, which specify that such judgments not be given credit, will be unconstitutional in whole or in part.

III. CONCLUSION

Same-sex-marriage bans implicate a number of federal constitutional guarantees. Because such bans undermine rather than promote societal and individual interests, they should be struck down on rational-basis grounds and certainly cannot withstand more demanding scrutiny. Even if one ignores due-process and equal-protection protections, some same-sex marriages must be recognized because of privileges-and-immunities guarantees. Finally, states are precluded by the Constitution from refusing to recognize all judgments of divorce involving same-sex couples, because the only possible justificatory basis for such a refusal itself would involve an overreaching Congress. In short, there are numerous federal constitutional bases upon which the Court should find that current same-sex-marriage bans do not pass muster.

108. Several courts have struck down the DOMA provision defining marriage for federal purposes. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y.), *aff'd*, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

109. Bills have been introduced to repeal the provision. See, e.g., Respect for Marriage Act, H.R. 1116, 112th Cong. (2011).

110. See *Williams*, 317 U.S. at 303.