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Interstate Marriage Recognition and the Right to Travel

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I. Introduction

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

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

Most courts determining the validity of marriages celebrated elsewhere did not feel constrained by federal constitutional guarantees and, instead, reached their conclusions in light of local law and policy as well as considerations of comity. However, it seems likely that the 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 II of this article outlines the kinds of analyses offered by courts when determining whether the forum would recognize a marriage that could not be celebrated locally but had nonetheless been validly celebrated elsewhere. Part III discusses some of the federal constitutional constraints on the power of states to refuse to recognize a marriage validly celebrated in a sister state. The article concludes by suggesting that federal constitutional guarantees should be understood to require 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, which 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 might be related by blood and still be permitted to marry.¹ States also differ with respect to the age at which individuals can marry² or, before 1967 when the Supreme Court struck down antimiscegenation laws as violating


² Compare Ariz. Rev. Stat. § 25-102 (“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.”) with Ark. Code Ann. § 9-11-208 (d) (“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 of 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, Fam. L., § 2-301 (a) (“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 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 Md. Code, Fam. L., § 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.”); with N.H. Rev. Stat. § 457:4 (“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.”) with Ohio Rev. Code § 3101.01 (A) (“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.”).
federal constitutional guarantees, whether interracial couples could marry. Some states imposed limitations on the right of an individual to remarry if that person had caused the break-up of his or her prior marriage. Difficulties would arise when a forum state was asked to determine the validity of a marriage that could not have been celebrated locally but had nonetheless been permissible in the state where it had been celebrated.

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

Several states imposed burdens on individuals who had caused their first marriages to end. For example, the Supreme Judicial Court of Massachusetts explained in Inhabitants of West Cambridge v. Inhabitants of Lexington that an individual whose marriage had been dissolved because he had committed adultery would be barred from remarrying within the state. That such a marriage could not be contracted locally, however, did not mean that the marriage could not be contracted anywhere. Indeed, it is not at all clear how a state could preclude someone who had changed domiciles from remarrying, even were there a desire to do so. As the United States

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3 See Loving v. Virginia, 388 U.S. 1 (1967)
4 See id. at 6 (“Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.”).
5 See, for example, Inhabitants of West Cambridge v. Inhabitants of Lexington, 18 Mass. 506, 514-15 (Mass. 1823) (discussing the limitation imposed on an individual found to have committed adultery during his first marriage).
7 See id. at 514-515 (“by 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. Ann. 765.03 (2) (“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.”).
8 West Cambridge, 18 Mass. at 517 (“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, 1826 WL 438 (Tenn. Err. & App. 1826) (woman who 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).
9 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 extraterritorial effect.”); Green v. McDowell, 242 S.W. 168, 172 (Mo. 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 (N.Y. Sur. 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.”) (citing Fisher v. Fisher, 165 N.E. 460 (N.Y. 1929)); Carter v. Carter, 191 S.W.2d 451, 452 (Tenn. 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 State v. Grengs, 33 N.W.2d 248, 250 (Wis. 1948)
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.”

Judgments including remarriage limitations have usually but not always been viewed as having no extraterritorial effect, although it is important to distinguish between two different kinds of scenarios. In one, an individual barred from marrying locally decides to move to another state and marries in accord with the law of his new domicile. His marriage would be recognized in the new domicile, although he might have difficulties should he decide to change his domicile again and move back to the state where he had been precluded from remarrying.

A different 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

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.

Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) ("[T]he statute under consideration is in no sense a penal law, [since it] . . . imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained, except upon the ground that the Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages.").

10 Huntington v. Attrill, 146 U.S. 657, 669 (1892).
11 Lanham v. Lanham, 117 N.W. 787, 788 (Wis. 1908) ("[T]he statute under consideration is in no sense a penal law, [since it] . . . imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained, except upon the ground that the Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages.").

12 West Cambridge, 18 Mass. at 517 ("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."); Marshall v. Marshall, 48 How. Pr. 57 (1874), overruled on other grounds, Van Voorhis v. Brintnall, 86 N.Y. 18 (N.Y. 1881) ("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."); Peart's Estate, 97 N.Y.S.2d at 882 ("it 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.") (citing Van Voorhis v. Brintnall, 86 N.Y. 18, 28 (N.Y. 1881)).
law, and comes back to his domicile with his new spouse. Such a marriage may well not be recognized by the domicile, if only because evasive marriages not only violate local public policy but also involve an attempt to defraud the state.

While many of the reported cases involved individuals domiciled in one state who had crossed state lines to evade local law, courts would sometimes suggest that states had the power to refuse to recognize marriages contrary to local law regardless of where and when 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

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13 See Williams v. Oates, 1845 WL 1030 (N.C. 1845) (refusing to recognize a marriage of North Carolina domiciliaries contracted in South Carolina to evade local law). See also *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.

14 See *In re Stull's Estate*, 39 A. 16, 18 (Pa. 1898)

The foregoing reasoning is satisfactory to us. In 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.”).


16 10 S.W. 305 (Tenn. 1889).
recognize any marriage, although much of the opinion offered support for 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.” 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.” However, there are exceptions to that rule: (1) “marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries,” and (2) “marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication.” Basically, the court suggested that it was in the interest of both society and the individuals themselves to recognize most marriages, although there were two exceptions to this general rule.

The first exception involves polygamous or incestuous marriages, where incest is understood to apply only to marriages in the direct line of consanguinity or to marriages between siblings. The justification offered for not

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17 Id. 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 Corporation, 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 v. Watkins, 180 So. 577, 581 (Ala. 1938) (“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.”).

18 Pennegar, 10 S.W. at 306.

19 Id.

20 Id.

21 Id.

22 Id. (“To the first class belong those which involve polygamy and incest”).
recognizing these unions was not merely that the marriage was not recognized locally but that there was general if not universal agreement that such marriages would not be recognized outside of the jurisdiction where celebrated. The North Carolina Supreme Court pointed out that such “marriages may be declared unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous.”

The second exception was more difficult to explain, at least in part, because it was obviously overbroad as stated—a limitation that could be avoided as long as there were “some positive statute or pronounced public policy of the particular state” would be no limitation at all. Basically, the question at hand involves determining which locally prohibited marriages will be recognized if validly celebrated elsewhere. But if the rule is that those marriages prohibited by local law or public policy will 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 included too much, 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.” For example, a couple failing to meet all of the formal requirements with respect to the marriage license but meeting the other marriage requirements may well be held to have a valid...

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23 See id. (“in 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”).

24 State v. Cutshall, 15 S.E. 261, 262 (N.C. 1892). See also Stevenson v. Gray, 1856 WL 4286, *9 (Ky. 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.

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

26 Id.
marriage. As the Indiana Supreme Court explained, whether there is a valid marriage should not depend “upon any mere matters of form or ceremony.”

Even where the focus is not on the merely formal but, instead, on the more substantive marriage requirements, the exception as written is 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.” Enforcement of any and all substantive limitations would be too destructive to fundamental interests. But this means that some way must be devised to determine which substantive prohibitions can be overlooked, so that this “most solemn relation” might be maintained and preserved.

See 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 Petition for Compulsory Accounting in Estate of Farraj, 2009 WL 997481, *1 (N.Y. Sur. 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. § 37:1-10 (2008) (“[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 Domestic Relations Law § 13, a marriage is not void for failure to obtain a marriage license if the marriage was solemnized. NY Dom. Rel. Law § 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.

Teter v. Teter, 1885 WL 4247, *4 (Ind. 1885).

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 would be to require legislatures to make their intentions clear—they might 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. However, at least two difficulties would be associated with such a proposal. First, the legislature might simply announce that it would not recognize certain marriages, notwithstanding the lack of important or compelling reasons to refuse to afford that recognition. Second, it might well be that the legislature would have inadvertently failed 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.” However, rather than simply assume 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.

Some of the factors that should be considered when determining whether a marriage validly celebrated elsewhere should be recognized include whether there is a statute criminalizing such a marriage or whether innocent parties would suffer were the marriage recognized. In particular, Tennessee had a “policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded . . . by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of

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30 Cf. Putnam v. Putnam, 25 Mass. 433, 449 (Mass. 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.”).
31 Several states have announced that they will not recognize a same-sex marriage even if validly celebrated in another domicile. See, for example, Alaska Stat. § 25.05.013 (a); Ark. Code Ann. § 9-11-208 (b); Ga. Code Ann. § 19-3-3.1 (b); Ky. Rev. Stat. § 402.045 (1); Ohio Rev. Code § 3101.01 C)(2); 23 Pa. Consol. Stat. Ann. § 1704; Vernon’s Tex. Code Ann., Family Code § 6.204 (b), (c); Va. Code Ann. § 20-45.2.
32 Pennegar, 10 S.W. at 307.
33 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”).
34 See id. (noting that the state criminalized attempts to enter into interracial marriages); 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.”).
avoiding our statute.” The Pennegar court announced that Tennessee would not recognize marriages celebrated elsewhere to avoid limitations imposed in Tennessee resulting from adulterous behavior during a prior marriage. The ramifications of such a holding for couples should not be minimized, since it would not only mean that the alleged spouse would be treated as a legal stranger for purposes of inheritance, but also that the couple might be subject to criminal penalty because living together without benefit of (a recognized) marriage.

Suppose, however, that the individuals do not marry to evade local law. What then? This might depend upon how the suit arises. For example, it might be that an individual changes domicile and marries in the latter domicile, where he lives and eventually dies. Eventually, a suit is brought in the former domicile to establish the validity of the marriage, e.g., because a child of that marriage would be entitled to property within the forum only if that child were legitimate, i.e., only if the validity of that marriage were recognized. In this kind of case, there would have been no attempt to impose a fraud on the forum. Indeed, the individual barred from marrying locally had never returned to his former state where the marriage’s validity might have been challenged.

Yet, the situation might be more complicated, for example, because the individual who had married after changing his domicile had changed his domicile yet again and had moved back to the original domicile. Thus, 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.

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35 Pennegar, 10 S.W. at 308.
36 Id. See also Stull's Estate, 39 A. at 17
   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.
37 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).
38 Pennegar, 10 S.W. at 308.
39 See West Cambridge, 18 Mass. at 518 (“it 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, 1881 WL 12957, *6 (N.Y. 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.”)
40 See, for example, Succession of Caballero, 1872 WL 7198, *1 (La. 1872) (individual established domicile in Spain and then came back to Louisiana where he died).
By the time that they are ready to marry in their new domicile, they have decided that they miss their former state and now wish to relocate back to where they had lived before.\(^{41}\)

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,\(^{42}\) and the validity of the marriage would depend upon how the forum treated evasive marriages. In the envisioned scenario, however, the marriage would have been valid according to local law, and the couple would not have been attempting to impose a fraud on the domicile.

Traditionally, a non-polygamous, non-incestuous marriage will be treated as valid everywhere if valid in light of the domicile’s law at the time of the marriage’s celebration.\(^{43}\) 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.\(^{44}\) 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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\(^{41}\) This is basically what happened in Newman v. Kimbrough, 59 S.W. 1061 (Tenn. App. 1900).  
\(^{42}\) See Williams v. Clark County Dist. Attorney, 50 P.3d 536, 542 (Nev. 2002) (“once 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”).  
\(^{43}\) See Restatement (First) Conflict of Laws § 132

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) Conflict of Laws § 283

(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.

\(^{44}\) 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. See id.
B. Interstate Recognition of Interracial Marriages

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

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

Other courts focused on the issue of such marriages, i.e., 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.” This was thought to be a reason to refuse to recognize such marriages.

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45 1819 WL 1487 (Mass. 1819).
46 *Id.* at *2.
47 *Id.*
48 *Id.*
50 See *Naim v. Naim*, 87 S.E.2d 749, 756 (Va.1955)
Many of the interracial marriage cases involved individuals who evaded local law by going to a jurisdiction that did not bar such unions, and then returning to their domicile to live together as a married couple. For example, in *State v. Kennedy*, the couple had been domiciled in North Carolina but had gone to South Carolina to marry so that they could evade local law. They then immediately returned to their domicile to live. The North Carolina 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.”

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

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

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*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 differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt [i.e., about 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.

51 1877 WL 2697 (N.C. 1877).
52 Id. at *1.
53 Id.
54 Id. at *2. *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).
55 *See* Succession of Caballero, 1872 WL 7198, *2 (La. 1872) (allowing daughter of interracial couple to inherit in the state, where her father and mother had never lived in the state as an interracial married couple).
56 *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.”).
57 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.”).
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 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 simply would have 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. 58

Another kind of example would also involve no evasion in the relevant sense. Suppose that an interracial couple
marries in one state in accord with local law and then, because of an opportunity arising after the marriage had been
celebrated, subsequently moves to the forum to live as a married couple, even though the 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 59 involved an interracial couple who had validly established their union in Utah, and then had
moved to California where they were precluded by law from marrying. 60 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.” 61

58 Cf. Ex parte Kinney 14 F.Cas. 602, 608 (E. D. Va. 1879) (“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.”).
59 51 Cal. 120 (Cal. 1875)
60 Id. at 122 -123.
61 Id. at 125. See also People v. Godines, 62 P.2d 787, 788 (Cal. 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.”)
Yet, courts were not always willing to recognize marriages validly celebrated in others domiciles 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, 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.

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 they had contracted the marriage, instead merely noting that the parties had been married in Mississippi. 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. 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 was true, e.g., 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 can be used to determine the validity of a marriage. Thus, it is difficult to tell whether Bell is forging new ground by subjecting a non-polygamous, non-incestuous marriage to the law of a later-acquired domicile or is merely employing the relatively noncontroversial practice of using the law of the domicile where the couple will live immediately after the marriage to determine the validity of the union.

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63 See id. at *1.
64 Id.
65 Id.
66 See Pennegar, 10 S.W. at 307 (“in State v. Bell, 7 Baxt. 9, 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”).
67 See notes 43-44 and accompanying text supra.
A different disappointing feature of the *Bell* opinion was in its likening interracial marriage to polygamous and incestuous marriages. This comparison was misleading in a very important respect. The latter were recognized as subject to non-recognition because of a widely accepted exception to the general rule regarding these kinds of marriages in particular\(^{68}\) rather than because of their degree of offensiveness. Yet, precisely because there was general agreement that incestuous and polygamous marriages need not be recognized by other jurisdictions but no agreement either among the states or among countries with respect to whether interracial marriages would be recognized, the analogy between interracial marriages and polygamous marriages broke down, and the existing jurisprudence did not permit a state to refuse to recognize an interracial marriage validly celebrated in a sister domicile. Further, arguably, as much if not more deference is 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.\(^{69}\)

*Bell* is helpfully contrasted with a North Carolina case, *State v. Ross*.\(^{70}\) At issue was whether the interracial marriage of a former domiciliary would be recognized.\(^{71}\) 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.”\(^{72}\) 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.”\(^{73}\)

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\(^{68}\) See Stevens v. Stevens, 136 N.E. 785 (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.

\(^{69}\) 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.”).

\(^{70}\) 1877 WL 2696 (N.C. 1877).

\(^{71}\) Id. at *1.

\(^{72}\) Id. at *2.

\(^{73}\) Id.
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,” because it “cannot be said to be the common sentiment of the civilized and Christian world” that the interracial marriage should not be recognized.

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.” Because North Carolina marriage law governed the validity of a marriage of North Carolina domiciliaries who had evaded local law to marry in South Carolina, North Carolina was under no obligation to recognize the marriage valid in the state of celebration, which meant that its domiciliaries could be convicted of living together without benefit of (a valid) marriage.

As a general matter, states are free to refuse to recognize an evasive marriage that violates an important public policy of the domicile, and also are free to refuse to recognize a polygamous or incestuous marriage validly celebrated elsewhere. However, there is no uniformity among the courts with respect to whether a state can refuse to recognize a marriage validly celebrated in another domicile if that non-polygamous, non-incestuous marriage

74 Id. at *3.
75 See id.

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 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. Bank in Grand Forks v. North Dakota Workmen’s Compensation 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.”) (citing McDonald v. McDonald, 58 P.2d 163 (1936)).
77 Kennedy, 1877 WL 2697 at *2.
nonetheless violates an important local policy. Some courts have suggested that the recognition of such marriages was required by comity or good public policy, whereas other courts implied that any marriage as disfavored as polygamous or incestuous marriages would also be subject to non-recognition.

Those states deciding whether to accord recognition to the marriage celebrated in another domicile did not feel constrained by federal constitutional guarantees—they did not believe that the refusal to allow such unions to be celebrated locally implicated equal protection or due process guarantees or that the refusal to recognize a marriage validly celebrated in a sister state implicated right to travel guarantees. However, it is simply false to think that states have as much discretion to formulate their marriage policies as do countries, and those limitations must be examined.

III. 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. Arguably, current same-sex marriage bans violate federal equal protection guarantees.
protection and due process guarantees. However, the focus here 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, and other jurisdictions will recognize such marriages if validly celebrated elsewhere, even though such marriages cannot be celebrated locally. However, many jurisdictions have not only precluded the local celebration of such marriages but have refused to recognize such marriages regardless of whether they were valid according to the law of the domicile at the time of celebration.

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 “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.” As the Court made clear in Crandall v. Nevada, a state may not impose a tax on individuals simply

85 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.”).
86 Daniel Barrick, Gay marriage becomes law; N.H. sixth state to extend rights Concord Monitor (N.H.), 6/4/09, 2009 WLNR 10695187 (“New Hampshire became the sixth state to allow same-sex couples to marry yesterday”).
87 See Denise Richardson, Same-sex couples here say: Change N.Y.’s marriage law Daily Star (Oneonta, N.Y.), 6/19/09, 2009 WLNR 11761773 (“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, Austl. Broad. Corp. (ABC) News, 5/10/09, 2009 WLNR 8878590 (“in Washington DC the city council has agreed to recognise same sex marriages in other states”).
88 See note 31 supra.
89 The Privileges and Immunities Clause is contained in Article IV, See 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. See 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, iso what those additional protections are. See 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.”)
91 73 U.S. 35 (1867).
for passing through the state. Yet, the right to travel has not been limited to the right to pass through a state. On the contrary, it includes the right to emigrate to a new state. The Privileges and Immunities Clause gives the citizens of each state 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.

Two caveats must be issued, however. States can discriminate between residents and non-residents for certain purposes. If the affected interest is not very important, then right-to-travel protections may not be implicated. The Court explained in Baldwin v. Fish and Game Commission of Montana that only with respect to “those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally,” and that whatever “rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, . . . elk hunting by nonresidents in Montana is not one of them.”

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

92 See id. at 49.
93 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.”).
95 See Toomer v. Witsell, 334 U.S. 385, 396 (1948) (“the 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”).
97 Id. at 383.
98 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. 36, 76 (1872) (“We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental.”).
99 Baldwin, 436 U.S. at 388.
100 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. See id. at 372. While understanding that the clients of the outfitters were
different analysis might have been offered. For example, Court struck down a differential licensing in South Carolina where residents were charged $25 per shrimp boat and non-residents were charged $2500 per shrimp boat.  

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. The Court noted that “medical care is as much ‘a basic necessity of life’ to an indigent as welfare assistance.” At least one of the considerations articulated by the Court was whether the restriction at hand was likely to deter migration. The Court noted:

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

The fact that a state policy has the effect of deterring migration does not entail that the state policy violates constitutional guarantees—there is no per se rule making the imposition of burdens on travel unconstitutional. Nonetheless, where right-to-travel guarantees are implicated, the state bears a heavy

almost exclusively out-of-staters, see id. at 376, the Court nonetheless analyzed the non-resident’s interest at issue as recreational rather than a means to a livelihood. See id. at 388.
101 See Toomer, 334 U.S. at 389 (“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.”). See also Mullaney v. Anderson, 342 U.S. 415 (1952) (striking down $50 licensing fee for non-resident commercial fishermen when there was only a $5 licensing fee for resident commercial fisherman ).
103 Id. at 252.
104 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)).
105 Id. at 257.
106 See 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.”).
burden to justify its policy. The Court will examine both the importance of the interest asserted and how closely tailored the means adopted is to the promotion of that interest.

The Court is wise to insist that the state’s interest be important or, perhaps, compelling rather than merely legitimate. Many of the right-to-travel cases involved economic burdens or benefits that adversely impacted individuals who were either domiciled in other states or who had 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 protecting the public fisc. It might be thought, then, that the state’s withholding benefits from individuals who had traveled or might travel to the state would protect the public fisc and therefore be constitutional. However, the Maricopa County Court cautioned that “a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens.” Further, the Court cautioned, it is unconstitutional to try to inhibit the immigration of citizens from other states.

When suggesting that constitutional guarantees would be violated by an attempt to inhibit immigration, the Court was not including an intent element in the right-to-travel analysis—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 Court examined a durational residence requirement for voting. The state of Tennessee had defended its requirement against a privileges and immunities

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107 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.”)
108 See Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (“any 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”).
109 See id. (statute burdening right to travel must promote a compelling interest to be constitutional).
110 Maricopa County, 415 U.S. at 263 (citing Shapiro, 394 U.S. at 633).
111 Id. at 263-64 (“to 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 174 (Jackson, J., concurring) (“This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, 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.”).
113 See id. at 339.
challenge by arguing that “durational residence requirements for voting neither seek to nor actually do deter . . . travel.” The Court characterized this defense as involving “a fundamental misunderstanding of the law,” because a statute might offend right-to-travel guarantees even if the state did not intend to deter migration and even if it was not established that the regulation had in fact deterred migration.

The effect of the Tennessee law was summed up as follows: “Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote [in the next election will be] . . . absolutely denied.” 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,” laws abridging that right must be examined closely. The statute will have to “further a very substantial state interest” and the State will have to have chosen a means that does not “unnecessarily burden or restrict constitutionally protected activity.” Because Tennessee had other methods by which to prevent fraud and because the method chosen was not particularly well-suited to accomplish that end, the durational residency requirement was struck down.

The purpose behind the Privileges and Immunities Clause was to “help fuse into one Nation a collection of independent, sovereign States,” 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."\(^{127}\) 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 term 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.”\(^{128}\)

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*,\(^{129}\) discussed both possible scenarios when explaining the conditions under which Virginia would recognize a marriage, void locally, that had been celebrated elsewhere.

*Kinney* involved an interracial couple domiciled in the state who had gone to the District of Columbia to marry so that they could evade local law.\(^{130}\) The *Kinney* court rejected that Virginia would be required to recognize its own domiciliaries’ marriage, prohibited locally, merely because those domiciliaries had traveled to D.C. to marry in accord with the law of the place of celebration.\(^{131}\) 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”\(^{132}\) if instead the interracial couple had been domiciled in D.C., had married there, and then had later moved to Virginia. Such a couple would have

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\(^{127}\) Shapiro, 394 U.S. at 629.


\(^{129}\) 14 F. Cas. 602 (E. D. Va. 1879).

\(^{130}\) 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.”).

\(^{131}\) 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.”).

\(^{132}\) Id. at 606.
a right of right of transit “through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence,” i.e., 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 the state. 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 emigrated to the state.

The United States Supreme Court has suggested that marriage is the kind of right that triggers right-to-travel guarantees. In Sosna v. Iowa, the Court examined Iowa’s divorce residency requirement. The challenge was analyzed in light of the right to travel jurisprudence, although the Court noted various respects in which the harms at issue in that case differed from the harms that had been discussed in some of the other cases. For example, while states cannot justify durational residence requirements by appealing to “budgetary or recordkeeping considerations,” the interests implicated in this case were much different. First, the plaintiff was not being foreclosed from getting a divorce by the one-year residency requirement—on the contrary, she was merely being asked to delay the proceeding. Once she had met the residency requirement, she could then get a divorce and be eligible to remarry should she wish to do so. Further, the Court noted, while the plaintiff had important interests implicated in her marital status, the same might be said about her soon-to-be ex-husband, and his interests might militate in favor of the residency requirement. Finally, the children’s interests had to be considered as well. Basically, the Court implied

133 Id.
134 Id.
135 Andrew Koppelman points out that Kinney suggest that 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 emigrated to a state. See Andrew Koppelman, Same Sex Different States: When Same-Sex Marriages Cross State Lines (New Haven: Yale University Press, 2006) 47-48.
137 Id. at 406.
138 Id.
139 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.”).
140 Id. (“Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights.”).
141 Id. at 406-07 (“Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support.”).
that the strength of the implicated interests justified Iowa’s imposition of a residency requirement for divorce, although the Court mentioned other interests of the state as well, such as the state’s interest in “minimizing the susceptibility of its own divorce decrees to collateral attack.”

For purposes here, the important lesson of Sosna is not 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 is 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.” For example, the Loving Court made clear that the right to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

As Sosna illustrates, that marriage (or divorce) triggers right-to-travel guarantees does not end the analysis-- a separate determination involves whether the state has sufficiently important interests to justify the burden that has been placed on the right to travel. That said, however, the increased burden on the state to justify its deterring travel should not be minimized, and 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 as had been true in Sosna, and if the burden imposed would not merely be temporary, as had been true in Sosna, 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 their refusing to recognize same-sex marriages validly celebrated in sister domiciliary states. Indeed, states may have some difficulty in establishing that they have a legitimate interest in refusing to recognize such

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142 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.”).
143 Id. at 408.
144 Id. at 419 (Marshall J dissenting).
145 Loving, 388 U.S. at 12.
146 See notes 140-41 and accompanying text supra.
147 See note 139 and accompanying text supra.
marriages. For example, the Romer Court noted that a disadvantage imposed against members of the LGBT (lesbian, gay, bisexual, transgender) community because of animus does not promote a legitimate state interest.\textsuperscript{148} Even more to the point, when the Court struck down Texas’s same-sex sodomy law in \textit{Lawrence v. Texas},\textsuperscript{149} 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.”\textsuperscript{150} Such a comment would not make any sense as support for striking down the statute at issue unless these enduring bonds themselves had value.\textsuperscript{151}

The claim here is not that the Lawrence Court recognized a right to marry a same-sex partner.\textsuperscript{152} The Court did not strike down same-sex marriage bans and, indeed, made quite clear that it was not addressing the constitutionality of such bans.\textsuperscript{153} Nonetheless, if the state does not have sufficiently important interests to justify its 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 for constitutional purposes than his or her interest in non-marital relations,\textsuperscript{154} 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 addressing the constitutionality of local same-sex marriage bans on state constitutional grounds. For purposes here, it is helpful to distinguish among the decisions in terms of the level of scrutiny employed by the courts. The state supreme courts have split when analyzing

\textsuperscript{149} 539 U.S. 558 (2003).
\textsuperscript{150} Id. at 567.
\textsuperscript{151} 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.”).
\textsuperscript{152} 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.”).
\textsuperscript{153} Id. at 578-79 (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).
\textsuperscript{154} 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.”).
the constitutionality of such bans in light of the rational basis test. Thus, for example, the Supreme Judicial Court of Massachusetts struck down that state’s same-sex marriage ban on rational basis grounds, whereas the New York Court of Appeals held that the state’s same-sex marriage ban survived that level of scrutiny.

There has been much more uniformity when the state supreme courts examined the same-sex marriage bans in light of a higher level of scrutiny—in those cases, such bans were held to violate constitutional guarantees. The point here should not be misunderstood. These analyses were in light of state constitutional guarantees. That same-sex marriage bans have not yet been upheld when the state courts were examining 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 the Thesis Here

The thesis here should be distinguished from a variety of other theses which, although arguably meritorious, are nonetheless not the focus of this article. It is not argued here, for example, 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, and it is not argued here that a domiciliary state never has the power to refuse to recognize a marriage of its own domiciliaries when those domiciliaries purposely evaded local law so that they could foist their marriage on the state. If, indeed, same-sex marriage bans pass constitutional muster, then a state’s refusing to

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155 See Goodridge v. Department of Public Health, 798 N.E.2d 941, 961 (Mass. 2003) (“we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection”).
156 See 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.”).
158 But see Angela P. Harris, Loving Before and After the Law, 76 Fordham L. Rev. 2821, 2837 (2008) (“prohibitions on same-sex marriage should be viewed as unconstitutional”).
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.\textsuperscript{159}

Nor is the argument here that the right to marry is so important that the state is 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,”\textsuperscript{160} and that the state’s power to determine who may marry whom is not unlimited.\textsuperscript{161} Here, the argument is merely that even if states are constitutionally permitted to refuse to recognize same-sex marriages, they face a heavier burden when seeking to justify their refusing 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 obnoxious to local policies.\textsuperscript{162} That argument is not offered here for a few reasons. First, the Full Faith and Credit Clause\textsuperscript{163} has been interpreted to impose more stringent requirements with respect to crediting other states’ judgments than other states’ laws.\textsuperscript{164} The Court has explained that with respect to judgments, “the full faith and credit obligation is exacting.”\textsuperscript{165} However, the same may not be said of laws—“not every statute of another state will override a conflicting statute of the forum by virtue of

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\bibitem{159} 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 \textit{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.

\bibitem{160} \textit{Maynard v. Hill}, 125 U.S. 190, 205-206 (1888).

\bibitem{161} See \textit{Loving}, 388 U.S. at 7 (noting that the 14\textsuperscript{th} Amendment limits the power of the state to regulate marriage).

\bibitem{162} See \textit{Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception}, 106 \textit{Yale L.J.} 1965, 1967 (1997) (“the 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”).

\bibitem{163} See \textit{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.”).

\bibitem{164} See \textit{Baker by Thomas v. General 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.’ [citing \textit{Pacific Employers Ins. Co. v. Industrial Accident Comm’n}, 306 U.S. 493, 501 (1939); \textit{Phillips Petroleum Co. v. Shutts}, 472 U.S. 797, 818-819 (1985)]. Regarding judgments, however, the full faith and credit obligation is exacting. A final 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.”).

\bibitem{165} Id. at 233.
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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. Because a marriage does not involve a judgment but instead involves a status created pursuant to a law, states are not obligated to give the same faith and credit to marriages from another state as they give to judgments from another state.

Second, 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.” While it is not at all clear the Congress had the power to pass the Defense of Marriage Act, 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.” 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.

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167 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 (2003) (suggesting that marriages are not judgments and hence the interstate recognition of marriages involves a conflict of laws analysis).
168 See U.S. Const., art. IV, §1.
169 See, for example, Mark Strasser, Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. Pitts. L. Rev. 279-323 (1997) (arguing that DOMA is unconstitutional for several reasons).
170 292 U.S. 216 (1934).
171 Id. at 223.
172 In the very next sentence, the Court makes clear that it is discussing the law of the domicile at the time of the marriage. See id. (“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.”) 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 notes 43-44 and accompanying text supra.
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 is not replicated in the Fourteenth Amendment. Instead, section 5 of the Fourteenth Amendment is phrased much differently, and Congress’s power under section 5 of the Fourteenth Amendment has been construed much more narrowly than has its power under the Effects Clause.

Further, the 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,” 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.”

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.” 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

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173 See text accompanying note 168 supra.
174 See U.S. Const. amend XIV, §5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”)
175 The Court has suggested that Congress’s section 5 powers are somewhat limited. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (Congress’s section 5 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’s 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.").
176 *Saenz*, 526 U.S. at 507. See also *Shapiro*, 394 U.S. at 641 (suggesting that Congress’s authorization would not save the statute at issue from violating right-to-travel guarantees).
177 *Saenz*, 526 U.S. at 507-08.
179 317 U.S. 287 (1942)
which the state must deal.\textsuperscript{180} The \textit{Williams} Court worried that leaving marital status uncertain “could not help but bring ‘considerable disaster to innocent persons’ and ‘bastardize children hitherto supposed to be the offspring of lawful marriage’\textsuperscript{181} Indeed, because marriage “affects personal rights of the deepest significance . . ., every consideration of policy makes it desirable that the effect should be the same wherever the question arises.”\textsuperscript{182} 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. Assuming that the domiciliary state’s marriage statute passes constitutional muster, then the domicile at the time of the marriage determines the validity of the marriage both for itself and for other states, too. 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.

\textbf{IV. 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 interests for right-to-travel purposes, and states have a heavy burden of justification when making citizens sacrifice their marriages as a price of emigrating to the state.

That right-to-travel guarantees are triggered when states force citizens seeking to emigrate 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 marriage. 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.

\textsuperscript{180} Id. at 298.
\textsuperscript{181} Id. at 301 (quoting Haddock v. Haddock, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting)).
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 the forum.

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

But 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 emigrating 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 those interests.

The claim that the right to travel jurisprudence cannot force State B to recognize the marriage of a citizen in state A if citizens in State B cannot also contract that marriage has been rejected for over a hundred years—the Kinney court recognized that the right to travel protected a marriage, void locally, if the married couple was traveling through rather than emigrating to the forum. But the Court’s jurisprudence in this area suggests that the

183 Bank of Augusta v. Earle, 38 U.S. 519, 586-87 (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 Kinney, 14 F.Cas. at 606 (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 emigrated, reasoning that doing so would be to treat those citizens more favorably than local citizens) (citing Earle).
184 Toomer, 334 U.S. at 395. See also Maricopa County, 415 U.S. at 261 (“the 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”).
right to emigrate has greater protections than the Kinney court imagined. 185 Basically, the Court has made clear that states cannot deter individuals from exercising their right to emigrate 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 in any of the same-sex marriage cases that would meet that burden, and it seems quite doubtful that such interests exist. Whether or not states can refuse to permit their domiciliaries from marrying 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.

185 See notes 132-35 and accompanying text supra.