

MARRIAGE, DOMICILE, AND THE CONSTITUTION

MARK STRASSER*

ABSTRACT

In three of the major right to marry cases in which the plaintiffs challenged their domicile's refusal to permit them to marry, the couples had married in a sister state in accord with local law. In none of these cases did the Court address the conditions under which states, as a constitutional matter, must recognize marriages validly celebrated in another state. This article argues that the position reflected in the First and Second Restatements of the Conflicts of Law captures the United States Constitution's approach. A marriage valid in the states of celebration and domicile at the time of its celebration must be recognized throughout the country, contrary policy of the forum state notwithstanding. In addition, the article discusses both the conditions under which states must permit the enjoyment of the incidents of marriage, and some of the changes in state law that would be necessary were the Court to expressly adopt the position advocated here.

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INTRODUCTION

Three of the major right-to-marry cases decided by the United States Supreme Court—*Loving v. Virginia*,¹ *Zablocki v. Redhail*,² and *Obergefell v. Hodges*³—implicated an issue that nevertheless remains unresolved: under what conditions does the Constitution require marriages validly celebrated in one state to be recognized by all other states? In each of these cases, the Court struck down a state’s contested marriage prohibition, which removed the conflict between that state’s law and the laws of other states who allowed such marriages, and thereby allowed the Court to avoid determining how such conflicts should be resolved.

Merely because no conflicts were posed in these cases, however, does not mean that conflicts never arise. On the contrary, states have long been forced to develop approaches to deciding whether to recognize marriages validly celebrated elsewhere that nonetheless contravene local law. As one example, a state of domicile might be forced to decide whether to recognize a marriage between individuals too closely related by blood according to that state’s law,⁴ even though

1. 388 U.S. 1 (1967).

2. 434 U.S. 374 (1978).

3. 135 S. Ct. 2584 (2015).

4. See, e.g., *Mason v. Mason*, 775 N.E.2d 706 (Ind. Ct. App. 2002) (discussing whether to recognize a marriage between first cousins, which was valid in the state of celebration (Tennessee) but prohibited in the state of domicile (Indiana)); see also *Mazzolini v. Mazzolini*, 155 N.E.2d 206

such marriages are permitted in the state of celebration.⁵ The *Restatements (First and Second) of the Conflicts of Law* provide guidance as to how such matters should be resolved.⁶ However, the Court has never explicitly addressed whether the *Restatements'* basic approach is constitutionally required, forcing lower courts to interpret the Constitution's limits and resulting in the adoption of inconsistent approaches among jurisdictions.⁷ The Court's implicit position is that the *Restatements'* approach, with a few important modifications, reflects the marriage recognition requirements of the Constitution.⁸

Part I of this article discusses the fundamental right to marry, as well as the conditions under which states will choose to recognize marriages validly celebrated elsewhere. This Part also discusses the constitutional limitations placed on states in deciding whether to recognize the validity of a marriage celebrated elsewhere, as well as whether to prohibit couples married elsewhere from enjoying the incidents of marriage. Part II applies the constitutional limitations discussed in Part I, demonstrating how these limitations render some state laws and practices unconstitutional and hence unenforceable. The article concludes by arguing that the Court should explicitly recognize the constitutional constraints it has implicitly endorsed. Doing so would manifest appropriate respect for both state sovereignty and the fundamental interest in marriage, promote certainty about marital

(Ohio 1958) (discussing whether to recognize a first cousin marriage valid in the state of celebration (Massachusetts) but prohibited in the state of domicile (Ohio)).

5. The state where the couple celebrates their marriage is the state of celebration, see Christopher S. Krimmer, *Federal Benefits for Married Same-Sex Couples*, 87 WIS. LAW. 39, 40 (Jan. 2014) (describing the "place of celebration" as "the jurisdiction in which the marriage took place or was celebrated"), while the state where the couple is living and plans to remain permanently is the state of domicile, see MAUREEN MCBRIEN & PATRICIA A. KINDREGAN, *THE MEANING OF DOMICILE IN DIVORCE PRACTICE*, 2 MASS. PRAC., FAMILY LAW AND PRACTICE § 29:2 (4th ed.). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19(a) (AM. LAW INST. 1971) [hereafter SECOND RESTATEMENT] (noting that "a domicil, once established, continues until a new one is acquired").

6. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121, 131, 132 (AM. LAW INST. 1934) [hereafter FIRST RESTATEMENT]; SECOND RESTATEMENT, *supra* note 5, § 283.

7. Compare *Port v. Cowan*, 44 A.3d 970, 976 (Md. 2012) ("Generally, Maryland courts will honor foreign marriages as long as the marriage was valid in the state where performed.") with *Oliver v. Stufflebeam*, 155 So. 3d 395 (Fla. Dist. Ct. App. 2014) (upholding state refusal to recognize same-sex marriage validly celebrated in another domicile) and *Mabry v. Mabry*, 882 N.W.2d 539, 540 (Mich. 2016) (McCormack, J., dissenting) ("Until 2015, same-sex couples were not permitted to marry in Michigan. Nor did Michigan recognize a legal marriage between a same-sex couple solemnized in another jurisdiction.").

8. Cf. *Loughran v. Loughran*, 292 U.S. 216, 223 (1934) ("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."). Here, the Court does not make clear whether it is describing a state practice or a constitutional mandate. *Id.*

status, and remove the guesswork about whether citizens would be sacrificing their marriages when visiting or moving to a particular state.

I. MARRIAGE RECOGNITION RIGHTS

The right to marry involves a fundamental interest, and the United States Constitution constrains the power of states to prohibit marriage on certain bases. However, states continue to differ with respect to certain regulations, e.g., who is barred from marrying because too closely related by affinity or consanguinity.⁹ A couple who marries in accord with local law might think twice about moving to or visiting a state which bars their marriage, fearing that were some accident to occur in the latter state, the two would be treated as legal strangers and thus unable to avail themselves of the special status accorded to spouses when making hospital visits or health care decisions.¹⁰ Such a couple might want to know before going within a state's borders the conditions, if any, under which their marriage would not be recognized.

States have adopted their own approaches to deciding which marriages that could not be celebrated locally will nonetheless be recognized; those approaches are reflected in the *Restatements (First and Second) of the Conflicts of Law*.¹¹ While the Court has not stated whether these approaches are constitutionally required, the Court's existing constitutional jurisprudence strongly suggests that a marriage valid in the state of domicile at the time of the marriage must be recognized throughout the country.

Section A of Part I discusses right-to-marry cases where the plaintiffs married in one state and then brought suit against their domiciles, claiming that their domicile's refusal to permit the couples to marry (or to recognize the marriage they had celebrated elsewhere) violated federal constitutional guarantees. Section B addresses the

9. Compare Ark. Code Ann. § 9-11-106 (West) ("All marriages between . . . first cousins are declared to be incestuous and absolutely void.") with 750 Ill. Comp. Stat. Ann. 5/212(a)(4) (2014) (prohibiting marriages between first cousins unless both parties are older than 50 years of age or one party is permanently and irreversibly sterile) with Tenn. Code Ann. § 36-3-101 (West) (prohibiting marriages between various ancestral relations, including between linear ancestors or descendants of a party, and between a grandparent and a grandchild).

10. Cf. Damien Rios, *Estate and Tax Planning Considerations for Same-Sex Couples*, 39 EST. PLAN. 9, 11 (May 2012) ("Not only is the same-sex [not legally recognized] spouse not legally permitted to make medical decisions for the incapacitated individual, unless appointed to do so under a health care proxy, but he or she might not be permitted to visit the individual in the hospital during visiting hours that are restricted to family members.").

11. See FIRST RESTATEMENT, *supra* note 6, § 121 (explaining that state and local law determines the validity of a marriage); SECOND RESTATEMENT, *supra* note 5, § 283.

Restatements' positions on when marriages validly celebrated in one state must be recognized in another. Section C includes a discussion of the effect of evasion statutes. Section D discusses the extent to which the Court has interpreted the Constitution to incorporate the *Restatements'* positions. The *Restatements* not only discuss whether marriages validly celebrated elsewhere must be recognized, but also whether states must permit couples to enjoy the incidents of marriage. Section E explains the difference between status recognition and incident enjoyment, as well as some of the constitutional limitations on the power of states to refuse to permit married couples to enjoy those incidents. Finally, Section F discusses how federal right to travel guarantees may affect the constitutionality of state practices regarding marital status and the enjoyment of marriage benefits.

A. Right to Marry Caselaw

Three of the important cases establishing the contours of the Constitution's fundamental right to marry involved individuals who had married outside of their state of domicile¹² and then challenged their domicile's refusal to recognize their union.¹³ Because local statutes prohibited the respective couples from marrying at home,¹⁴ they wed in states permitting their marriages and then claimed that their respective domicile's prohibition violated constitutional

12. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) ("Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore."); *Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978) ("Counsel for appellee informed us at oral argument that appellee was married in Illinois some time after argument on the merits in the District Court, but prior to judgment."); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) ("In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws.").

13. See *Obergefell*, 135 S. Ct. at 2593 (citing MICH. CONST., ART. I, § 25; KY. CONST. § 233A; OHIO REV. CODE ANN. § 3101.01) (Lexis 2008); TENN. CONST., ART. XI, § 18) ("These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman."); *Zablocki*, 434 U.S. at 382 ("[A]ppellee's individual claim is unaffected, since he is still a Wisconsin resident and the Illinois marriage is consequently void under the provisions of §§ 245.10(1), (4), (5)."); *Loving*, 388 U.S. at 4 ("Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between 'a white person and a colored person' without any judicial proceeding.").

14. See *Obergefell*, 135 S. Ct. at 2593 (discussing Kentucky, Michigan, Ohio, and Tennessee provisions which barred same-sex marriage); *Zablocki*, 434 U.S. at 375 (describing the Wisconsin statute §§ 245.10(1), (4), (5) which made it very difficult if not impossible for certain indigents to marry); *Loving*, 388 U.S. at 4 (describing Virginia statutes §§ 20-57, 20-58, and 20-59 which barred interracial marriage).

guarantees.¹⁵ In each case, the Court discussed why the right to marry is of such “fundamental importance”¹⁶ and then held that the state could not prohibit the marriage at issue.¹⁷ These holdings did nothing to clarify the conditions, if any, under which the Constitution might permit a state of domicile to refuse to recognize a marriage valid under the law of the state of celebration.

The first case, *Loving v. Virginia*, involved an interracial couple domiciled in Virginia.¹⁸ Because Virginia had a statute prohibiting interracial marriages, the couple traveled to the District of Columbia to be lawfully married.¹⁹ At the time, Virginia also had an evasion statute, which specified that interracial couples who married in another state would be treated as if they had tried to marry in-state, and the marriage would be void.²⁰

The *Loving* Court did not address whether the marriage validly celebrated in the District of Columbia had to be recognized in Virginia, instead holding that Virginia itself was not free to prohibit interracial marriage.²¹ While much of the opinion discussed why Virginia’s ban violated equal protection guarantees, the Court also addressed the right to marry itself, describing marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²²

15. See *Obergefell*, 135 S. Ct. at 2593 (discussing the claim that the state’s statute violated the Fourteenth Amendment); *Zablocki*, 434 U.S. at 376 (same); *Loving*, 388 U.S. at 1 (same).

16. *Zablocki*, 434 U.S. at 383. See also *Obergefell*, 135 S. Ct. at 2594 (discussing “the transcendent importance of marriage”); *Loving*, 388 U.S. at 12 (describing marriage as a “vital personal right”).

17. See *Obergefell*, 135 S. Ct. at 2607 (“[S]ame-sex couples may exercise the fundamental right to marry in all States.”); *Zablocki*, 434 U.S. at 388 (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”); *id.* at 390–91 (“The statutory classification created by §§ 245.10(1), (4), (5) . . . cannot be justified by the interests advanced in support of it.”); *Loving*, 388 U.S. at 12 (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

18. *Loving*, 388 U.S. at 2.

19. *Id.*

20. *Id.* at 4 (“If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife . . . the marriage shall be governed by the same law as if it had been solemnized in this State.” (citing VA. CODE ANN. §§ 20-58)); see also *id.* (“Virginia [statute] . . . § 20-57 . . . automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding.”).

21. *Id.* at 12 (“Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

22. *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the

Given the importance of marriage and the lack of a “legitimate overriding purpose independent of invidious racial discrimination” to justify the ban,²³ Virginia’s prohibition did not pass constitutional muster.²⁴ This meant that Virginia was constitutionally required to both permit interracial couples to celebrate their marriages *in* Virginia and to recognize interracial marriages celebrated *outside* of Virginia, so long as the marriages met Virginia’s other marriage requirements.²⁵ In holding that this particular marriage ban was unconstitutional, there was no need for the Court to address whether a marriage celebrated in the District of Columbia in accord with local law had to be recognized in Virginia, notwithstanding a valid Virginia law prohibiting the celebration of such marriages.

The second right-to-marry case, *Zablocki v. Redhail*, involved a Wisconsin law prohibiting noncustodial parents from marrying if they were unable to meet their child support obligations.²⁶ Like Virginia, Wisconsin had an evasion statute, although this one treated all marriages prohibited under local law as void, even if those marriages had been validly celebrated in another state.²⁷

When Redhail sought to marry his pregnant fiancée, he owed over \$3700 in back child support.²⁸ Barred from marrying in Wisconsin,

orderly pursuit of happiness by free men.”)). The Court’s glowing description of marriage echoed its opinion in *Griswold v. Connecticut* two years earlier: “Marriage is . . . intimate to the degree of being sacred [and] . . . is an association that promotes a way of life . . . a harmony in living . . . a bilateral loyalty . . . [that] is . . . for as noble a purpose as any involved in [the Court’s] prior decisions.” 381 U.S. 479, 486 (1965).

23. *Loving*, 388 U.S. at 11.

24. *See id.* at 12 (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).

25. Virginia also required, for example, that the marriage participants be of age, VA. CODE ANN. § 20-48 (West 2016), not too closely related by affinity or consanguinity, *id.* § 20-38.1(a), and competent to consent, *id.* § 20-45.1(b).

26. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (“Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order.”).

27. *Id.* at 382 n.9 (“[H]e is still a Wisconsin resident and the Illinois marriage is consequently void under the provisions of §§ 245.10(1), (4), (5).” (citing *State v. Mueller*, 171 N.W.2d 414 (Wis. 1969))). *See also* WIS. STAT. ANN. § 765.04 (1) (West) (“If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.”).

28. *Zablocki*, 434 U.S. at 379 (“[A]ppellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time . . . [A]s of December 1974 there was an arrearage in excess of \$3,700.”).

Redhail and his fiancée wed in Illinois.²⁹ This case seemed to place the constitutionality of a domicile’s refusal to recognize a marriage validly celebrated elsewhere squarely before the Court. To see why, assume that Wisconsin’s law preventing domiciliaries from marrying if they had outstanding child support obligations passed constitutional muster. In that event, a marriage celebrated in accord with the law of the state of celebration (Illinois) would nonetheless not have to be recognized in the domicile (Wisconsin), assuming that Wisconsin’s refusal to recognize the marriage passed constitutional muster.

Rather than address the interstate recognition issues, the *Zablocki* Court focused on the importance of the right to marry, noting that it makes “little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”³⁰ The Court then held that the Constitution precluded Wisconsin from prohibiting marriages of individuals who had unpaid child support obligations.³¹ As had been true in *Loving*, the *Zablocki* holding eliminated the conflict between the laws of the states of celebration and domicile, obviating any need to address whether the Constitution would require Wisconsin to recognize a marriage prohibited locally when that marriage had been celebrated in accord with the law of a neighboring state.

Obergefell v. Hodges, another right to marry case, involved a challenge to same-sex marriage bans in Ohio and other states.³² James Obergefell and John Arthur, Ohio domiciliaries, celebrated a marriage in Maryland, which permitted same-sex marriage.³³ Ohio refused to recognize the marriage,³⁴ not because of an evasion statute, but because

29. *Id.* at 382 n.9 (“Counsel for appellee informed us at oral argument that appellee was married in Illinois some time after argument on the merits in the District Court, but prior to judgment.”).

30. *Id.* at 383–84, 386.

31. *See id.* at 391 (affirming the lower court’s decision to invalidate the state’s prohibition).

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“These cases come from Michigan, Kentucky, Ohio, and Tennessee The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.”).

33. *Id.* at 2594 (“[T]hey traveled from Ohio to Maryland, where same-sex marriage was legal [T]he couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore.”).

34. *Id.* at 2594–95 (“Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death Obergefell . . . brought suit to be shown as the surviving spouse on Arthur’s death certificate.”).

Ohio had a constitutional amendment preventing the celebration or recognition of same-sex marriages.³⁵

Like its predecessor Courts, the *Obergefell* Court extolled the importance of marriage:

Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.³⁶

The *Obergefell* Court held that federal constitutional guarantees preclude states from prohibiting same-sex marriage.³⁷ As in *Loving*³⁸ and *Zablocki*,³⁹ this meant there was no longer a conflict between the laws of the states of celebration and domicile.

However, part of the *Obergefell* analysis did focus on the individual harms that might be caused by a state's refusal to recognize a marriage valid elsewhere.⁴⁰ "Being married in one State but having that valid marriage denied in another," the Court explained, "is one of 'the most perplexing and distressing complication[s]' in the law of domestic relations."⁴¹ The Court noted that numerous foreseeable difficulties might occur. For example, "even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines."⁴² Such "recognition bans inflict substantial and continuing harm."⁴³ The Court did not address which, if any, state interests would be sufficiently weighty to justify that substantial and continuing harm, instead merely noting that no interests had been articulated in the case at hand that would justify this particular ban.⁴⁴

35. See OHIO CONST. ART. XV, § 11 (held unconstitutional by *Obergefell*, 135 S. Ct. 2584 (2015)) ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

36. *Obergefell*, 135 S. Ct. at 2594.

37. *Id.* at 2607 ("The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.").

38. See *supra* note 21 and accompanying text.

39. See *supra* note 26 and accompanying text.

40. *Obergefell*, 135 S. Ct. at 2607.

41. *Id.* (citing *Williams v. North Carolina*, 317 U.S. 287, 299 (1942)).

42. *Id.*

43. *Id.*

44. *Id.* at 2608 ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-

In the cases discussed above, the Court held that states may not prohibit marriage based on the races,⁴⁵ poverty,⁴⁶ or sexes of the parties.⁴⁷ However, other marriage limitations remain, such as those based on the age of a contracting party,⁴⁸ which means that certain marriages are still permitted in some jurisdictions but not in others. In such situations—where state laws differ about which marriages are permitted—some method is necessary to determine whether a particular marriage is valid. The *Restatements (First and Second) of the Conflict of Laws* offer guidelines to develop such a method, although the *Restatement* position is only persuasive⁴⁹ unless it has been adopted by a State.⁵⁰

sex marriage performed in another State on the ground of its same-sex character.”). Suppose that a state refused to recognize same-sex marriages celebrated elsewhere even though such marriages could be contracted within the state. Such a policy would be difficult to justify. For example, a state could not justify such a policy by claiming that it wanted its domiciliaries to spend their wedding dollars at home rather than in other states, because such a policy would violate dormant commerce clause guarantees. *See, e.g., United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“Discriminatory laws motivated by ‘simple economic protectionism’ are subject to a ‘virtually *per se* rule of invalidity.’”)).

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

46. *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978).

47. *Obergefell*, 135 S. Ct. at 2608.

48. *See, e.g., ARIZ. REV. STAT. ANN. § 25-102 (B)* (2018) (“Persons who are under sixteen years of age shall not marry.”); *DEL. CODE ANN. TIT. 13, § 123 (a)* (West 2018) (“No individual under the age of 18 shall be granted a marriage license.”); *IND. CODE ANN. § 31-11-1-5* (West) (allowing 17 year old individuals to marry if “each individual who is less than eighteen (18) years of age receives the consent required by IC 31-11-2,” and the individuals are not otherwise prohibited from marrying each other.); *MD. CODE ANN., FAM. LAW § 2-301(a)* (West) (stating that individuals 16 or 17 years old may not marry unless 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, absent consent, either party provides a certificate from a physician or nurse stating that “the woman is pregnant or has given birth to a child”); *id.* § 2-301(c) (“An individual under the age of 15 may not marry.”); *MINN. STAT. ANN. § 517.02* (West 2013); (“A person of the full age of 16 years may, with the consent of the person’s legal custodial parents, guardian, or the court . . . receive a license to marry, when . . . the person’s application for a license and consent for civil marriage of a minor form is approved by the judge of the district court of the county in which the person resides.”); *N.H. REV. STAT. ANN. § 457:4* (2019) (“No person below the age of 16 years shall be capable of contracting a valid marriage, and all marriages contracted by such persons shall be null and void.”).

49. *Cf. Myhre v. Hessey*, 9 N.W.2d 106, 109 (Wis. 1943) (“In considering whether . . . [a particular position] should be adopted as the settled law of this state it should be noted that the Restatement of the Law, Torts, is apparently contrary to it.”).

50. *See, e.g., Bryant v. Silverman*, 703 P.2d 1190, 1191 (Ariz. 1985) (“In determining which state’s law to apply, this Court has adopted the rules embodied in the Restatement (Second) of Conflicts (1971) to analyze and solve conflicts problems arising in Arizona.”). *But see Convergys Corp. v. Keener*, 582 S.E.2d 84, 85 (Ga. 2003) (“[T]he United States Court of Appeals for the Eleventh Circuit . . . certified the following question of Georgia law to this Court: Whether a court applying Georgia conflicts of laws rules [must] follow the language of Restatement (Second) Conflict of Laws § 187(2) Because the Restatement (Second) Conflict of Laws has

B. *The Restatements*

Because the United States is such a mobile society,⁵¹ individuals who cannot marry in one state may go to another to marry. These individuals might then (1) return to live in their domicile with its stricter marriage laws, (2) remain in the state with the more forgiving marriage laws, or (3) move to some third state.

The *Restatements (First and Second) of the Conflict of Laws* offer analyses of the conditions under which states should recognize marriages celebrated elsewhere, even if those marriages are subject to local prohibitions that do not violate constitutional guarantees.⁵² The *Restatements* balance a number of considerations, including each state's interests in having its procedures followed and preventing its domiciliaries from contracting marriages which violate an important public policy of the state.⁵³ While there are some differences between the two *Restatements*,⁵⁴ both suggest that only the law of certain states will determine the validity of a marriage,⁵⁵ and that marriages valid when celebrated should be recognized throughout the country.

With certain important exceptions,⁵⁶ the *First Restatement* suggests that marriages valid where celebrated should be recognized

never been adopted in Georgia, and because we continue to refuse to enforce contractual rights which contravene the policy of Georgia, we answer in the negative.”).

51. Hilary K. Josephs, *Book Review - Conflict of Laws: American, Comparative, International: Cases and Materials*, 60 LA. L. REV. 1123, 1123–24 (2000) (“The United States is . . . a highly mobile society.”); Stephen Rauls, *Family Law-Guardianship - the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: A Uniform Solution to an Arkansas Problem*, 33 U. ARK. LITTLE ROCK L. REV. 75, 75 (2010) (“[T]he United States is a very mobile society.”). *But see* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1716 (2012) (“[R]ecent studies have found that the United States is a far less mobile society than many European countries.”).

52. Both Restatements are discussed here because courts may “[c]hoose whether they will adopt a particular Restatement.” Peter A. Alces & Chris Byrne, *Is It Time for the Restatement of Contracts, Fourth?*, 11 DUQ. BUS. L.J. 195, 196 (2009).

53. Note that both the states of celebration and domicile have interests in having their laws followed. *See infra* notes 62–75 and accompanying text (discussing the Restatements’ positions on which state’s law governs marriage formalities and which state’s law governs the situations in which a marriage prohibited in the domicile may nonetheless be permitted in the state of celebration).

54. Compare FIRST RESTATEMENT, *supra* note 6, § 132 (c) (discussing the conditions under which interracial marriages need not be recognized), with SECOND RESTATEMENT, *supra* note 5 (omitting discussion because *Loving* had already been decided four years prior to the publication of the SECOND RESTATEMENT).

55. *See infra* notes 58–59 and 63–70 and accompanying text (suggesting that a marriage’s validity will be determined in light of the laws of the states of celebration and domicile at the time of the marriage’s celebration).

56. *See infra* notes 60–65 and accompanying text.

everywhere.⁵⁷ In determining whether a marriage is valid, the law of the state of celebration will be used to assess:

1. the necessity of a license;
2. the necessity of a formal ceremony;
3. the person to perform the ceremony;
4. the manner of the performance of the ceremony;
5. the capacity of the parties to enter into the contract of marriage;
6. the necessity of physical examination before marriage.⁵⁸

Similarly favorable to the state of celebration, the *First Restatement* also explains the conditions under which common law marriages will be recognized: “A marriage without any formal ceremony is valid everywhere if the acts alleged to have created it took place in a state in which such a marriage is valid.”⁵⁹

The *First Restatement* specifies two exceptions to the rule that marriages valid where celebrated are valid everywhere. Section 131 addresses cases where both parties to a divorce have been barred from remarrying,⁶⁰ while Section 132 addresses certain specific marriages that are deemed void by the domicile of at least one of the parties.⁶¹ Section 132 reads:

A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

- (a) polygamous marriage,
- (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,

57. FIRST RESTATEMENT, *supra* note 6, § 121 (“Except as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.”).

58. *Id.* § 121(e).

59. *Id.* § 123.

60. *Id.* § 131. For example, both parties might be prohibited from marrying third parties for some defined period. *E.g.*, 15 R.I. GEN. LAWS ANN. § 15-5-23 (a) (West 2016) (“No judgment for a divorce shall become final and operative until three (3) months after the trial and decision.”). A state might do this in the hopes that the parties might reconcile. *See* *Coe v. Coe*, 303 S.E.2d 923, 925 (Va. 1983) (“The statutorily mandated waiting period . . . between the time separation occurs and the time a final decree of divorce can be granted is designed primarily to give the parties an opportunity to reconcile and to determine if they desire the separation to be final.”).

61. FIRST RESTATEMENT, *supra* note 6, § 132.

(c) marriage between persons of different races where such marriages are at the domicil regarded as odious,⁶²

(d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.⁶³

In these cases, the *Restatement* privileges the law of the domicile at the time of celebration, at least where the marriage is thought to undermine a very important state interest (which is normally reflected by the state's having made such marriages void).⁶⁴ After *Loving*, states may not claim that interracial marriages violate an important public policy, but the rest of Section 132 remains persuasive authority.⁶⁵

The *Second Restatement* also privileges the law of the domicile at the time of the marriage's celebration.⁶⁶ According to this Restatement, like the *First*, a marriage contracted in accord with the law of the state of celebration will be valid in other states unless that marriage violates an important public policy of the domicile at the time of the marriage.⁶⁷ However, the *Second Restatement* includes some further details when deciding which state's law to apply. For example, if the public policy at issue involves formality requirements such as a license or formal ceremony, the law of the state of celebration will apply unless the marriage's invalidity "is required by the strong policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage,"⁶⁸ i.e., the spouses' domicile. With regards to common law marriage, the *Second Restatement* suggests that whether a common law marriage will be recognized is a decision involving the formality requirements of marriage,⁶⁹ which means that the law of the state where the marriage is contracted will govern unless

62. This provision is no longer good law. See *infra* note 65 and accompanying text.

63. FIRST RESTATEMENT, *supra* note 6, § 132. Some marriages are merely prohibited and are not treated as void—those marriages would be subject to recognition if validly celebrated elsewhere. *E.g.*, *Loughran v. Loughran*, 292 U.S. 216, 223 (1934).

64. See Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 294–95 (1997) (noting that when states declare a marriage void, they indicate that the marriage violates an important public policy of the state).

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

66. See SECOND RESTATEMENT, *supra* note 5, § 283 cmt. i ("Upholding the validity of marriage in such a case by application of the validating rule of the state of domicil would seem required . . .").

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

68. *Id.* § 283 cmt. f.

69. See *id.* § 283 cmt. g ("Whether a marriage can be created without formal ceremony is a question relating to formalities.").

the recognition of such a marriage violates a strong policy of the parties' domicile.⁷⁰

C. Evasion Statutes

Evasion statutes are laws that are designed to prevent domiciliaries from avoiding (or evading) the marriage prohibitions contained in local law by crossing a border, marrying in accord with another state's law, and then returning home claiming to have a valid marriage.⁷¹ The *First Restatement* discusses evasion statutes in Sections 121 and 134. Section 121 discusses an evasion statute that a state of celebration might have:

A statute in the state where the marriage is celebrated may provide that no marriage shall be contracted therein by one domiciled and intending to continue to be domiciled in another state if such marriage would be void if contracted in such other state and that every marriage celebrated in violation of such provision shall be null and void.⁷²

Section 132 discusses a statute that a state of domicile might have:

A statute may provide in specific words or be so interpreted that if parties domiciled in a state and intending to continue to be domiciled there, who are disabled or prohibited from contracting marriage under the law of the state of the domicil, shall go into another state and there contract a marriage prohibited and declared void by the law of the domicil, such marriage shall be null and void for all purposes in the state of the domicil, with the same effect as though such prohibited marriage had been entered into in the state of the domicil. A marriage contracted under the circumstances referred to in such a statute will be void everywhere under the rule stated in this Section, clause (d).⁷³

Thus, the *First Restatement* recognizes that a domicile with an evasion statute may refuse to recognize any marriage that is treated as

70. *See id.* ("If the acts relied upon to create the marriage meet the requirements of the state where the acts took place, the marriage will not be held invalid for lack of the necessary formalities except in the unusual circumstances stated in Comment f.")

71. *See King v. Klemp*, 57 A.2d 530, 536 (N.J. Ch. 1947) ("Such statutes generally declare that if either of the contracting parties residing and intending to continue to reside in the state, goes into another jurisdiction with intent to evade the marriage laws of the domiciliary state, such marriage is void."); Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 355 (1997) ("Not wanting their domiciliaries to be able to avoid their marriage laws by simply marrying in another state, states have passed evasion statutes.")

72. FIRST RESTATEMENT, *supra* note 6, § 121(g).

73. *Id.* § 132(e).

prohibited and void in the domicile,⁷⁴ even if the marriage was validly celebrated elsewhere. Several illustrations are offered so that the meaning of this section is clear. In each of the illustrations, the law of the domicile *at the time of the marriage's celebration* is considered.⁷⁵

That said, a state need not have an evasion statute to refuse to recognize a marriage celebrated elsewhere.⁷⁶ Thus, a marriage void in the domicile does not to be recognized even though (1) the marriage was celebrated elsewhere in accord with local law, and (2) the domicile does not have an evasion statute specifically precluding that marriage.⁷⁷ However, merely because a marriage is treated as void under local law does not establish that such a marriage will not be recognized if validly celebrated elsewhere—many states have general policies of recognizing marriages that are valid where celebrated, even if the marriage is void in the domicile.⁷⁸

Sometimes, a state's evasion statute in effect announces that marriages violating an important public policy of the state will not be recognized even if those marriages are validly celebrated elsewhere.⁷⁹

74. A state might disallow a marriage by either prohibiting it or by making it voidable or void. As a general matter, a prohibited or voidable marriage is considered less offensive to public policy than a void marriage. *See* Strasser, *supra* note 71, at 353 (“Just as voidable marriages are not viewed as particularly odious and thus not the kind of marriages which the state should refuse to recognize if validly celebrated elsewhere, so too prohibited (but not void) marriages are viewed as less odious to public policy than void marriages.”).

75. FIRST RESTATEMENT, *supra* note 6, illus. 1-3. *See also id.* § 134 cmt. a (“Wherever a particularly strong policy of the state of the domicil at the time of the marriage is concerned, the validity of the marriage may be involved under the rule stated in § 131 and 132.”).

76. Strasser, *supra* note 71, at 355 (“[T]hese statutes were unnecessary insofar as they were designed to justify the refusal to recognize a marriage void in the domicile but legally celebrated elsewhere.”).

77. *See* First Nat. Bank in Grand Forks v. N. Dakota Workmen's Comp. Bureau, 68 N.W.2d 661, 663 (N.D. 1955) (citing McDonald v. McDonald, 58 P.2d 163 (Cal. 1936)) (“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.”).

78. *See, e.g.,* CAL. FAM. CODE § 308 (West 2017) (“A marriage contracted outside this state that would be valid by laws of the jurisdiction in which the marriage was contracted is valid in California.”); Mason v. Mason, 775 N.E.2d 706 (Ind. Ct. App. 2002) (recognizing a first cousin marriage celebrated in Tennessee by an Indiana domiciliary, notwithstanding that such a marriage was void in the domicile); Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958) (recognizing validity of a first-cousin marriage validly celebrated elsewhere even though such a marriage would be void if celebrated in Ohio).

79. *See, e.g.,* 750 ILL. COMP. STAT. ANN. 5/216 (2004) (“[I]f any person residing and intending to continue to reside in this state and who is a person with a disability or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage

When there is such a statute, a court would be less likely to interpret state policy as favoring the recognition of a marriage valid where celebrated even though void in the domicile, precisely because the legislature had expressly stated that such marriages should not be recognized.⁸⁰

A state need not reserve its evasion statute for those marriages that are *void* in the domicile.⁸¹ Instead, a state might refuse to recognize *any* marriage celebrated elsewhere by its domiciliaries if that marriage is prohibited locally.⁸² In effect, adopting an evasion statute voiding any marriage that cannot be celebrated within the state suggests that domiciliaries of that state who attempt to evade local marriage law by going elsewhere to marry have *thereby* violated an important public policy of their state. Such a state implicitly considers the evasion itself as violating an important public policy, which the state presumably views as adequate justification to refuse to recognize the marriage even if the marriage itself does not violate an important public policy.⁸³

D. Marital Status Recognition Caselaw

Both *Restatements* suggest that a marriage valid in the *domicile* at the time of the marriage must be recognized in subsequently acquired domiciles. However, a *Restatement* position does not bind a particular state unless the state has adopted that position.⁸⁴ Further, a legislature

had been entered into in this state.”).

80. See, e.g., *Mazzolini*, 155 N.E.2d at 360 (citing *State v. Yoder*, 130 N.W. 10 (Minn. 1911) (“A marriage contract is a nullity *ab initio* only where expressly so declared by statute. In such a case, it is absolutely void, requiring no judicial decree for its dissolution.”)). See also Strasser, *supra* note 71, at 355 (“When an evasion statute has been passed, courts are less able to argue that the legislature’s intent is unclear and that therefore the marriage legally celebrated elsewhere should be recognized by the domicile. The statute specifies which marriages, legally celebrated elsewhere, should nonetheless not be recognized in the domicile.”).

81. See, e.g., WIS. STAT. ANN. § 765.04(1) (West 1979) (“If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.”).

82. See *In re Estate of Toutant*, 633 N.W.2d 692, 698 (Wis. Ct. App. 2001) (invalidating the marriage of Wisconsin domiciliaries that had been celebrated within six months of the divorce of one of parties, in violation of WIS. STAT. ANN. § 765.04, notwithstanding that the state of celebration, Texas, did not have a similar bar).

83. Cf. SECOND RESTATEMENT, *supra* note 5, § 283(2) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

84. Michael Baram et al., *Regulatory and Liability Considerations*, 6 B.U. J. SCI. & TECH. L. 5, 60 (2000) (statement of Gary Marchant) (“Each state has to independently adopt the

or state supreme court could always decide to reject a position that had previously been adopted.⁸⁵ For example, a state that had been willing to recognize any marriage valid in the domicile at the time of celebration might subsequently adopt a different position because of changes in public policy or later developments in that state's law.⁸⁶ This ability of states to depart from the *Restatements'* recommendations illustrates the importance of establishing—as a constitutional matter—which marriages must be recognized. Those seeking to understand which marriages are constitutionally protected should consider the Court's divorce jurisprudence, where the Court has discussed the conditions under which a marital status determination from one state must be given credit in other states.

The Court has long recognized that states have an important interest in regulating marriage and divorce. For example, it has noted that the legislature “prescribes 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 . . . and the acts which may constitute grounds for its dissolution.”⁸⁷ But the Court's acknowledgement that states have an important interest in marriage and divorce does not help determine *which* state's law controls where marriages permitted in one jurisdiction are prohibited in another.

The Court has suggested that the domicile has an especially important interest in the marital status of its domiciliaries, as *Haddock v. Haddock*⁸⁸ illustrates. At issue in *Haddock* was the marital status of John and Harriet Haddock.⁸⁹ The couple wed in New York,⁹⁰ although

new Restatement before it becomes binding in that state.”). *See also* Hedrick v. Rains, 477 S.E.2d 171, 172 (N.C. 1996) (“Except as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law.”).

85. *See, e.g.,* Paige v. City of Sterling Heights, 720 N.W.2d 219, 235 (Mich. 2006) (“[T]his Court has the authority to overrule one of its prior decisions.”).

86. *See* Dake v. Tuell, 687 S.W.2d 191, 194 (Mo. 1985) (Blackmar, J., concurring in the result) (citing Keener v. Dayton Elec. Manufacturing Co., 445 S.W.2d 362 (Mo. 1969)) (“Our Court has been very willing to consider modern developments in the law of torts and to overrule or distinguish earlier cases which seemed to stand in the way.”).

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

88. 201 U.S. 562 (1906), *overruled in part by* *Williams v. North Carolina*, 317 U.S. 287 (1942).

89. *Id.* at 564–65 (“The wife, a resident of the state of New York, sued the husband in that state in 1899, and there obtained personal service upon him . . . [T]he answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive.”).

90. *Id.* at 606 (Brown, J., dissenting).

John claimed that Harriet had fraudulently induced him to marry her.⁹¹ In any event, they separated shortly after the wedding without consummating the marriage and never lived together thereafter.⁹² John established domicile in Connecticut⁹³ while Harriet remained domiciled in New York.⁹⁴ After constructively serving Harriet with notice,⁹⁵ John secured a divorce from her in Connecticut,⁹⁶ even though she never appeared at the Connecticut proceeding.⁹⁷ Harriet later sued John for divorce in New York.⁹⁸

The *Haddock* Court reasoned that because John had been domiciled in Connecticut when securing his divorce from Harriet, his marital status (no longer being married to Harriet) could not be challenged in Connecticut. The Court wrote: “[W]here a court of one State, conformably to the laws of such State . . . has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen[.]”⁹⁹ At this time,¹⁰⁰ the domicile’s power over the marital status of its citizens was viewed as so great that the state’s determination of its domiciliary’s marital status was immune from a federal due process challenge.¹⁰¹

Connecticut’s power to change the marital status of one of its own domiciliaries,¹⁰² however, did not extend to changing the marital status of a non-domiciliary lacking ties to the state.¹⁰³ Thus, while Connecticut

91. *Id.* at 564–65.

92. *Id.* at 606.

93. *Id.*

94. *Id.* at 564.

95. *Id.* at 566.

96. *Id.* at 606.

97. *Id.* at 565.

98. *Id.* at 564.

99. *Id.* at 569 (citing *Maynard v. Hill*, 125 U. S. 190 (1888)).

100. Note that this view has not withstood the test of time, and complainants can now bring federal due process challenges to a state’s marriage restriction. *See Williams v. North Carolina*, 317 U.S. 287, 306 (1942) (Frankfurter, J., concurring) (“If the actions of the Nevada court had been taken ‘without due process of law,’ the divorces which it purported to decree would have been without legal sanction in every state including Nevada.”).

101. *Haddock*, 201 U.S. at 569 (citing *Maynard v. Hill*, 125 U.S. 190 (1888)) (“[T]he validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution.”).

102. *See id.* at 572 (“[N]o question can arise . . . concerning the right of the State of Connecticut . . . to give effect to the decree of divorce rendered in favor of the husband . . . domiciled in that state . . .”).

103. *See id.* (“[T]he Connecticut court did not acquire jurisdiction over the wife . . . by virtue of the domicile of the wife within the State or as the result of personal service upon her within its borders.”).

had the power to change John's marital status, it did not have the power to change the marital status of Harriet, who was a New York domiciliary.¹⁰⁴ John's Connecticut divorce decree did not trigger full faith and credit guarantees,¹⁰⁵ and New York was free to grant Harriet spousal support and a separation from bed and board.¹⁰⁶ In other words, New York was free to refuse to recognize that Connecticut had legally ended the Haddocks' marriage.¹⁰⁷

Haddock represents great deference to the domicile's power to determine marital status, in that each domicile in certain circumstances is permitted to make its own determination regarding its domiciliary's marital status. But this policy of deference to the domicile leads to anomalous results where two married individuals are domiciled in different states.

In *Atherton v. Atherton*, another marriage recognition case decided shortly before *Haddock*, the Court suggested that the law would never recognize a spouseless spouse:

The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law.¹⁰⁸

Although seemingly contradictory, *Atherton* and *Haddock* are distinguishable. In *Atherton*, the divorce was granted in the state of

104. *Cf. id.* at 574 (“If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail.”).

105. *Id.* at 606 (“[T]he decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.”). *See also* Sheila Jordan Cunningham, *Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have A Protected Due Process Interest in Their Marital Status?*, 13 MEM. ST. U. L. REV. 205, 222 (1983) (“In upholding the denial of recognition to the Connecticut decree, the Supreme Court did not emphasize the rights of the absent spouse whose marital status was determined without her presence, but rather, emphasized the rights of the absent spouse's domiciliary state.”).

106. *Haddock*, 201 U.S. at 565.

107. *See id.* at 581 (suggesting that the Connecticut decree could but did not have to be recognized by New York as a matter of comity).

108. 181 U.S. 155, 162 (1901).

marital domicile,¹⁰⁹ whereas in *Haddock* it was not.¹¹⁰ According to the *Haddock* Court, an *ex parte* divorce in the marital domicile is subject to full faith and credit guarantees,¹¹¹ whereas a divorce in a nonmarital domicile lacking personal jurisdiction over the nondomiciliary spouse is not.¹¹²

The *Haddock* approach is not without difficulty. Suppose, for example, that John Haddock had remarried in Connecticut following his Connecticut divorce, and then had moved with his new wife, Helen, and their children to New York. Suppose further that John died and both Harriet and Helen sought to administer the estate. New York could decide that Harriet was still married to John, which would have negated Helen's marriage (and family) in the eyes of the law.¹¹³ As Justice Holmes observed in his *Haddock* dissent, "[T]he decision . . . is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage[.]"¹¹⁴

The Court overruled *Haddock* in *Williams v. North Carolina*,¹¹⁵ illustrating that the interests of subsequent domiciles in enforcing their marriage laws must give way to other interests.¹¹⁶ At issue in *Williams* was whether North Carolina had to recognize divorce decrees issued in

109. *Id.* at 157. The place of marital domicile is the state where the married couple lives, with the intention to remain there indefinitely. See *In re Smidt's Will*, 295 N.Y.S. 227, 230 (Sur. 1937) (citing *In re Newcomb's Estate*, 84 N.E. 950, 954 (N.Y. 1908)).

110. *Haddock*, 201 U.S. 577 ("As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut.").

111. *Id.* at 572.

112. *Id.* ("[I]t is apparent that the Connecticut court did not acquire jurisdiction over the wife . . . by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders."). See also *id.* at 606 ("[T]he decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.").

113. Cf. *Andrews v. Andrews*, 188 U.S. 14 (1903), *abrogated by Sherrer v. Sherrer*, 334 U.S. 343 (1948). In *Andrews*, Charles's first wife, Kate, and his second wife, Annie, each sought to be declared his lawful widow. The Supreme Judicial Court of Massachusetts, affirmed by the United States Supreme Court, held that Charles's divorce was void, which made his second marriage void and which made Kate his lawful widow. See *id.* at 42 ("[W]e conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the Supreme Judicial Court of Massachusetts in obeying the command of the state statute, and refusing to give effect to the decree of divorce in question.").

114. *Haddock*, 201 U.S. at 628 (Holmes, J., dissenting).

115. 317 U.S. 287, 304 (1942).

116. See *id.* at 303-04 ("[T]he considerable interests involved, and the substantial and far-reaching effects which the allowance of an exception would have on innocent persons, indicate that the purpose of the full faith and credit clause and of the supporting legislation would be thwarted to a substantial degree if the rule of *Haddock v. Haddock* were perpetuated.").

Nevada to individuals domiciled in North Carolina at the time the divorce decrees were contested.¹¹⁷ The Court held that the decrees were subject to full faith and credit,¹¹⁸ assuming that the Nevada court had jurisdiction to grant the divorces.¹¹⁹ In so holding, the *Williams* Court relied on the importance of domicile, explaining that “the power of a state to alter the marital status of its domiciliaries . . . is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders.”¹²⁰ But the Court also held that once a court has granted a divorce to the party domiciled there (assuming that the other party has been afforded proper notice),¹²¹ that divorce decree triggers full faith and credit guarantees, regardless of whether either party subsequently changes domicile:

[W]hen a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.¹²²

Suppose that Margaret and Michael Salmon marry in New York post-*Williams*. Michael abandons Margaret immediately after the wedding and becomes a Connecticut domiciliary. A year and a half later,¹²³ he obtains a divorce after affording Margaret the requisite notice. Under *Williams*, that divorce triggers full faith and credit guarantees,¹²⁴ and New York will be forced to recognize the divorce.

117. *Id.* at 290.

118. *Id.* at 303.

119. *Id.* at 302 (“[I]n this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham.”).

120. *Id.* at 300.

121. *See id.* at 298–99 (citing *Atherton v. Atherton*, 181 U.S. 155, 172 (1901)) (“[E]ach state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent . . . [as long as the notice afforded] meet[s] the requirements of due process.”).

122. *Id.* at 303.

123. *See* CONN. GEN. STAT. ANN. § 46b-44(c)(1) (West 2018) (“A decree dissolving a marriage or granting a legal separation may be entered if: (1) One of the parties to the marriage has been a resident of this state for at least the twelve months next preceding the date of the filing of the complaint or next preceding the date of the decree.”).

124. *See supra* note 121 and accompanying text (noting that once a court has granted a divorce to a party domiciled in a certain state, that divorce decree triggers full faith and credit guarantees, regardless of whether either of the formerly married parties subsequently changes domicile).

Williams limits the power of New York (Margaret’s domicile in the hypothesized example) to determine its domiciliary’s marital status. The *Williams* Court understood the implications of its decision, recognizing that the first domicile’s powers to determine the marital status of its own domiciliaries and enforce its own divorce laws would be undermined if the state were forced to give full faith and credit to a subsequent domicile’s decree.¹²⁵ However, the Court reasoned that an analogous objection “goes to the application of the full faith and credit clause to many situations.”¹²⁶ In other words, states occasionally having their policies undermined to some degree is an inherent effect of the Full Faith and Credit Clause. While this reality means that “one state’s policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state,”¹²⁷ the Court explained, “[s]uch is part of the price of our federal system.”¹²⁸

In *Estin v. Estin*,¹²⁹ the Court detailed some of the reasons why domiciles have an important interest in the marital status of their domiciliaries:

Marital status involves the regularity and integrity of the marriage relation. It affects the legitimacy of the offspring of marriage The State has a considerable interest . . . in protecting the offspring of marriages from being bastardized The State should have the power to guard its interest in [its domiciliaries] by changing or altering their marital status *and by protecting them in that changed status throughout the farthest reaches of the nation.*¹³⁰

In *Estin*, the Court decided that an order of spousal support issued during a separation proceeding was enforceable even after a divorce decree had been granted by another state,¹³¹ and the Court’s insights are relevant in other contexts as well. If a marriage might subsequently be invalidated in a different domicile, property interests and the legitimacy of children would be at risk.¹³²

125. *Williams*, 317 U.S. at 302 (“It is objected, however, that if such divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected.”).

126. *Id.*

127. *Id.*

128. *Id.*

129. 334 U.S. 541 (1948).

130. *Id.* at 546 (emphasis added).

131. *Id.* at 542 (“This case . . . presents an important question . . . whether a New York decree awarding respondent \$180 per month for her maintenance and support in a separation proceeding survived a Nevada divorce decree which subsequently was granted petitioner.”).

132. When discussing marriage annulments, both Restatements refer to the law of the domicile at the time of the marriage’s celebration. See SECOND RESTATEMENT, *supra* note 5,

E. Limiting Enjoyment of the Incidents of Marriage

Even if a marriage is considered “valid” throughout the nation, a state might still choose to deny certain couples some of the incidents or benefits of that marriage. For example, the state might refuse to accord to certain spouses a special status in tort or in medical decision-making.¹³³ Because this ability might permit states to undermine the requirement that they recognize marriages validly celebrated elsewhere, the power to deny the incidents of marriage must also be addressed here.

The *Restatements’* policies regarding the recognition of marital status and the enjoyment of marital incidents strike a compromise by precluding states from refusing to recognize the couple’s marital status, while allowing states to deny the enjoyment of some of the incidents of marriage.¹³⁴ The Constitution imposes some limits on the power of states to deny marital couples the enjoyment of these incidents,¹³⁵ although the contours of those limitations have not been fully developed.

The *First Restatement* suggests that while a marriage valid in the states of celebration and domicile at the time of the marriage is valid in all states,¹³⁶ states may prohibit married couples from enjoying all the incidents of marriage if their union violates an important public policy of the state.¹³⁷ For example, suppose that the state of celebration and

§ 286 (“The law governing the right to a decree of nullity is the law which determines the validity of the marriage.”); *id.* § 286 cmt. a (“For the law which determines the validity of a marriage, see § 283.”); *id.* § 283(2) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”); FIRST RESTATEMENT, *supra* note 6, § 136 (“The law governing the right to a decree of nullity is the law which determined the validity of the marriage with respect to the matter on account of which the marriage is alleged to be null.”); *id.* § 132 (listing multiple situations in which marriages against the law of the state of domicile of either party will be invalid, even though the might comply with the law of the state of celebration).

133. *Cf.* *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999) (discussing “a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections”).

134. *See infra* notes 137–159 and accompanying text.

135. *See infra* notes 144–159 and accompanying text.

136. *See* FIRST RESTATEMENT, *supra* note 6, § 121 (stating that “a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with”); *id.* § 132 (suggesting that the marriage will be valid as long as it does not violate a very important public policy of the domicile at the time of the marriage).

137. *See id.* § 134 (“If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state

domicile recognizes polygamous unions. A man marries two women in accord with the law of the domicile, and then moves to a state that does not recognize polygamous unions. Under the *First Restatement's* approach, the latter state must recognize the marriage, but may refuse to permit them all to live together.¹³⁸ According to the *First Restatement*, such a refusal does not constitute a rejection of the marriage's validity,¹³⁹ although it would of course have important implications for the family's living arrangements. The *Second Restatement* incorporates a similar approach.¹⁴⁰

In *Pavan v. Smith*, the Court addressed whether Arkansas could deny an incident of marriage to a same-sex couple: namely, having both parents' names on the birth certificate of a child born into the marriage.¹⁴¹ The Court struck down Arkansas's law "[b]ecause that differential treatment infringes *Obergefell's* commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" ¹⁴² By the same token, the Court would likely strike down a state attempt to prevent a married same-sex couple from living together. Indeed, *Lawrence v. Texas* precludes states from prohibiting even non-marital same-sex couples from living together.¹⁴³

It remains to be seen, however, whether *Lawrence* and *Pavan* would preclude states from ever denying the enjoyment of any incidents of marriage. For example, *Lawrence* expressly restricts its holding to

will refuse to give that effect to the marriage."'). See also Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1473 (2012) ("Under traditional conflicts doctrine, while the place of celebration rule governed the validity of the marriage, courts were allowed to look to local law to determine whether a married party should be entitled under local law to enjoy a particular marital incident."').

138. FIRST RESTATEMENT, *supra* note 6, § 134 illus. 1 ("A, domiciled in state X, validly marries B and C in X. By the law of Y, a polygamous marriage is void. A brings B and C to state Y; Y may refuse to permit him to cohabit with them. A and B die; Y may grant a widow's allowance to C."').

139. *Id.* § 134 cmt. a ("The action of the state in refusing to give effect to a marriage on the ground stated in this Section does not deny the validity of the marriage, but precludes the enjoyment within the state of some particular right or other interest incident to the marriage."').

140. SECOND RESTATEMENT, *supra* note 5, § 284 cmt. c ("A state will not give a particular incident to a foreign marriage when to do so would be contrary to its strong local policy. The state will not do so even though the marriage is valid in the state where it was contracted and even though the incident in question would be granted in that state. A denial of a particular incident on the grounds stated in this Comment does not deny the validity of the marriage."').

141. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017).

142. *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

143. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("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. The liberty protected by the Constitution allows homosexual persons the right to make this choice."').

adults,¹⁴⁴ and thus does not preclude states from preventing an adult from living with a minor whom he had married.¹⁴⁵ *Pavan*'s reach might also be limited in that Arkansas was trying to do something that even the *Restatement* did not authorize.¹⁴⁶

At issue in *Pavan* was an Arkansas provision denying the enjoyment of an incident of marriage to couples *who were permitted to marry within the state*.¹⁴⁷ By contrast, the *Restatement* sections permitting the denial of enjoyment of the incidents of marriage involve marriages that were valid in the domicile when celebrated, but which could *not* have been celebrated within the forum, e.g., the state where the couple moved several years into their marriage.¹⁴⁸ *Pavan* might thus be interpreted in two different ways. The narrower interpretation is that states may only deny the incidents of marriage to marriages that could not be celebrated within the state. The broader interpretation is that states may not deny the incidents of marriage to *any* valid marriage, even if those marriages could not have been celebrated within that state.

Citing *Obergefell*, the *Pavan* Court suggested that Arkansas was engaging in “disparate treatment” of same-sex couples.¹⁴⁹ If the Court was thereby implying that the State did not have legitimate reasons to support its differential treatment,¹⁵⁰ then the Court may be leaving open whether states are permitted to deny the incidents of marriage to couples where doing so would not be demeaning or discriminatory¹⁵¹ but would instead promote legitimate state interests.

144. *Id.* at 578 (“The present case does not involve minors.”).

145. *See id.* (noting that the present case also “does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused”).

146. *See infra* note 148 and accompanying text.

147. *Pavan*, 137 S. Ct. at 2075. Here, the incident being denied was a birth certificate bearing both parents’ names—in this case, two mothers. *Id.* at 2077.

148. *See* FIRST RESTATEMENT, *supra* note 6, § 134 cmt. b (noting that “the foreign marriage would have been contrary to the statute of the forum had it occurred within the state”); *see also* SECOND RESTATEMENT, *supra* note 5, § 284 cmt. b (noting that “the marriage would have been invalid in the state if it had been contracted there”).

149. *Pavan*, 137 S. Ct. at 2078 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)).

150. *See Obergefell*, 135 S. Ct. at 2604 (“Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.”).

151. *Cf. id.* at 2602 (“It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”).

The *Obergefell* Court stated that the Constitution “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”¹⁵² That Court may have been thinking either that the Constitution requires states to treat all marriages similarly or that the Constitution permits states to make distinctions among couples with respect to the enjoyment of the incidents of marriage as long as those distinctions are reasonable.¹⁵³ For example, states might be able to deny the enjoyment of some of the incidents of marriage to *some* of those couples who could not have contracted the marriage within the state, i.e., those marriages that are very offensive to local policy.¹⁵⁴ Clarification of the constitutional limitations on the power of states to restrict the enjoyment of the incidents of marriage will have to await resolution in future cases.

F. Right to Travel

An additional constitutional consideration supports the contention that a marriage valid in the domicile at the time of the marriage’s celebration must be recognized throughout the nation. The Court has recognized that a United States citizen’s “‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”¹⁵⁵ Individuals who have a valid marriage according to their domicile’s law cannot be precluded from visiting other states.¹⁵⁶ Indeed, the *Obergefell* Court noted that permitting one state to refuse to recognize a marriage validly recognized in a sister domicile might severely burden individual travel rights: “[E]ven an ordinary drive into

152. *Id.* at 2607.

153. *Cf. Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of . . . marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”).

154. *See* FIRST RESTATEMENT, *supra* note 6, § 134 cmt. b (“The mere fact that the foreign marriage would have been contrary to the statute of the forum had it occurred within the state, does not make it so offensive to local policy as to be refused enforcement.”); *see also* SECOND RESTATEMENT, *supra* note 5, § 284 cmt. b (“A state will give the same incidents to a marriage, which is valid under the principles stated in § 283, that it gives to a marriage validly contracted within its own territory, except as stated in Comment c. This is true even though the marriage would have been invalid in the state if it had been contracted there. So a state will usually permit the parties to a valid foreign marriage to cohabit within its territory even though the marriage would have been invalid . . .”).

155. *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)).

156. *Id.* at 500 (“The ‘right to travel’ discussed in our cases . . . protects the right of a citizen of one State to enter and to leave another State, [and] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State.”).

a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines."¹⁵⁷

The difficulty posed by a state's refusal to recognize a marriage of a *visiting* couple is avoided if only *domiciles* are permitted to refuse to recognize marriages that had been valid at the time of celebration. Suppose, for example, that a couple is domiciled in State D, celebrates a marriage in State C, and visits friends in State V. Assume further that the marriage is valid in states D and C. State V would be required to recognize the marriage, even if the marriage violated an important policy of that state. But if the couple decided to stay and make State V their new domicile, the limitation on non-domiciles would not prevent State V (their new domicile) from refusing to recognize their marriage.¹⁵⁸ Here, it is critical to note that the right to travel not only protects the right of United States citizens to visit other states, but also protects, "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."¹⁵⁹

Both the *Restatements* and the Constitution would thus preclude a subsequent domicile from refusing to recognize a marriage valid in the state of domicile at the time of the marriage's celebration. As the Court has explained, "[s]tates . . . do not have any right to select their citizens."¹⁶⁰ Further, a state may not discourage individuals from coming to that state merely because the state views those individuals as undesirable. For example, a state is precluded from trying to deter indigents from moving to that state,¹⁶¹ notwithstanding the state's valid interest in protecting the public fisc.¹⁶² So, too, a state is not permitted to refuse to recognize marriages validly celebrated in other domiciles as a way to deter those married couples from moving to the state. The *Restatements'* position reflects a similar approach—a subsequent

157. *Obergefell*, 135 S. Ct. at 2607 (citing *Williams v. North Carolina*, 317 U.S. 287, 299 (1942)).

158. *Cf. Ex parte Kinney*, 14 F. Cas. 602, 606 (C.C.E.D Va. 1879) ("That such a citizen [who had entered into an interracial marriage in another domicile] would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence [notwithstanding Virginia's treating such marriages as void], may be conceded, because those are privileges following a citizen of the United States.").

159. *Saenz*, 526 U.S. at 500.

160. *Id.* at 511.

161. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) ("[T]he purpose of deterring the immigration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible.").

162. *Id.* at 633 ("We recognize that a State has a valid interest in preserving the fiscal integrity of its programs.").

domicile may not deny the validity of a marriage valid in the couple's former domicile at the time of celebration, because a marriage valid in the state of domicile at the time of celebration is valid throughout the country.¹⁶³ A marriage valid throughout the country would be valid in the subsequently acquired domicile as well.

This result might seem counter-intuitive because such an approach favors the couple who subsequently acquires a domicile over the couple who had always lived there. Consider a couple, Riley Rivers and Reese Rogers, precluded by Domicile₁'s law from marrying. This couple has always lived in that state. Even were they to visit another state and marry in accord with local law, Domicile₁ would not have to recognize that marriage if that union violated an important public policy of the state.¹⁶⁴ Next consider Sandy Smith and Sasha Stockton, who live in Domicile₂ and marry in accord with local law. If Sandy and Sasha had lived in Domicile₁, they could not have married for the same reason that Riley and Reese are precluded from marrying.

Suppose that a few years into their marriage Sandy and Sasha receive very attractive job offers from an employer based in Domicile₁. Were Sandy and Sasha to accept those offers and move to Domicile₁, their marriage would have to be recognized because it had been valid in the state of celebration and domicile at the time of its celebration. Nonetheless, Riley and Reese would still be precluded from marrying in Domicile₁. Further, even if they temporarily visited Sandy and Sasha's former home (Domicile₂) and celebrated their wedding there, Domicile₁ could legally refuse to recognize that marriage. It might seem that Sandy and Sasha, who subsequently moved to Domicile₁, are being accorded better treatment than Riley and Reese, who had always lived there.

As unfair as this outcome may seem, Riley and Reese are unlike Sandy and Sasha in an important respect: the former couple never had a valid marriage in their domicile, while the latter couple did. Sandy and Sasha cannot constitutionally be forced to forego their valid marriage as a price of traveling or moving to Domicile₁, whereas Riley and Reese would never have had a valid marriage.

163. See, e.g., *Cook v. Cook*, 104 P.3d 857, 865–66 (Ariz. Ct. App. 2005) (“When the parties moved from Virginia to Arizona in 1989, their marriage was valid *under the laws of the state of Arizona*, not simply under Virginia law.” (emphasis in original)). Note, however, that a state *might* be able to deny the couple the enjoyment of some of the incidents of marriage. See *supra* note 134 and accompanying text.

164. See *supra* note 67 and accompanying text.

The couple marrying in accord with the laws of the states of celebration and domicile at the time of the marriage would have justifiable and reasonable beliefs about the validity of their marriage, whereas the couple evading their domicile's law would be on notice that their domicile at the time of the marriage might not recognize the union even if it was validly celebrated elsewhere.¹⁶⁵

Thus, there is an important sense in which Sandy and Sasha are not comparable to Riley and Reese. Sandy and Sasha might well have made a variety of decisions reasonably and justifiably relying on the validity of their marriage. They would be more comparable to Charlie and Casey, who had married at home in Domicile₁ in accord with the law of the state of celebration and domicile (i.e., Domicile₁). Refusing to recognize the marriage of Sandy and Sasha, who had married in accord with the law of the state of celebration and domicile at the time of the wedding (Domicile₂) while recognizing the marriage of Charlie and Casey would involve treating the citizens of another state (Domicile₂) less favorably than the citizens of Domicile₁. Disfavoring couples with valid marriages from other states implicates right to travel guarantees.¹⁶⁶

The right to travel precludes a state, absent some extremely important justification, from imposing a severe burden on United States citizens who wish to emigrate to that state.¹⁶⁷ The Court has not made clear which state interests, if any, would be sufficiently important to justify refusing a couple the enjoyment of the incidents of marriage if that couple's marriage was valid in the couple's domicile at the time of celebration. Perhaps polygamous unions would present sufficiently important interests to deny the enjoyment of the incidents of marriage.¹⁶⁸ Perhaps not.

165. Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS U. L. REV. 553, 575 (2000).

166. Cf. Strasser, *supra* note 64, at 307 (“[A] law which would void one’s marriage validly celebrated in another state would be a serious deterrent to travel, given that marriage involves such a fundamental interest.”).

167. Cf. *Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254 (1974) (“[B]ecause this classification impinged on the constitutionally guaranteed right of interstate travel, it was to be judged by the standard of whether it promoted a compelling state interest.”).

168. Cf. *supra* note 154 and accompanying text (discussing the fact that some state interests might be sufficiently important to allow a state to deny the incidents of a marriage).

II. ASSESSING THE CONSTITUTIONALITY OF SELECTED STATE RECOGNITION PRACTICES

Both *Restatements* suggest that a marriage valid in the *domicile* at the time of the marriage is valid throughout the country. The Court has emphasized the interests of the domicile in assuring that its marital status determinations are respected throughout the nation. In the divorce context, the Court has made clear that the interest of subsequent domiciles in determining marital status must give way to considerations such as the individual interests implicated in marriage and the state interests in being part of a federal system. Further, the fundamental interest in marriage is abridged when individuals are forced to surrender their marriages as a price of entering a state. Additionally, right to travel guarantees limit the power of subsequent domiciles to deny a marriage's validity and, perhaps, the enjoyment of certain incidents of marriage. Were the Court to expressly embrace these constitutional limitations, some state recognition practices with respect to common law marriage and to marriages involving individuals closely related by consanguinity or affinity might need to be modified.

A. Common Law Marriage

Several states still recognize common law marriage,¹⁶⁹ while other states not only prohibit such marriages but also treat them as void.¹⁷⁰ Given this divergence of practice and the degree to which certain states believe common law marriage to be contrary to public policy,¹⁷¹ it would be helpful to know the conditions under which states must recognize such marriages if contracted elsewhere, even assuming that states may constitutionally prohibit their being contracted locally.

When permitted, a common law marriage may be contracted where two parties agree to be married, hold themselves out to the community

169. Bryan E. Gates, *Filing Status*, 2 INTERNAL REVENUE MANUAL-ABRIDGED & ANNOTATED March 2019 Update, § 4.19.14.6.4 (“The states that recognize common law marriages are CO, IA, KS, MT, OK, RI, SC, TX, UT and the District of Columbia.”).

170. *See, e.g.*, IND. CODE ANN. § 31-11-8-5 (West) (“A marriage is void if the marriage is a common law marriage that was entered into after January 1, 1958.”); *see also* MINN. STAT. ANN. § 517.01 (West) (“A lawful civil marriage may be contracted only when a license has been obtained as provided by law and when the civil marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.”).

171. *Cf. Hesington v. Hesington's Estate*, 640 S.W.2d 824, 827 (Mo. Ct. App. 1982) (noting that “§ 451.040.5 expressly declares that ‘common-law marriages hereafter contracted shall be null and void’” (emphasis in original)).

as married, and are capable of contracting a marriage.¹⁷² There are some differences among states permitting such marriages to be contracted; for example, whether a common law marriage will be presumed once an impediment to its formation has been removed.¹⁷³ But the focus here is on whether a common law marriage contracted in a jurisdiction permitting such unions must later be recognized by a jurisdiction that does not permit such marriages to be contracted. State legislatures can specify by statute whether common law marriages can be contracted within the state, and whether common law marriages contracted elsewhere will be recognized.¹⁷⁴ However, if a state legislature has not spoken directly to either or both of those issues, courts must clarify state law.

Two cases, *Hewitt v. Hewitt*¹⁷⁵ and *Marvin v. Marvin*,¹⁷⁶ are helpful when examining different state attitudes about common law marriage. *Hewitt* is thought to represent strong disagreement with the recognition of common law marriages, while *Marvin* is thought to represent the opposite.¹⁷⁷ At issue in *Hewitt* was whether Illinois would permit Victoria Hewitt, who “lived with defendant Robert Hewitt from 1960 to 1975 in an unmarried, family-like relationship to which three

172. See Mark Strasser, Obergefell, *Retroactivity, and Common Law Marriage*, 9 NE. U.L. REV. 379, 406–07 (2017) (“As a general matter, individuals domiciled in a state that permits individuals to contract a common law marriage can establish such a union by: (1) treating each other as spouses, (2) holding themselves out as spouses to the community, and (3) being free to marry, e.g., not already having a living spouse.”).

173. Compare Callen v. Callen, 620 S.E.2d 59, 62 (S.C. 2005) (stating that after the impediment is removed—in this case, one party’s existing marriage to a third person—“the relationship is not automatically transformed into a common-law marriage,” but instead “remains non-marital”) with Thomas v. Murphy, 107 F.2d 268, 269 (D.C. Cir. 1939) (“[T]he removal of an impediment while parties continue to live together as husband and wife gives rise to a common-law marriage.”).

174. See Ohio Rev. Code Ann. § 3105.12(B)(1) (West) (“On and after October 10, 1991 . . . common law marriages are prohibited in this state”); *id.* § 3105.12(B)(2) (“Common law marriages that occurred in this state prior to October 10, 1991, and that have not been terminated by death, divorce, dissolution of marriage, or annulment remain valid on and after October 10, 1991.”); *id.* § 3105.12(B)(3)(a-b) (“Common law marriages that satisfy all of the following remain valid on and after October 10, 1991: They came into existence prior to October 10, 1991, or come into existence on or after that date, in another state or nation that recognizes the validity of common law marriages in accordance with all relevant aspects of the law of that state or nation; They have not been terminated by death, divorce, dissolution of marriage, annulment, or other judicial determination in this or another state or in another nation.”).

175. 394 N.E.2d 1204 (Ill. 1979).

176. 557 P.2d 106 (Cal. 1976).

177. Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1843 (1987) (“Because the California and Illinois supreme courts had different fundamental conceptions of the nature of marriage and the law’s relation to it, their analyses are diametrically opposed to one another.”).

children have been born,” to recover “an equal share of the profits and properties accumulated by the parties during that period.”¹⁷⁸ The Hewitts had begun their relationship in Iowa,¹⁷⁹ although there was some question whether the couple had lived together there.¹⁸⁰

In denying Victoria Hewitt’s claim as a matter of public policy,¹⁸¹ the *Hewitt* court discussed the state’s view of common law marriage— Illinois by statute denied recognition to common law marriages contracted after 1905.¹⁸² After acknowledging the state’s policy, the court nevertheless explained how the family seemed to meet the requirements for common law marriage.¹⁸³ “The parties expressly manifested their present intent to be husband and wife; immediately thereafter they assumed the marital status; and for many years they consistently held themselves out to their relatives and the public at large as husband and wife.”¹⁸⁴ Apparently, the couple met in college. She became pregnant, they agreed to become a family, and “the parties immediately announced to their respective parents that they were married and thereafter held themselves out as husband and wife.”¹⁸⁵

The surprising part of the *Hewitt* opinion is that the court nowhere addresses whether a valid common law marriage had been established in Iowa.¹⁸⁶ If one had been established, the question would have been whether Illinois recognized common law marriages validly contracted in other jurisdictions, and if not, whether the state was constitutionally required to do so.

While Illinois’s refusal to permit common law marriages to be contracted within the state has existed for over a century, the state does

178. *Hewitt*, 394 N.E.2d. at 1205.

179. *Id.*

180. *See Hewitt v. Hewitt*, 380 N.E.2d 454, 456 (Ill. App. 1978), *rev’d*, 394 N.E.2d 1204 (Ill. 1979) (noting at one point that “the parties immediately announced their marriage to their respective parents, thereafter lived together as husband and wife” while noting at another point that “[t]he trial court . . . found that the parties had never lived together in the State of Iowa”).

181. *Hewitt*, 394 N.E.2d at 1211 (“[P]laintiff’s claims are unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”).

182. *Id.* at 1209 (citing ILL. REV. STAT. 1977, ch. 40, par. 214) (“The Act also provides: ‘Common law marriages contracted in this State after June 30, 1905 are invalid.’”).

183. *Id.* at 1210 (“Plaintiff’s allegations disclose a relationship that clearly would have constituted a valid common law marriage in this State prior to 1905.”).

184. *Id.*

185. *Id.* at 1205.

186. The sole mention of Iowa in the opinion involved the court’s pointing out that Grinnell College was located there. *See id.*

recognize such marriages if validly contracted in a sister domicile.¹⁸⁷ Many states have similar policies.¹⁸⁸ If the *Hewitt* court had recognized that a common law marriage was validly established in Iowa, then *Hewitt* would likely not have stood for the proposition that common law marriage and nonmarital cohabitation are grave threats to traditional marriage,¹⁸⁹ if only because the court would have held that the common law marriage was valid.

The Illinois Supreme Court has suggested that a common law marriage contracted in a state permitting them will not be recognized in Illinois if the common law marriage was contracted while the parties were Illinois domiciliaries.¹⁹⁰ But this differs from the claim that a common law marriage contracted in a different *domicile* should nonetheless be void.¹⁹¹

187. See *Bangaly v. Baggiani*, 20 N.E.3d 42, 82 (Ill. App. 2014) (citing *Allen v. Storer*, 600 N.E.2d 1263 (Ill. App. 1992)) (“For instance, while common law marriages are not permitted under Illinois law . . . common law marriages contracted in another state where they are valid are recognized.”).

188. See, e.g., *Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644, 647 (Fla. Dist. Ct. App. 2015) (citing *Smith v. Anderson*, 821 So. 2d 323, 325 (Fla. Dist. Ct. App. 2002)) (“Florida also recognizes common law marriages entered into in states that accept common law marriages, even though Florida itself does not recognize common law marriages contracted for in Florida after 1968.”); *Raum v. Rest. Assocs.*, 675 N.Y.S.2d 343, 347–48 (N.Y. App. Div. 1998) (Rosenberger, J., dissenting) (citing *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657 (N.Y. 1980)) (“While New York has not recognized common-law marriages created in New York since 1933, it will recognize such marriages if they were valid under the laws of the states where contracted.”).

189. Cf. *Kandoian*, *supra* note 177, at 1845–46 (noting the *Hewitt* court’s view that common law marriage undermined the institution of marriage). See also *Ayala v. Fox*, 564 N.E.2d 920, 921 (Ill. App. 1990) (citing *Hewitt*, 394 N.E.2d at 1211) (“In *Hewitt*, our supreme court held that it would not grant mutual property rights to unmarried cohabitants because to do so would reinstate common-law marriage and violate the public policy of this State.”).

190. *Peirce v. Peirce*, 39 N.E.2d 990, 993 (Ill. 1942) (“[T]he proposition that a common law marriage is void in Illinois, even if performed in some other jurisdiction . . . is limited to the situation where the parties whose marriage is sought to be upheld in Illinois were, at the time of the marriage, domiciled in Illinois, although the marriage occurred in another State.”). It may be that the trial court had based its decision on the Hewitts having been Illinois rather than Iowa domiciliaries, see *Hewitt*, 380 N.E.2d at 456 (“[P]rior to June 1960, the parties were residents of Illinois attending Grinnell College in Iowa.”), although the question would then be whether the Hewitts had become domiciled in Iowa while schooling there. See *In re Estate of Elson*, 458 N.E.2d 637, 641–42 (Ill. App. 1983) (citing *Schultz v. Chicago City Bank & Tr.*, 51 N.E.2d 140, 144 (Ill. 1943)) (“To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intent not to return to it; also, physical presence must be established in another place with the intention of making the last-acquired residence her permanent home.”).

191. *Allen v. Storer*, 600 N.E.2d 1263, 1266–67 (Ill. App. 1992) (noting that these claims differ and that Illinois only refuses to recognize common law marriages that had allegedly been contracted by Illinois domiciliaries).

Courts have sometimes claimed that they need not recognize a common law marriage validly contracted in another domicile where such a marriage contravenes an important public policy.¹⁹² To say that a jurisdiction *need not* recognize a marriage contracted elsewhere does not mean that the jurisdiction *will not* recognize a common law marriage validly contracted elsewhere.¹⁹³ Just as a domicile might recognize *out of comity* the validity of a domiciliary's marriage that had been celebrated elsewhere even though that marriage could not have been celebrated locally,¹⁹⁴ a subsequent domicile might recognize *out of comity* a marriage that was validly celebrated in a sister domicile even though such a marriage could not have been celebrated in the subsequent domicile.¹⁹⁵ A state recognizing marriages validly celebrated in other domiciles *out of comity* in effect reserves the right not to recognize such marriages if they violate local public policy.¹⁹⁶ However, the right to travel militates against the constitutionality of a state refusal to recognize a ceremonial marriage valid in a sister domicile at the time of the marriage.¹⁹⁷ That same right also militates against the constitutionality of a state refusal to recognize a common law marriage validly contracted in a sister domicile. Right to travel guarantees require the recognition of a common law marriage valid in the domicile at the time it was contracted.

B. Incestuous Relations

States sometimes claim that they need not recognize marriages validly celebrated in other domiciliary states if the parties are too

192. See *Brinson v. Brinson*, 96 So. 2d 653, 660 (La. 1957) (“But we are not bound to give effect to a common law marriage, even if valid in the state where contracted, when it contravenes the public policy of Louisiana and good morals generally.”).

193. See *Matter of Lamb’s Estate*, 655 P.2d 1001, 1003 (N.M. 1982) (citing *Ferret v. Ferret*, 237 P.2d 594, 602 (N.M. 1951)). There, the court wrote:

New Mexico applies the rule of comity, that the law of the place where the marriage is performed governs the validity of that marriage. To determine whether a valid common law marriage was formed in a foreign jurisdiction, it is therefore necessary to look to the substantive law of that jurisdiction.

194. *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (“As a matter of comity, Indiana can choose to recognize Tennessee marriages between first cousins, even though such a marriage could not be validly contracted between residents of Indiana.”). In *Mason*, John Mason had been an Indiana domiciliary before the marriage and had returned to live in Indiana with his wife three months after the marriage. *Id.* at 708.

195. See *Brinson*, 96 So. 2d at 659 (“[T]his Court has heretofore recognized, as a matter of comity, common-law marriages valid where contracted.”).

196. See *id.* at 660 (“[W]e are not bound to give effect to a common law marriage, even if valid in the state where contracted, when it contravenes the public policy of Louisiana and good morals generally.”).

197. *Supra* notes 159–162 and accompanying text.

closely related by affinity or consanguinity.¹⁹⁸ All states prohibit, for example, parents from marrying their children,¹⁹⁹ and siblings from marrying each other.²⁰⁰ States differ, however, in whether they permit first cousins to marry.²⁰¹

Arizona not only suggests that *domiciliaries* who marry their first cousins elsewhere (without meeting a narrow exception²⁰²) will not have their marriages recognized,²⁰³ but also suggests that after 1996 individuals who marry their first cousins in accord with their domicile's law will nonetheless not be recognized as married if they move to Arizona.²⁰⁴ While the constitutional limitations articulated in the preceding sections are compatible with Arizona's refusal to recognize its domiciliaries' first cousin marriages celebrated in accord with the law of the state of celebration, the Constitution does not permit

198. See ARIZ. REV. STAT. ANN. § 25-112(A) (“Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101.”); see also *id.* at § 25-101(A)-(B) (“Marriage between . . . first cousins, is prohibited and void. Notwithstanding subsection A, first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.”).

199. Christine M. Metteer, *Some “Incest” Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL’Y 262, 273 (2000) (“[A]ll states continue to prohibit marriages between parents and children.”).

200. Sonu Bedi, *An Illiberal Union*, 26 WM. & MARY BILL RTS. J. 1081, 1135 (2018) (suggesting that no state permits siblings to marry); see also Nicole Licata, *Should Premarital Counseling Be Mandatory As A Requisite to Obtaining A Marriage License?*, 40 FAM. CT. REV. 518, 526 (2002) (“States have enacted laws that prohibit a person from marrying his or her own sibling.”). *But see* Israel v. Allen, 577 P.2d 762 (Colo. 1978) (upholding validity of marriage between brother and adoptive sister).

201. Compare ARK. CODE ANN. 9-11-106(a) (West) (“All marriages between . . . first cousins are declared to be incestuous and absolutely void”) with OR. REV. STAT. ANN. § 106.020(2) (West) (“The following marriages are prohibited; and, if solemnized within this state, are absolutely void: . . . When the parties thereto are first cousins or any nearer of kin to each other . . . except that when the parties are first cousins by adoption only, the marriage is not prohibited or void.”); with TENN. CODE ANN. § 36-3-101 (West) (“Marriage cannot be contracted with a lineal ancestor or descendant, nor the lineal ancestor or descendant of either parent, nor the child of a grandparent, nor the lineal descendants of husband or wife, as the case may be, nor the husband or wife of a parent or lineal descendant.”). See also Smith v. State, 6 S.W.3d 512, 518 (Tenn. Crim. App. 1999) (“The revised statutes limited prohibitions against marriage to relatives closer than first cousins.”).

202. *Supra* note 198.

203. *In re* Mortenson’s Estate, 316 P.2d 1106, 1108 (Ariz. 1957) (“Marriages performed outside the state which offend a strong public policy of the state of domicile will not be recognized as valid in the domiciliary state.”).

204. See Cook v. Cook, 104 P.3d 857, 866 (Ariz. Ct. App. 2005).

Arizona to refuse to recognize marriages validly celebrated in a sister domicile.²⁰⁵

CONCLUSION

The *Restatements (First and Second) of the Conflict of Laws* suggest that a marriage valid in the domicile at the time of its celebration is valid throughout the country. Further, both individuals and states have important interests implicated in the continuing recognition of such marriages until ending because of death, divorce, or dissolution. Finally, the United States Constitution protects the right to travel, and individuals who must sacrifice their marriages as a price of emigrating to other states have had their right to travel severely burdened. The Constitution is best understood as requiring state recognition of marriages valid in sister domiciles at the time of celebration.

The *Restatements* suggest that a state may withhold enjoyment of certain incidents of marriage if a couple's marriage violates an important public policy of that state. However, the Court has not yet made clear as a constitutional matter which, if any, state interests are sufficiently important to justify such a denial. The right to travel enjoyed by United States citizens includes the right to emigrate to other states, and the Court has not explained whether states who would deny the incidents of marriage to new domiciliaries, or even temporary visitors, would thereby infringe upon the right to travel. Just as surrendering one's marriage would be a heavy price to pay for the privilege of emigrating to another state, surrendering one's right to live with one's spouse and children would be a heavy price, too. The Court should explain whether and to what extent the Constitution protects the validity of citizen's marriages among the states, and the ability of citizens to enjoy the incidents of marriage as they exercise their rights to travel through or emigrate to other states in the Union.

205. See *supra* note 197 and accompanying text (suggesting that right to travel guarantees would require the recognition of a common law marriage contracted in the domicile).