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Free Exercise, the Respect for Marriage Act, and Some Potential Surprises

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Free Exercise, the Respect for Marriage Act, and Some Potential Surprises

MARK STRASSER*

ABSTRACT

Congress recently passed the Respect for Marriage Act to assure that certain marriages would remain valid even if the Supreme Court were to overrule past precedent and hold that the Constitution does not protect the right to marry a partner of the same sex or of a different race. However, the Act, as written, may not offer protection for certain same-sex or interracial marriages and may open the door to the federal protection of plural marriages, congressional intent notwithstanding, because of the Court's increasingly robust free exercise jurisprudence.

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I. INTRODUCTION

Congress recently passed the Respect for Marriage Act ("Act"), which requires the recognition of certain marriages validly celebrated in other jurisdictions.[1] The law was enacted in response to *Dobbs v. Jackson Women's Health Organization*,[2] where the Court provides the basis for modifying existing substantive due process guarantees and holding that the United States Constitution does not afford protection to particular marriages or, perhaps, to marriage as a general matter.[3]

Regrettably, the Act was not drafted as carefully as one might have hoped, thereby creating uncertainties about which marriages must be recognized. As a separate matter, the Court's increasingly robust free exercise jurisprudence may now require the recognition of plural marriage,[4] express congressional intent to the contrary notwithstanding.

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[1] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[3] Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 145 n.248 (2022) ("Given the invocation of the *Glucksberg* test in *Dobbs*, the Court now appears committed to the position that the fundamental right to marry protected under substantive due process does not include the right of a nonwhite person to marry a white person.").

[4] STEPHEN SHEPPARD, POLYGAMY (PLURAL MARRIAGE OR POLYGAMOUS) (Wolters Kluwer Bouvier Law Dictionary Desk ed. 2012).

Although the congressional intent behind the Act is clear in some respects,[5] that law might be interpreted to have unintended consequences that significantly alter current marriage recognition practices. Congress or the courts will have to clarify which of these likely unintended changes to existing marriage recognition practices should now become the norm.

Part I of this Article discusses *Dobbs* and why it may have implications for the fundamental right to marry. Part II discusses the Act, noting how a drafting ambiguity may cloud who is entitled to federal benefits. Part III discusses the Court's increasingly robust free exercise jurisprudence and its possible implications. Part IV discusses yet another ambiguity and the steps that might be taken to prevent the Act's purposes from being undermined. The Article concludes by suggesting that Congress should amend the Act in certain ways to avoid inconsistency in court opinions and unwelcome surprises for millions of families.

A. Dobbs *and the Right to Marry*

The *Dobbs* Court sent "shockwaves" through the legal system.[6] Overruling nearly fifty years of precedent,[7] the Court not only substantially changed the legal landscape with respect to reproductive rights,[8] but also set the stage for changes with respect to other matters.[9] The decision leaves right to privacy jurisprudence in "uncharted

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[5] Congress clearly sought to protect same-sex and interracial couples. *See* 1 U.S.C.S. § 7, sec. (3) (LexisNexis 2023) (expressly discussing "interracial and same-sex couples"); *see also* 28 U.S.C.S. § 1738C(a)(1)–(2) (LexisNexis 2022) ("No person acting under color of State law may deny full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals; or a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or national origin of those individuals.").

[6] *Cf.* Camille A. Nelson, *Welcome Remarks*, 45 U. HAW. L. REV. 262, 262 (2023) ("[T]he United States Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* sent shockwaves throughout the nation.").

[7] *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *see also* Paula A. Monopoli, *Situating* Dobbs, 14 CONLAWNOW 45, 45 (2023) ("[T]he Court abandoned fifty years of precedent in *Dobbs*.").

[8] David S. Cohen et al., *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 2 (2022) (discussing "what the changed legal landscape means for abortion rights legal advocacy").

[9] James G. Hodge, Jr. et al., *Supreme Court Impacts in Public Health Law: 2021-2022*, 50 J.L. MED. & ETHICS 608, 609 (2022) ("Worse still is the precedent *Dobbs* sets for the Court's retraction of other fundamental, non-textual rights ahead including rights to contraception, marriage equality, and intimacy despite the Court's assurances its opinion was limited to abortion access.").

territory,"[10] and has already induced Congress and state legislatures to respond in various ways.[11]

B. Dobbs *Sets the Stage*

In *Dobbs v. Jackson Women's Health Organization*, the Court overruled the longstanding abortion jurisprudence,[12] noting that the "Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment."[13] By doing so, the Court not only overruled settled case law,[14] but also cast into doubt other decisions relying on substantive due process guarantees.[15]

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10 *Cf.* Cohen et al., *supra* note 8, at 1 ("[T]he movement for abortion rights and access finds itself in uncharted territory.").

11 *See, e.g.*, Evan D. Bernick, *Vindicating Cassandra: A Comment on* Dobbs v. Jackson Women's Health Organization, 2022 CATO SUP. CT. REV. 227, 227 (2022) ("In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court of the United States overruled *Roe v. Wade* and held that the U.S. Constitution does not guarantee the right to terminate a pregnancy. The decision triggered abortion bans in 11 states."); Dane Brody Chanove, *A Tough Roe to Hoe: How the Reversal of* Roe v. Wade *Threatens to Destabilize the LGBTQ+ Legal Landscape Today*, 13 UC IRVINE L. REV. 1041, 1065 n.203 (2023) (discussing "Congress's passage of the Respect for Marriage Act, Pub. L. No. 117-228 (2022), in response to the Court's ruling in *Dobbs*"); *cf.* Kerry Lynn Macintosh, Dobbs*, Abortion Laws, and in Vitro Fertilization*, 26 J. HEALTH CARE L. & POL'Y 1, 18 (2023) ("Congress and state legislatures may take *Dobbs* as an open invitation to enact new laws that protect IVF embryos even when abortion laws do not.").

12 *Dobbs*, 142 S. Ct. at 2242 ("We hold that *Roe* and *Casey* must be overruled.").

13 *Id.*

14 *See* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1902 (2023) ("As other courts have put it, 'for more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion.'" (citing Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 539 (S.D. Miss. 2018)) (quoting Jackson Women's Health Org. v. Currier, 760 F.3d 448, 453 (5th Cir. 2014), *aff'd sub nom.* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *rev'd and remanded*, 142 S. Ct. 2228 (2022))); John V. Orth & Paul T. Babie, *Not Child's Play: A Constitutional Game of Pass the Story in* Dobbs*,* Shurtleff*, and* Kennedy, 127 PENN ST. L. REV. PENN STATIM 50, 53 (2022) (discussing "the Court's rejection of what was thought to be settled precedent").

15 *Cf. Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring) ("[T]he Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, 'forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." (quoting Reno v. Flores, 507 U.S. 292, 302 (1993))); Isabelle G. Horn, Dobbs v. Jackson Women's Health Organization, *142 S. Ct. 2228 (2022)*, 49 OHIO N.U. L. REV. 231, 246 (2022) ("Many of the rights so many Americans feel are fundamental to them are rooted in the Due Process Clause and doctrine of substantive due process, such as the right to interracial marriage, the right to same-sex marriage, the right to obtain and use contraception, and even the right to engage in private sexual intimacy.").

In reversing *Roe*, the *Dobbs* Court explained that *Roe* "held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[16] The same point might be made about several rights recognized as falling within the right to privacy—the Constitution nowhere mentions the right to marry or the right to parent one's child;[17] indeed, the Constitution does not even mention "family."[18] The Court's analysis provides the framework for rejecting that a variety of interests should be afforded increased constitutional protection.[19]

The *Dobbs* Court denied that its decision had such far-reaching implications, explaining that the "abortion right is . . . critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of 'liberty,'"[20] because "it destroys . . . 'fetal life.'"[21] Yet, many of the rights protected under the right to privacy might be characterized as "critically different" from the other rights falling within substantive due process protections.[22] For example, the right to contraception might be characterized as the only currently recognized

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16 *Dobbs*, 142 S. Ct. at 2245 (majority opinion) (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973)).

17 *See* Kimberly M. Mutcherson, Professor at L., Rutgers L., *University of Kansas School of Law "Post-Pandemic Privacy" Symposium: Keynote Speech*, 31 KAN. J.L. & PUB. POL'Y 363, 365 (2022) ("[T]he cases that protect our right to the care, custody, and control of our minor children, our right to procreate, our right to access birth control, both for married people and single people, the right to terminate a pregnancy, and the right to marry interracially or to marry a same-sex partner. And now, importantly, and we all know this because we're law-related people, none of these rights appear as such in the text of the Constitution."); *cf*. United States v. Windsor, 570 U.S. 744, 767 (2013) ("The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383–84 (1930))).

18 Eugene Lee, *Recognizing the Right to Family Unity in Immigration Law*, 121 MICH. L. REV. 677, 681 (2023) ("The Constitution does not mention 'family,' much less a specific right to family unity.").

19 Darren Lenard Hutchinson, *Thinly Rooted:* Dobbs*, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 391 (2023) (discussing "the far-reaching implications of *Dobbs*, including the reality that the Court's reasoning could justify invalidation of fundamental rights related to same-sex marriage, sexual privacy, and contraception").

20 *Dobbs*, 142 S. Ct. at 2243.

21 *Id.*; *see also* Donald A. Daugherty, Jr., *Originalism Carries On*, 24 FEDERALIST SOC'Y REV. 77, 83–84 (2023) ("Although opposition to abortion both in the courts and the public square have been unrelenting in the decades since *Roe*, this is not the case for contraception, interracial marriage, same-sex marriage, or other widely-accepted matters that liberals contend are at risk after *Dobbs*.").

22 *But see Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.").

constitutional right which undermines the State's "legitimate interest in protecting 'potential life.'"[23]

Unlike Justice Thomas,[24] the *Dobbs* Court admits that substantive due process guarantees protect unenumerated rights, noting that "the Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution."[25] Nonetheless, the *Dobbs* Court cautioned that "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,'" citing *Washington v. Glucksberg*.[26] Regrettably, the *Dobbs* Court neglected to mention that the *Glucksberg* test has itself been rejected by the Court as the test by which substantive due process guarantees should be evaluated.[27] The *Obergefell* Court explained:

> *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.[28]

The *Obergefell* Court noted that the use of the *Glucksberg* test can have unfair results—"if rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[29] In particular, the Court rejected that such an approach is applicable to the right to marry.[30]

C. The Right to Marry

The *Obergefell* Court recognized that the "right to marry is fundamental as a matter of history and tradition,"[31] thereby suggesting that substantive due process guarantees protect marriage even in light of the test later endorsed in *Dobbs*.[32] However, the current Court might have a somewhat different understanding of what history and

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[23] *Id.* at 2241 (majority opinion).

[24] *Id.* at 2301 (Thomas, J., concurring) ("[T]he Due Process Clause at most guarantees *process*.").

[25] *Id.* at 2242 (majority opinion).

[26] *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

[27] Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

[28] *Id.*

[29] *Id.*

[30] *Id.* ("This Court has rejected that approach . . . with respect to the right to marry.").

[31] *Id.*

[32] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

tradition protect. After all, the Virginia anti-miscegenation laws struck down in *Loving v. Virginia* had been on the books in some form since before the Nation's founding,[33] so the current Court might reject that history and tradition protect the right to marry.[34]

The seminal case on the right to marry is *Loving v. Virginia*.[35] Yet, most of the *Loving* opinion was devoted to explaining why Virginia's anti-miscegenation law violated equal protection guarantees,[36] while the discussion of why anti-miscegenation laws violate due process guarantees was confined to two paragraphs on one page.[37]

The Supreme Court offered a more developed analysis of why the right to marry is protected under due process guarantees in *Zablocki v. Redhail*,[38] where much of the discussion of marriage focused on the importance of that right.[39] For example, the *Zablocki* Court noted that in *Maynard v. Hill* "the Court characterized marriage as 'the most important relation in life,'"[40] and as "the foundation of the family and of society, without which there would be neither civilization nor progress."[41] Following the

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[33] *See* Loving v. Virginia, 388 U.S. 1, 6 (1967) ("Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period."); Mark Strasser, *Federal Courts, Misdirection, and the Future of Same-Sex Marriage Litigation*, 23 KAN. J.L. & PUB. POL'Y 73, 78 (2013) ("Virginia had prohibited interracial relationships since before the Nation's founding. Further, over half of the states had laws prohibiting interracial marriage as late as 1950."); *cf.* Christopher R. Leslie, *Justice Alito's Dissent in* Loving v. Virginia, 55 B.C. L. REV. 1563, 1601–02 (2014) ("The nation certainly had no deeply rooted tradition of recognizing a right to interracial marriage at the time that the *Perez* plaintiffs brought their case to the California Supreme Court—indeed, most of the nation had a long, if not entirely unbroken, tradition of barring interracial marriage."). The Court now appears committed to the position that the fundamental right to marry protected under substantive due process does not include the right of a nonwhite person to marry a white person because bans on such marriages went as far back as the days of slavery.

[34] *Cf.* Jack I. Primack, *Liberty Under the United States Constitution: Why the Court Should Use the Personal Dignity and Autonomy Test to Find Unenumerated Rights*, 24 LOY. J. PUB. INT. L. 1, 3 (2022) ("[T]he foundation of other unenumerated rights that are arguably not rooted in history and tradition, such as the right to interracial marriage and same-sex marriage will be placed in jeopardy.").

[35] Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (noting that the "leading decision . . . on the right to marry is *Loving v. Virginia*" (citing *Loving*, 388 U.S. at 1)).

[36] *See Loving*, 388 U.S. at 6–12.

[37] *See id.* at 12. The *Zablocki* Court offered a different approach to understanding the *Loving* decision, noting that although *Loving* could have been decided solely on the basis of equal protection guarantees, "the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *See Zablocki*, 434 U.S. at 383.

[38] *See generally Zablocki*, 434 U.S. 374.

[39] *Id.* at 383–86.

[40] *Id.* (citing Maynard v. Hill, 125 U.S. 190, 205, 211 (1888)).

[41] *Id.* at 384 (citing *Maynard*, 125 U.S. at 211).

example set by the *Loving* Court,[42] the *Zablocki* Court[43] neglected to mention that the *Maynard* Court had cited the importance of the interest in marriage as a reason that marital regulation "has always been subject to the control of the legislature."[44] So, too, after pointing to the *Skinner* Court's observation that "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[45] neither the *Loving* Court[46] nor the *Zablocki* Court[47] mentioned that the *Skinner* Court expressly rejected that its purpose was "to reexamine the scope of the police power of the States."[48] Instead, the *Skinner* Court's point was that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[49] But invidious discrimination against groups is the stuff of which equal protection challenges are made.[50]

The point here is not to deny that marriage is a fundamental right guaranteed by due process guarantees, but merely to note that a United States Supreme Court so inclined might well deny that history and tradition establish such a right.[51] Will the Court do so? That is unclear. The *Dobbs* Court suggested that its "conclusion that the Constitution does not confer such a right [to abortion] does not undermine them [the other rights protected by due process guarantees] in any way.[52] However, Justice Thomas suggested in his concurrence that the Court "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[53] Regardless, Congress passed the Act not long after *Dobbs* was issued.[54]

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[42] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[43] *See Zablocki*, 434 U.S. at 384.

[44] *Maynard*, 125 U.S. at 205.

[45] Skinner v. State of Okla. ex rel. Williamson, 316 U.S. 535, 541 (1942).

[46] *See Loving*, 388 U.S. at 12.

[47] *See Zablocki*, 434 U.S. at 384.

[48] *Skinner*, 316 U.S. at 541.

[49] *Id.*

[50] *See id.* ("[T]he instant legislation runs afoul of the equal protection clause.").

[51] *See* Naim v. Naim, 350 U.S. 985 (1956) (holding that a challenge to Virginia's anti-miscegenation statute was "devoid of a properly presented federal question").

[52] Dobbs v. Jacksons Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

[53] *Id.* at 2301 (Thomas, J., concurring).

[54] Lauren M. DesRosiers, *Out of Bounds: Gender Outlaws, Immigration & the Limits of Assimilation*, 24 GEO. J. GENDER & L. 117, 120–21 (2022) ("After the Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health*, threatening the jurisprudential underpinnings of marriage equality, a bipartisan effort in Congress with notable Republican support, passed the Respect for Marriage Act in November 2022.").

II. THE RESPECT FOR MARRIAGE ACT

Dobbs was handed down on June 24, 2022,[55] and the Respect for Marriage Act was signed into law that very same year.[56] The Act includes several provisions and is supported by congressional findings that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family,"[57] that "[m]illions of people, including interracial and same-sex couples, have entered into marriages and have enjoyed the rights and privileges associated with marriage,"[58] and that "[c]ouples joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children."[59] But Congress was clear that the Act was not intended to protect all marriages, expressly excluding polygamy from the statute's protections.[60]

The Act specifies the conditions under which a validly celebrated marriage will be recognized by the Federal Government and the conditions under which a validly celebrated marriage must be accorded recognition in other states.[61] While both the Federal Government and the States are required to recognize certain validly celebrated marriages, the conditions under which the Federal Government is required to recognize a marriage are not identical to the conditions under which States are required to recognize a marriage validly celebrated elsewhere.[62] That difference creates the possibility that some marriages will be recognized for federal but not state purposes,

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[55] *Dobbs*, 142 S. Ct. at 2228.

[56] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022); *see also* Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and A Modest Role for Congress*, 35 J. AM. ACAD. MATRIM. LAW. 461, 502 (2023) ("*Dobbs* ignited not only fears about abortion access but also concerns about the continuing protection for marriage equality . . . . For marriage equality . . . we saw a very different outcome: passage of the Respect for Marriage Act, with bipartisan support, including twelve Republican Senators."); Chanove, *supra* note 11 (discussing "Congress's passage of the Respect for Marriage Act, Pub. L. No. 117-228 (2022), in response to the Court's ruling in *Dobbs*").

[57] Respect for Marriage Act, Pub. L. No. 117-228, § 7, 136 Stat. 2305, 2306 (2022).

[58] § 7, 136 Stat. at 2305.

[59] *Id.*

[60] 1 U.S.C.S. § 7(b) (LexisNexis 2023) ("Nothing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more than two individuals.").

[61] *Id.*

[62] Some commentators do not seem to appreciate the distinctions in the Act. *See* Note, Romer *Has It*, 136 HARV. L. REV. 1936, 1939 (2023) ("Most recently, in December 2022, Congress passed the bipartisan Respect for Marriage Act, which formally repealed DOMA and required the states to recognize all marriages, regardless of gender, validly entered into in another state."). While states are precluded from refusing to recognize a marriage validly celebrated elsewhere based on the genders of the parties, see *infra* note 115 and accompanying text, states are not precluded from recognizing all marriages validly celebrated in another state.

which has the potential to create much confusion and the disappointment of settled expectations.

A. Marriages Recognized by the Federal Government

The Act directs the Federal Government to recognize a marriage "if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State."[63] To determine whether a marriage could have been entered into in a state, the term "State" is construed rather broadly to include "a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States."[64] Thus, the language suggests that the Federal Government should recognize a couple's marriage if: (1) that marriage between two individuals was valid where entered into, and (2) such a marriage is recognized somewhere in the United States.

These seemingly straightforward conditions are not so straightforward after all. Congress "clarified"[65] the first condition by explaining that "in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, *only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.*"[66] The difficulty posed by this explanation is that by referring to "the law of the jurisdiction applicable at the time the marriage was entered into,"[67] Congress implies that there is only *one* applicable law at the time a marriage comes into being. But that implication is incorrect. As a general matter, the states whose laws are relevant when determining the validity of a marriage are the states of celebration and domicile at the time of the marriage.[68] If the law of the state of celebration does not permit the couple to contract the marriage, then the couple will not have contracted

[63] 1 U.S.C.S. § 7(a) (LexisNexis 2023).

[64] *Id.* § 7(b).

[65] Normally, a clarification facilitates understanding. *See Clarify*, Dictionary.com, https://dictionary.com/browse/clarify (last visited Jan. 12, 2024) (defining clarify (verb) as "to make (an idea, statement, etc.) clear or intelligible; to free from ambiguity").

[66] 1 U.S.C.S. § 7(c) (LexisNexis 2023) (emphasis added).

[67] *Id.*

[68] *See* Mark Strasser, *Marriage, Domicile, and the Constitution*, 15 DUKE J. CONST. L. & PUB. POL'Y 103, 115 (2020) (noting that both the First and Second Restatement of the Conflicts of Law suggest that "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"); *see also* United States v. Windsor, 570 U.S. 744, 796 (2013) (Scalia, J., dissenting) ("Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)?").

a lawful marriage by attempting to marry there.[69] Even if the law of the state of celebration permits the couple to wed, the marriage will nonetheless not be valid if it is contrary to an important public policy of the couple's domicile at the time of the marriage.[70]

Ironically, had there been no "clarifying" language in the statute,[71] the Act would presumably have meant that a marriage valid in the state of celebration (where the marriage was entered into) would be recognized by the Federal Government.[72]

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[69] McDowell v. Sapp, 39 Ohio St. 558, 560 (1883) ("It is well settled that the validity of a marriage must be determined from the *lex loci contractus*. If . . . invalid there, it is invalid everywhere.").

[70] Mark Strasser, United States v. Windsor *and Interstate Marriage Recognition*, 60 S.D. L. REV. 409, 417 (2015) ("Traditionally, a marriage validly celebrated in another state will be recognized unless contrary to an important public policy of the domicile."). Some states have Evasion statutes specifying that a marriage valid in the state of celebration but invalid in the domiciliary state will not be recognized if the domiciliary was attempting to evade local law by going elsewhere to marry. Sometimes, the limitation is only with respect to marriages that would have been void in the domicile. *See* N.H. REV. STAT. ANN. § 457:43 (2017) ("If any person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and goes into another jurisdiction and there contracts 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 had been entered into in this state."). At other times, the limitation is broader than that. *See* W. VA. CODE ANN. § 48-2-602 (West 2001) ("If a resident of this state marries in another state or country, the marriage is governed by the same law, in all respects, as if it had been solemnized in this state if, at the time of the marriage: (1) The marriage would have been in violation of section 3-103 if performed in this state [specifying certain void or voidable marriages]; (2) The person intended to evade the law of this state; and (3) The person intended to return and reside in this state."); WIS. STAT. ANN. § 765.04(1) (West 2023) ("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.").

[71] *See supra* notes 65–70 and accompanying text (noting that the allegedly clarifying language obscures legislative intent).

[72] Sometimes, the law of the state of celebration is indexed to the law of the celebrant's domicile so that a marriage that would have been valid is not valid if the marriage would have been void in the domicile. *See* WIS. STAT. ANN. § 765.04 (3) (West 2023) ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."). For example, for a period during which Massachusetts permitted same-sex marriages to be celebrated and many states viewed such marriages as void, Massachusetts had a law precluding the state from permitting such marriages to be celebrated if those marriages would not be recognized in the domicile. *See* Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 631–32 (Mass. 2006) (Spina, J., concurring), *abrogated by* Obergefell v. Hodges,

Perhaps that is the best interpretation of congressional intent anyway because Congress apparently believed that there was only *one* jurisdiction whose law was applicable at the time of the marriage, and Congress clearly recognized that the law of the jurisdiction where the marriage was entered into was applicable law.[73] Yet, if that was Congress's intention, then there was no need to add the clarifying language. The fact that Congress believed it necessary to add the clarification might be interpreted as an indication that Congress did not simply mean that the law of the state of celebration at the time of the marriage determined whether the Federal Government would recognize the marriage.[74]

Consider Mildred Jeter and Richard Loving, the plaintiffs in *Loving v. Virginia*, who married in the District of Columbia[75] because Virginia law precluded them from marrying at home.[76] In this case, the place of celebration was the District of Columbia, while the state of domicile was Virginia.[77] While the Lovings' marriage was valid in the District of Columbia,[78] their domicile of Virginia prohibited the celebration of

576 U.S. 644 (2015) ("A majority of the Justices also agree that, as to the plaintiffs who reside in Connecticut, Maine, New Hampshire, and Vermont, a judgment for the defendants shall enter in the Superior Court because same-sex marriage is prohibited in those States."). The law prohibiting such marriages from being celebrated in the state was later repealed. *See* MASS. GEN. LAWS ANN. ch. 207, § 11–13 (repealed by Acts 2008, ch. 216, § 1). So too, Illinois repealed its statute preventing the celebration of marriages in Illinois that would be void in the celebrants' domicile. *See* 2023 Ill. Legis. Serv. 103–21 (West) ("Section 5. The Illinois Marriage and Dissolution of Marriage Act is amended by repealing Sections 217, 218, and 219."). That bill was approved and will be effective in 2024. *See* 2023 Ill. Legis. Serv. 103–21 (West) ("Approved: June 9, 2023; Effective: January 1, 2024.").

[73] Yet, there is also reason to reject that interpretation of congressional intent, precisely because that is the interpretation that would have been offered without the clarifying language, which in effect treats the clarifying language as if it had never been offered. *Cf.* In re Benny, 812 F.2d 1133, 1149 n.17 (9th Cir. 1987) (Norris, J., concurring) ("While we must construe language in light of congressional intent when that language is ambiguous, we cannot simply ignore clear language to save Congress from its own errors.").

[74] *Cf.* United States v. Papia, 910 F.2d 1357, 1362 (7th Cir. 1990) ("Congress' intent to clarify . . . is . . . evidence of . . . Congress' view of the original statute's meaning . . . .").

[75] 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.").

[76] *Id.* at 3 ("[A] grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages.").

[77] *See id.* at 2 (referring to "two residents of Virginia").

[78] *Id.* (explaining that the Lovings "were married in the District of Columbia pursuant to its laws").

their marriage within the state[79] and, in addition, prohibited them (while Virginia domiciliaries) from celebrating such a marriage in another jurisdiction.[80]

Historically, a marriage valid in the state of celebration but not in the domicile was valid unless the marriage violated an important public policy of the domicile.[81] Because interracial marriages were thought to violate an important public policy of Virginia,[82] the Lovings' marriage was invalid, despite being valid in the state of celebration.

When the *Loving* Court reversed the Virginia Supreme Court decision upholding the constitutionality of the State's anti-miscegenation law,[83] the United States Supreme Court held that states could not prevent interracial couples from marrying.[84] Because no state could preclude interracial couples from marrying, the *Loving* Court had no need to address the conditions under which the domicile has to recognize a marriage valid in the state of celebration.[85]

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[79] *Id.* at 4 n.3 ("Section 20-57 of the Virginia Code provides: 'Marriages void without decree.–All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.'" (citing VA. CODE ANN. § 20-57 (1960 Repl. Vol.))).

[80] *Id.* at 4 ("If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage." (citing VA. CODE ANN. § 20-58 (repealed 1986))).

[81] Strasser, *supra* note 70 ("Traditionally, a marriage validly celebrated in another state will be recognized unless contrary to an important public policy of the domicile."); Mark Strasser, *The Legal Landscape Post-Doma*, 13 J. GENDER, RACE & JUST. 153, 155–56 (2009) ("The Restatement (First) of the Conflicts of Law suggests that marriages valid in the place of celebration may nonetheless be invalid depending upon the domicile's law, [citing RESTATEMENT (FIRST) OF THE CONFLICTS OF LS. § 132 (AM. L. INST. 1934)] and the Restatement (Second) of the Conflicts of Law recognizes that 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." (citing RESTATEMENT (SECOND) OF THE CONFLICTS OF LS. § 283 (AM. L. INST. 1971))).

[82] *See* Jessica L. Roberts, *To Have and to Uphold: The Common Language of Status-Preserving Countermovements*, 21 NAT'L BLACK L.J. 122, 132 (2009) (discussing the contention "that the Lovings had committed 'a most serious crime . . . .'").

[83] *See* Loving v. Commonwealth, 147 S.E.2d 78, 80 (Va. 1966), *rev'd sub nom.*, *Loving*, 388 U.S. 1 (1967).

[84] *Loving*, 388 U.S. 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.").

[85] Mark Strasser, *Interracial Marriage Litigation Foreshadows What the* Obergefell *Court Chose to Address*, 45 CAP. UNIV. L. REV. 47, 57 (2017) ("The case law involving the interstate recognition of interracial marriages suggests that states are given wide latitude to decide

Suppose that a marriage between first cousins is at issue and the domicile prohibits such marriages.[86] Some states prohibit the celebration of first-cousin marriages within the state but recognize such marriages if validly celebrated elsewhere.[87] Other states do not allow such marriages to be celebrated locally and will not recognize the validity of such marriages, even if valid in the state of celebration, because marriages between first cousins violate an important state public policy.[88]

Assume that first cousins celebrate a marriage in accord with the law of the state of celebration, even though their marriage violates an important public policy of their domicile. It is simply unclear whether the Act directs the Federal Government to recognize the marriage. One jurisdiction whose law is applicable at the time the marriage is entered into (the state of celebration) treats the marriage as valid, while the other jurisdiction whose law is applicable at the time the marriage is entered into (the domicile) treats the marriage as void. By suggesting that the Federal Government should recognize the marriage if the marriage is valid according to the law of the jurisdiction applicable at the time of the marriage, the Act leaves open whether such a first-cousin marriage should be recognized by the Federal Government, creating the potential for a rather nasty surprise sometime in the future when federal benefits are sought.[89]

Suppose, for example, that first cousins, Cody and Dakota, contract a marriage valid in the state of celebration but void in the domicile. They return home. Perhaps because they have been advised that their state will not recognize the marriage,[90] they

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which marriages validly celebrated elsewhere need not be recognized locally. The Court had the opportunity to address that issue in *Loving* but refused to do so.").

[86] *See, e.g.*, OHIO REV. CODE ANN. § 3101.01(A) (West 2019) (specifying that individuals who marry must not be "nearer of kin than second cousins . . . .").

[87] *See* Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958) (recognizing a marriage between first cousins valid in the state of celebration even though such a marriage could not be contracted in Ohio); Mason v. Mason, 775 N.E.2d 706 (Ind. Ct. App. 2002) (recognizing a marriage between first cousins valid in the state of celebration even though such a marriage could not be contracted in Indiana).

[88] *See* Hoffman v. Miller, No. 1 CA-SA-0001, 2023 WL 1838765, at *2 (Ariz. Ct. App. Feb. 9, 2023) (suggesting that Arizona will not recognize a marriage between fertile first cousins who are under age 65 even if the marriage is valid in the state of celebration); *see also* Cook v. Cook, 104 P.3d 857 (Ariz. Ct. App. 2005) (holding prospectively that marriages between first cousins that were not in accord with local law would not be recognized even if valid in the state of celebration).

[89] *Cf.* Hawkins v. Weinberger, 368 F. Supp. 896 (D. Kan. 1973) (holding plaintiff denied social security benefits because she could not establish that she had been validly married to the deceased).

[90] *Cf., e.g.*, *In re* Marriage of Adams, 604 P.2d 332, 333 (Mont. 1979) ("We find that this marriage between first cousins is void Ab initio."), *abrogated by* Dagel v. City of Great Falls, 819 P.2d 186 (Mont. 1991) (reversing [*Adams*] with respect to the conditions under which equitable estoppel could be asserted).

do not bother to secure a court declaration that their marriage is void.[91] They live together awhile but eventually go their separate ways.

Several years later, Cody marries Hayden in accord with their domicile's law. Hayden and Cody live together for twenty years until Cody dies of a heart attack. It is simply unclear who under the Act is entitled to the Social Security benefits that would normally be due to the spouse of the deceased.[92] If the Federal Government recognizes the marriage between Cody and Dakota because it was valid in the state of celebration and, in addition, the Federal Government does not recognize plural marriages,[93] then it would seem that Hayden should not be recognized as a lawful spouse because Hayden married Cody when Cody already had a spouse (at least in the eyes of the Federal Government).

Perhaps Hayden and Dakota would both be entitled to benefits, one as the actual spouse and the other as a putative spouse,[94] that is, as an individual who in good faith believed that he or she had celebrated a valid marriage even though he or she had not.[95] But even if Social Security benefits could be awarded to both,[96] a separate question would be whether other federal laws would be as forgiving in other contexts.

Suppose that the example involving Cody and Hayden is slightly modified. In this version, Cody and Dakota still marry in accord with the law of the state of celebration,

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[91] *Cf*. Macias v. Sabillon, No. 51457/2017, slip op. at 5 (N.Y. Sup. Ct. Sep. 20, 2017) ("Void marriages—those that are bigamous or incestuous—do not require a declaration by the Court to nullify the marriage and are void *ab initio*.").

[92] JOHN A. GEBAUER ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 71:162 (Aug. 2023) ("The Social Security Act provides for benefits to the surviving spouse of a deceased wage earner."); SOCIAL SECURITY LAW AND PRACTICE § 17:1 (June 2023) ("A widow, widower, or surviving divorced spouse of a person who died as a fully insured individual under the Social Security Act may be entitled to receive benefits based on the deceased person's earnings record. A widow, widower, or surviving divorced spouse is entitled to these benefits if he or she: (1) is not married; (2) is 60 years old or older or, if under a disability, is 50 years old or older but not yet age 60; (3) has filed an application for benefits; and (4) is not entitled to retirement benefits that are equal to or larger than the insured person's primary insurance amount.").

[93] *In re* Takia Mohsen Ali, No. AXX XX9 989–CALI, 2007 WL 4707517, at *1 (DCBABR Oct. 31, 2007) (noting that "there is a strong federal public policy against polygamy in this United States").

[94] *See* Knott v. Barnhart, 269 F. Supp. 2d 1228 (E.D. Cal. 2003) (awarding social security benefits to putative spouse, likening her to a divorced spouse); *see also* SOCIAL SECURITY LAW AND PRACTICE § 15:23 (June 2023) ("According to SSA policy, when a court has granted an insured person a decree of annulment dissolving his or her marriage to a claimant and, under state law, the decree has the same effect as a final decree of divorce, the decree, although designated an annulment, may be considered a final decree of divorce within the meaning of the Social Security Act, thereby entitling the claimant to benefits as the divorced spouse of the insured person if the claimant has met all other conditions for entitlement.").

[95] *See, e.g.*, Jahed v. Abraham, 524 P.3d 83, *6 (Nev. App. 2023) ("[F]or the putative spouse doctrine to apply, at least one party must have a good faith belief that there was no legal impediment to the marriage at the time of the ceremony.").

[96] *See Knott*, 269 F. Supp. 2d 1228.

even though their marriage is void in their domicile. After returning home and being advised that their marriage is void, Cody and Dakota do not seek a court declaration of their marriage's invalidity. They eventually separate and Cody subsequently marries Hayden. This time, Cody does not die, and Social Security benefits are not at issue. Instead, Cody wishes to invoke his testimonial privilege in federal court so that he does not have to testify against Hayden. If the Federal Government does not recognize Cody and Hayden's marriage because Cody's marriage with Dakota was recognized by the Federal Government and that marriage was never dissolved so that Cody was not free to marry Hayden, then Cody might well be precluded from asserting the privilege.[97]

It is not as if Cody and Dakota were powerless to prevent these undesirable outcomes. They might have secured an annulment of their marriage in their domicile, thereby establishing that they did not have a valid marriage and precluding any uncertainty about that marriage's validity.[98] Further, it might be important to secure such an annulment before either party sought to marry another, so that the latter marriage would not be viewed as bigamous and void.[99] Nonetheless, it is simply unclear under the Act which marriage should be recognized by the Federal Government as valid if no annulment has been secured.

One difficulty pointed to here is the ambiguity in the Act's language. Some courts might apply the law of the domicile at the time of the marriage because that law is applicable to the marriage's validity, whereas other courts will apply the law of the state of celebration at the time of the marriage because that law is applicable to the marriage's validity. Relevantly similar cases may be decided differently depending upon whether the law of the state of celebration or the state of domicile is applied unless Congress or the courts clarify which law should be applied.

A different issue is whether a subsequent domicile can refuse to recognize a marriage valid in the states of celebration and domicile at the time of the marriage. The Act makes clear that if a particular state was neither the state of celebration nor the state of domicile at the time of the marriage, then its law cannot be applied to determine a marriage's validity.[100] Presumably, Congress limited the applicable law to the governing law at the time the marriage was entered into, at least in part, because individuals have a reasonable and justified expectation that a marriage valid when entered into in the United States will be recognized as valid throughout the country.[101]

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[97] *See* Catlin v. Davis, No. 1:07–CV–01466–LJO-SAB, 2019 WL 6885017, *64 (E.D. Cal. Dec. 17, 2019) (discussing "the rule that the marital privilege applies only in the case of a valid marriage").

[98] Williams v. Williams, 97 P.3d 1124, 1127 (Nev. 2004) ("An annulment proceeding is the proper manner to dissolve a void marriage and resolve other issues arising from the dissolution of the relationship."); *see also* Fontana v. Callahan, 999 F. Supp. 304, 308 (E.D.N.Y. 1998) ("[A]n annulment is equivalent to a divorce for purposes of the Social Security Act . . . .").

[99] Lukich v. Lukich, 666 S.E.2d 906, 907 (S.C. 2008) ("While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second 'marriage.'").

[100] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

[101] Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 383 (1998) ("A subsequent domicile's refusal to

If a subsequent domiciliary state could declare a marriage void even though it was valid in the states of celebration and domicile at the time the marriage was celebrated, then a married individual might be able to avoid his marital obligations by moving to a state that refused to recognize the marriage and then having that marriage declared null and void.[102]

Consider two of the plaintiffs in *Obergefell v. Hodges*, Ijpe DeKoe and Thomas Kostura, who married in New York in 2011.[103] The marriage of DeKoe and Kostura was valid because New York was both the domicile and the state of celebration at the time of the marriage.[104] But Dekoe and Kostura moved to Tennessee, and Tennessee law precluded the recognition of same-sex marriages, including those marriages valid in the states of celebration and domicile at the time of celebration.[105]

When the *Obergefell* Court invalidated state laws precluding the recognition of same-sex marriages, the Court made clear that no state could preclude same-sex

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recognize a marriage valid in the states of celebration and domicile at the time of the marriage is, however, clearly impermissible . . . . It is simply inconceivable that states would be given the power to effectuate local prejudices through law, thereby frustrating the reasonable and just expectations of individual parties.").

[102] Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 ALB. GOV'T L. REV. 613, 633 (2012) ("Individuals who sought to avoid their marital obligations could flee to jurisdictions that would not recognize such unions—the individuals would thereby rid themselves not only of no-longer-desired marriages but also of not-desired obligations of support or property distribution."); *cf*. Strasser, *supra* note 101, at 346 ("[I]t would be important to establish a system that would not make the validity of a marriage contracted years ago dependent upon where a couple decides to retire or where an individual seeking to avoid his or her marital obligations is willing to be domiciled.").

[103] Obergefell v. Hodges, 576 U.S. 644, 659; *see also* N.Y. DOM. REL. LAW § 10-a(1) (McKinney 2011) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."). The law became effective on July 24, 2011. *See id*. The couple married a little over a week later. *See* Samantha Masunaga, *From Traffic Ticket to Supreme Court: A Gay Couple's Legal Odyssey*, L.A. TIMES (Jan. 18, 2015), https://www.latimes.com/nation/la-na-same-sex-marriage-plaintiffs-20150117-story.html.

[104] *See* Mark Strasser, Obergefell*, Retroactivity, and Common Law Marriage*, 9 NE. U. L. REV. 379, 392 (2017).

[105] TENN. CONST. art. XI, § 18 ("The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state."); *see also* OHIO CONST. art. XV, § 11 ("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.").

couples from marrying.[106] That made the interstate recognition issue easy to resolve—because no state could refuse to prohibit same-sex marriages, no state was permitted to refuse to recognize a same-sex marriage validly celebrated elsewhere "on the ground of its same-sex character."[107] Like the *Loving* Court, the *Obergefell* Court did not offer any guidance with respect to interstate recognition practices where the marriage at issue was not itself protected under constitutional guarantees.[108]

When the provision regarding federal marriage recognition limits applicable state law for determining marriage validity to those laws applicable at the time of celebration, the Act is not offering a revolutionary or even novel position.[109] What is unusual is the Act's failure to offer guidance with respect to which law applies in the event of a conflict between the laws of the states of celebration and domicile at the time of the marriage's celebration[110] or even to acknowledge that there is more than one law applicable at the time of celebration.[111]

B. Interstate Marriage Recognition

The Act has a separate provision regarding interstate marriage recognition.[112] The conditions discussed in this section differ somewhat from the conditions determining when the Federal Government will recognize a marriage.

The Act specifies that "[n]o person acting under color of State law may deny full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals."[113] Not only are state actors precluded from denying full faith and credit to such acts, records, or judicial proceedings, but state actors are also precluded from denying "a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on

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[106] *See Obergefell*, 576 U.S. at 681 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

[107] *Id.*

[108] Strasser, *supra* note 85 ("The Court had the opportunity to address that issue [which marriages validly celebrated elsewhere need not be recognized locally] in *Loving* but refused to do so, and the Court avoided that question in *Obergefell* as well.").

[109] *See* RESTATEMENT (SECOND) OF CONFLICT OF LS. § 283(2) (AM. L. INST. 1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage *at the time of the marriage*.") (emphasis added).

[110] *See supra* notes 66–70 and accompanying text.

[111] *See supra* notes 69–70 and accompanying text.

[112] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

[113] 28 U.S.C.A. § 1738C(a)(1) (West).

the basis of the sex, race, ethnicity, or national origin of those individuals."[114] Basically, the interstate recognition provision requires states to recognize certain but not other marriages valid in the state of celebration.

Suppose that the United States Constitution did not prevent a state from prohibiting marriages between parties who were not of the "correct" sexes, races, ethnicities, or national origins. Suppose further that a state enacted prohibitions based on one or more of those classifications. Local prohibition notwithstanding, no state actor could deny recognition to a marriage validly celebrated in another state if the basis for denial was that one or both of the parties was/were of the wrong sex, race, ethnicity, or national origin.

Here, the Act does not specify that to be entitled to full faith and credit, the marriage valid in the state of celebration must not violate an important public policy of the domicile. Instead, the statute requires all states to recognize a marriage valid in the state of celebration if the basis for denial would involve the sex, race, ethnicity, or national origin of one or both of the parties.[115]

Yet, the Act does not simply impose the rule that a marriage valid where celebrated is valid everywhere.[116] A first-cousin marriage valid in the state of celebration would not have to be recognized in the domicile if violating an important public policy of that state—in that case, the basis for denying recognition would be that the parties were too closely related by affinity or consanguinity[117] rather than that one of the parties was of the wrong race, sex, ethnicity, or national origin.

The congressional decision to require states to recognize marriages validly celebrated elsewhere only where the basis for denial was sex, race, ethnicity, or national origin might have been a compromise—Congress wanted to prevent states from denying recognition to marriages on those bases in particular while preserving state autonomy with respect to denying recognition on other bases. Congress might have justified its focus on those particular bases by noting that those classifications trigger higher scrutiny under equal protection analysis.[118] Or, Congress might have

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[114] *Id.* § 1738C(a)(2).

[115] *Id.*

[116] Maghu v. Singh, 2018 VT 2, ¶31, 206 Vt. 413, 181 A.3d 518 (discussing the rule that a marriage valid where celebrated is valid everywhere).

[117] *Cf.* ANDREW SERWIN & KENNETH MORTENSEN, HEALTH CARE PRIVACY AND SECURITY § 2:335 n.1 (Oct. 2022) ("Relatives by affinity (such as by marriage or adoption) are treated the same as relatives by consanguinity (that is, relatives who share a common biological ancestor). In determining the degree of the relationship, relatives by less than full consanguinity (such as half-siblings, who share only one parent) are treated the same as relatives by full consanguinity (such as siblings who share both parents). (i) First-degree relatives include parents, spouses, siblings, and children. (ii) Second-degree relatives include grandparents, grandchildren, aunts, uncles, nephews, and nieces. (iii) Third-degree relatives include great-grandparents, great-grandchildren, great aunts, great uncles, and first cousins.").

[118] *See* Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 18 (2002) (noting that "actions which discriminate on the basis of race, ethnicity, national origin, [and] gender . . . are subjected to a higher level of scrutiny . . . .").

been focused on same-sex and interracial marriages in particular, fearing that *Loving* and *Obergefell* might be overruled.[119] In any event, certain kinds of marriages have been afforded extra protection, and Congress's privileging certain kinds of marriages may have implications under the Court's evolving Free Exercise jurisprudence.

III. FREE EXERCISE PROTECTIONS

Currently, the controlling precedent with respect to free exercise guarantees is *Employment Division, Department of Human Resources of Oregon v. Smith*.[120] But several members of the Court believe that *Smith* should be overruled[121] and, in any event, *Smith* has recently been interpreted to provide rather robust free exercise guarantees.[122] The Court's current understanding of free exercise guarantees may have important implications for the Act's reach.

A. Smith

In *Smith*, the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

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[119] When members of Congress discussed the marriages that would be protected, they often focused on same-sex and interracial marriages in particular. *See* 168 CONG. REC. S6833 (daily ed. Nov. 29, 2022) (statement of Sen. Michael Bennet) ("[T]he Respect for Marriage Act . . . is a historic piece of legislation to ensure that if a same-sex or interracial couple marries in one State, that every State has to honor that marriage."); 168 CONG. REC. S6833–39 (daily ed. Nov. 29, 2022) (statement of Sen. Robert Portman) ("The Respect for Marriage Act . . . simply allows interracial or same-sex couples who are validly married under the laws of one State to know that their marriage will be recognized by . . . other States if they move."); 168 CONG. REC. H8807–08 (daily ed. Dec. 7, 2022) (statement of Rep. Mary Scanlon) ("The Respect for Marriage Act will . . . ensure that all across America, families in same-sex and interracial marriages are afforded the respect and legal rights and protections they deserve."); 168 CONG. REC. H8827–29 (daily ed. Dec. 8, 2022) (statement of Rep. David Cicilline) (discussing "crucial protections for same-sex and interracial marriages"); 168 CONG. REC. H8827–30 (daily ed. Dec. 8, 2022) (statement of Rep. Angie Craig) (noting that "the Respect for Marriage Act . . . ensures that same-sex and interracial marriage is recognized in every State . . . .").

[120] Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

[121] Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) ("Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled . . . . In my view, the textual and structural arguments against *Smith* are more compelling."); *id.* at 1883 (Alito, J., concurring) ("Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination."); *id.* at 1926 (Gorsuch, J., concurring) ("*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice."); Bradley J. Lingo & Michael G. Schietzelt, *A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise After* Fulton, 57 WAKE FOREST L. REV. 711, 712 (2022) ("*Fulton* confirms that at least five Justices stand ready to overrule *Smith*.").

[122] *See infra* notes 148–49 and accompanying text (discussing the Court's understanding that religion is accorded a privileged status under current guarantees).

religion prescribes (or proscribes).'"[123] The *Smith* decision has been widely criticized, sometimes for its reasoning[124] and sometimes for its result.[125]

Certainly, it is fair to suggest that the *Smith* Court did not accurately account for the then-prevailing jurisprudence.[126] Yet, a separate question is whether the jurisprudence preceding *Smith* was consistent or even coherent.[127] Indeed, the *Smith* Court suggested that the prior free exercise jurisprudence could not be reconciled with the principles allegedly applied in those cases,[128] and thus one way to understand

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123 *Smith*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

124 Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001) ("According to the conventional wisdom in the community of First Amendment scholars, in *Employment Division v. Smith* the Supreme Court 'abandoned' its longstanding commitment to protecting the free exercise of religion."); James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 719 (2019) ("First and foremost is *Smith*'s shamelessly dishonest treatment of free exercise precedent.").

125 Branton J. Nestor, *Revisiting* Smith*: Stare Decisis and Free Exercise Doctrine*, 44 HARV. J.L. & PUB. POL'Y 403, 415 (2021) ("*Smith*'s holding and rationale broke with a settled line of a free exercise jurisprudence that had held that—subject to only a few, well-delineated exceptions—the Free Exercise Clause provided heightened protection for religiously motivated conduct against even neutral laws of general applicability."); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 260 (1993) ("*Employment Division v. Smith* is substantively wrong and institutionally irresponsible."); Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. CIN. L. REV. 396, 398 (2022) ("In *Employment Division v. Smith*, the Supreme Court gutted the Free Exercise Clause.").

126 *See* Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 78 (2008) ("*Smith*'s characterization of the pre-existing jurisprudence is inaccurate.").

127 *See* Mark Strasser, *Old Wine, Old Bottles, and Not Very New Corks: On State RFRAs and Free Exercise Jurisprudence*, 34 ST. LOUIS U. PUB. L. REV. 335, 336 (2015) ("Precisely because the free exercise opinions not only adopted differing approaches but also made implausible distinctions when attempting to reconcile the cases previously decided, the jurisprudence prior to *Smith* was open to such different interpretations that those loudly proclaiming their wish to return to the pre-*Smith* jurisprudence did not thereby provide much guidance with respect to what they thought free exercise guarantees protected."); Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 299–300 (1992) (emphasis omitted) ("This bifurcation of the two parts of the Religion Clause has led to problems both in theory and practice. An example of the theoretical confusion is the conflict the Court built into the standards it laid down in the *Lemon* case for determining a violation of the No-Establishment Clause. If taken seriously, these criteria *prohibited* what the Free Exercise Clause was thought to *require*, at least before the *Smith* case.").

128 *See* Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 TULSA L. REV. 1, 31 (2015) ("*Smith* contradicts the past jurisprudence, which does not require a hybrid right to be at issue in order for strict scrutiny to be triggered. However, the *Smith* Court captures the spirit of the past jurisprudence when suggesting that courts are not competent to judge the centrality of religious beliefs and, further, is correct that applying a version of strict

Smith is as an attempt by the Court to save itself from the difficulties posed by the preceding jurisprudence.[129]

Consider *Fulton v. City of Philadelphia, Pennsylvania*,[130] where several Justices expressed their dissatisfaction with *Smith*.[131] However, the *Fulton* Court was unwilling to overrule *Smith*,[132] likely at least in part because the Court does not know what to adopt in its place.[133] But not knowing what principle to put in *Smith*'s stead at least suggests that the jurisprudence preceding *Smith* is not viewed as an acceptable alternative.

That said, there is cause for concern about the approach that the Court will adopt in the future. Justice Barrett noted in her concurrence that she was skeptical "about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[134] But the refusal to adopt a categorical approach may result in decision-making that seems inconsistent or, perhaps, favoring some religious traditions over others.[135]

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scrutiny that has not been watered down will mean that many laws will have to include religious exemptions in order to pass constitutional muster."); *cf. Smith*, 494 U.S. at 888 (citation omitted) ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

[129] Strasser, *supra* note 128, at 2 ("*Employment Division v. Smith* may have involved an attempt by the Court to extricate itself from some of the difficulties that its own jurisprudence had created . . . .").

[130] Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

[131] *See id.* at 1882 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling."); *id*. at 1912 (Alito, J., concurring) ("In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text. Indeed, the case against *Smith* is very convincing.").

[132] *Fulton*, 141 S. Ct. at 1877 (majority opinion) ("But we need not revisit that decision here.").

[133] *Id.* at 1882 (Barrett, J., concurring) ("Yet what should replace *Smith*?").

[134] *Id.* at 1883 (Barrett, J., concurring).

[135] *See, e.g.*, Celeste Wilson, *Native Americans and Free Exercise Claims: A Pattern of Inconsistent Application of First Amendment Rights and Insufficient Legislation for Natives Seeking Freedom in Religious Practice*, 2015 THE CRIT: CRITICAL STUD. J. 1, 10 (2015) ("[E]ven prior to the *Smith* decision there was a pattern of denying the free exercise to minority religions, including Native American religious practices."). Commentators differ

Justice Barrett asked rhetorically what would happen if the Court were to apply strict scrutiny categorically—"would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?"[136] Here, Justice Barrett seems to be making the same point that had been made in a different way in *Smith*, namely, that "if 'compelling interest' really means what it says . . . , many laws will not meet the test. "[137]

The *Smith* Court understood that its analysis of free exercise guarantees left minority religions at the mercy of the legislature,[138] and some commentators have railed at that suggestion because, allegedly, strict scrutiny had been used in the past to protect religious minorities.[139] Other commentators have been less critical of *Smith* because in their view the resulting jurisprudence has not had the feared effect in

about suggested approaches to avoiding the appearance of religious favoritism. *Compare* Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens's Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 631 (2012) ("[D]rafting general laws which are sensitive to the majority's beliefs and practices while ignoring the interests of minority faiths is less likely to be perceived as religious favoritism than the granting of discrete exemptions to certain faiths but not others."), *with* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 536 (2009) ("Specific targeted accommodations raise the specter of unequal treatment where the legislature, whether out of favoritism and hostility, or merely selective sympathy and indifference, singles out certain religious practices for accommodation but declines to accommodate others.").

136 *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) (citing Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888–89 (1990)).

137 *Smith*, 494 U.S. at 888.

138 *See id.* at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."); *Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713, 1724 (2002) ("As Justice Scalia conceded, the *Smith* rule will leave minority religions, which may have less political power to lobby for an exemption, significantly more burdened than majority religions."); *see also* Justin Burnworth, *Replacing* Smith *with A "Graduated Scale" Approach to the Free Exercise Clause*, 54 U. TOL. L. REV. 1, 16 (2022) ("The biggest failure of the *Smith* test was leaving religious accommodation to the democratic political process."); So Chun, *A Decade After* Smith*: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305, 1305 (2000) ("*Smith* was a shocking and ill received opinion, conceived by many to be a malicious design to coerce minority religions into conformance with the mainstream.").

139 *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1999 (2007) ("Before *Smith*, any substantial burden on a religious practice, whether intentional or not, and whether affecting a majority or minority religion, had to pass the free exercise compelling interest test.").

practice.[140] Too few commentators examined the case law prior to *Smith* to see just how little protection was actually being afforded to some religious minorities under the alleged application of strict scrutiny.[141]

Justice Barrett commented that "[t]here would be a number of issues to work through if *Smith* were overruled."[142] Presumably, one difficulty is that there are so many religious beliefs and practices[143] that it would be impractical to protect all of them,[144] and picking and choosing might in practice translate into the appearance or actuality of favoritism towards some religious traditions and practices over others.[145] That said, it is not always clear that the Justices worry about whether they appear to favor certain religious traditions over others.[146]

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140 *See* Antony Barone Kolenc, *"Mr. Scalia's Neighborhood": A Home for Minority Religions?*, 81 ST. JOHN'S L. REV. 819, 841 (2007) ("While minority religions are disadvantaged under *Smith* in theory, that risk has not materialized in reality.").

141 *But see* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) ("[T]he free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test, despite some powerful claims."); Robert N. Clinton, *Peyote and Judicial Political Activism Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92, 92 (1991) ("[T]he Court's previous decisions indicating that governmental interests sometimes overrode the rights of religious minorities to practice their religion.").

142 Fulton v. City of Phila., 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

143 *See* Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 701 (2008) (discussing "the great diversity of religious traditions flourishing in the United States").

144 *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

145 *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."); *see also* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) ("[G]overnment cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014); Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 977–78 (1998) (discussing the difficulty posed by picking and choosing among religious practices).

146 *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) ("The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. . . . Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.");

Perhaps as a placeholder until the Court can articulate a new standard,[147] the Court now interprets free exercise jurisprudence to require that religious beliefs and practices be accorded a privileged status—if relevantly similar secular practices are accorded protection, then religious practices must also be accorded that protection too.[148] Such a position requires a nuanced analysis of what constitutes a relevantly similar secular practice.[149]

Regrettably, the Court has made clear its aversion to nuanced assessment in free exercise cases. For example, in *Tandon v. Newsom*,[150] the Court examined a California law limiting in-home gatherings to three households in order to stem the spread of COVID-19,[151] whether the people were coming together for secular or religious activities.[152] But the Court held that the Ninth Circuit erred when refusing to enjoin this limitation because California law was more permissive with respect to "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants."[153] The difficulty in the Court's analysis was that the courts below found that there were relevant differences between

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Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting) ("Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.").

[147] *See Fulton*, 141 S. Ct. at 1877 (suggesting that several Justices have expressed dissatisfaction with *Smith*).

[148] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."); Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) ("The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny . . . .").

[149] *See* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017) ("[D]eterminations of similarity—or resemblance . . . require some metric enabling the analogizer to assess which similarities are important and which are not.").

[150] *Tandon*, 141 S. Ct. 1294.

[151] *Id.* at 1297.

[152] *Id.* at 1298 (Kagan, J., dissenting) ("California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike.").

[153] *Id.* at 1297.

the businesses and the homes and that those differences justified the differential treatment.[154]

The Court seems to have adopted a kind of "Most Favored Nation" analysis for religion[155]—if there are secular exceptions, then there must be exceptions for religion too.[156] If indeed, that is the Court's understanding of free exercise guarantees, then there may be important implications for the Act.

B. *The Respect for Marriage Act's Exception*

The Respect for Marriage Act specifically protects certain marriages from nonrecognition, requiring "full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals."[157] But Congress does not offer similar protection for marriages celebrated as a matter of faith, and Congress expressly states that the Act does not authorize the federal recognition of plural marriages—"Nothing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more

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154 *See id.* at 1298 (Kagan, J., dissenting) (discussing these differences); *see also id.* (Kagan, J., dissenting) ("[T]he law does not require that the State equally treat apples and watermelons.").

155 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category" (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990))); Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990) (explaining how this Court's precedents grant "something analogous to most-favored nation status" to religious organizations). For a discussion of this Most Favored Nation status interpretation and why it does not account for existing case law, see generally Mark Strasser, *Covid-19, Free Exercise, and Most Favored Nation Status*, 27 LEWIS & CLARK L. REV. 1 (2023).

156 *See* Trip Carpenter, *Espinoza's Energized Equality and Its Implications for Abortion Funding*, 98 N.Y.U. L. REV. 647, 650 (2023) ("[R]eligion instead takes a 'most favored nation' status, meaning that 'a law must have universal application to be considered nondiscriminatory vis-à-vis religion.'"); Leah Reiss, *Freedom to Pray, Not to Protest*, 107 MINN. L. REV. 2285, 2325 n.224 (2023) ("*Tandon v. Newsom* has generated significant attention for its apparent adoption of the 'most favored nation' interpretation of the Free Exercise Clause."); *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1178 (2023) ("[T]he Supreme Court has essentially adopted the test that had once been percolating among the lower courts[:] the most-favored-nation theory of free exercise.").

157 28 U.S.C. § 1738C(a)(1); *see also* 168 CONG. REC. No. 183, S6833 (daily ed. Nov. 29, 2022) (statement of Sen. Bennet) ("[The Respect for Marriage Act] is a historic piece of legislation to ensure that if a same-sex or interracial couple marries in one State, that every State has to honor that marriage. The Federal Government has to honor that marriage as well."); 168 CONG. REC. No. 183, S6839 (daily ed. Nov. 29, 2022) (statement of Sen. Portman) ("The Respect for Marriage Act . . . simply allows interracial or same-sex couples who are validly married under the laws of one State to know that their marriage will be recognized by the Federal Government and other States if they move."); 168 CONG. REC. No. 119, H6725 (daily ed. July 19, 2022) (statement of Rep. Pelosi) ("[T]his legislation blocks States from denying recognition to valid, out-of-state marriages, even if a State were to enact heinous restrictions.").

than 2 individuals."[158] Further, members of Congress made very clear that they were not authorizing the recognition of such marriages.[159]

The question at hand is *not* whether Congress intended to protect polygamy, but whether under the Court's robust free exercise jurisprudence religious marriages (including plural marriages) must be protected because certain secular marriages are afforded protection.[160] Presumably, a challenge to the Act's refusal to protect religious polygamous marriages will trigger strict scrutiny because of the protection accorded to certain secular marriages.[161]

Perhaps the Court will find that plural marriage bans pass muster under strict scrutiny.[162] But if the state's interest in banning plural marriage is to prevent adult men from marrying teenage women,[163] then the current Court might question whether the ban could be narrowed to protect teenage women without banning the practice entirely.[164] Further, the Court might require an explanation of which particular state interests are served by only recognizing marriages between two individuals and then

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158 Respect for Marriage Act, Pub. L. 117-228, § 7, 136 Stat. 2305, 2306 (2022).

159 *See, e.g.*, 168 CONG. REC. No. 177, S6722 (daily ed. Nov. 16, 2022) (statement of Sen. Portman) ("It certainly does not allow polygamy. This is a point that has been raised by some of my colleagues on my side of the aisle. Polygamy is illegal in every jurisdiction in the United States, and this does nothing to change that. It actually adds another provision in our amendment . . . that explicitly prohibits polygamy.").

160 Chief Justice Roberts seems to suggest that same-sex marriage and plural marriage are comparable in some respects. *See* Obergefell v. Hodges, 576 U.S. 644, 704 (Roberts, C.J., dissenting) ("If '[t]there is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices' . . . why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?").

161 *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

162 *See, e.g.*, Potter v. Murray City, 585 F. Supp. 1126, 1140 (D. Utah 1984), *aff'd as modified*, 760 F.2d 1065 (10th Cir. 1985) (upholding polygamy ban under strict scrutiny).

163 There is some evidence to suggest that religions that engage in polygamy target young women for marriage with older men. *See* Maura I. Strassberg, *Scrutinizing Polygamy: Utah's* Brown v. Buhman *and British Columbia's* Reference Re: Section 293, 64 EMORY L.J. 1815, 1873 (2015) ("Some of the communities that practice religious polygamy target young teenage girls for entry into polygamous marriages.").

164 *See Tandon*, 141 S. Ct. at 1296–97 ("[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest . . . ."); *see also* Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1486 (2006) ("[L]ess intrusive means than banning polygamy to combat these dangers already exist."); *cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'").

seeing whether the asserted interests might also be served by recognizing marriages involving three or more individuals.[165]

The Act might seem immune from a challenge by three people seeking to have their relationship recognized for a different reason. Even if the language specifically excluding polygamous marriages had never been included,[166] such relationships would not be protected because the Act only requires recognition of marriages valid in a "State,"[167] and no state currently recognizes such marriages.[168] Perhaps a different analysis would be required if one of the states changed local law and started recognizing such unions. But such an eventuality does not seem likely,[169] even if some commentators suggest that states should do so.[170]

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165 *Cf. Obergefell*, 576 U.S. at 704 (Roberts, C.J., dissenting) ("Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world."); Christopher R. Leslie, *Dissenting from History: The False Narratives of the* Obergefell *Dissents*, 92 IND. L.J. 1007, 1010 (2017) ("Roberts raised the specter that *Obergefell* could create a slippery slope toward constitutionally-protected plural marriage when he menacingly suggested that 'from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to *plural unions, which have deep roots in some cultures around the world*.'"); Amberly N. Beye, *The More, the Marry-Er? The Future of Polygamous Marriage in the Wake of* Obergefell v. Hodges, 47 SETON HALL L. REV. 197, 198 (2016) ("Chief Justice Roberts' dissent in Obergefell questions the viability of a definition of marriage that is limited to those unions between two people. In his view, the majority calls this definition and its limit into question."); Renuka Santhanagopalan, *Ménage à What? The Fundamental Right to Plural Marriage*, 24 WM. & MARY J. WOMEN & L. 415, 422 (2018) ("Chief Justice Roberts' dissent in *Obergefell* argues that the majority uses the number 'two,' with respect to the number of people in the union, in a manner that is random.").

166 *See* Respect for Marriage Act, Pub. L. No. 117-228, § 7, 136 Stat. 2305, 2306 (2022) ("Nothing in this Act, or any amendment made by this Act, shall be construed to require or authorize Federal recognition of marriages between more than 2 individuals.").

167 *Id.*

168 168 CONG. REC. No. 183, S6839 (daily ed. Nov. 29, 2022) (statement of Sen. Portman) ("[S]ome critics continue to make the bewildering argument that this bill will lead to legalized and recognized polygamy. Again, this has no grounding in reality. No State allows bigamy or polygamy, and this bill does not change this.").

169 Sarah L. Eichenberger, *When for Better Is for Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067, 1103 (2012) ("[I]t is unlikely that Congress will reverse its stance on the validity of polygamous marriages under immigration law."); *see also* Keith Jaasma, *The Religious Freedom Restoration Act: Responding to* Smith*; Reconsidering* Reynolds, 16 WHITTIER L. REV. 211, 296 (1995) (noting that those who voted for strict scrutiny for free exercise claims would not welcome a reversal of a case forbidding a polygamous marriage).

170 *See, e.g.*, Greggary E. Lines, *Polymmigration: Immigration Implications and Possibilities Post* Brown v. Buhman, 58 ARIZ. L. REV. 477, 507 (2016) ("[T]he absolute bar on polygamous immigrants may be unnecessary and even unethical."); Peter Nash Swisher, *"I*

Suppose that it is true that no state is likely to start permitting plural marriages to be celebrated.[171] Even so, such a reading of the Act does not pay close enough attention to its language.

Those focusing on state law might insist that they are merely following the language of the Respect for Marriage Act, which reads:

> For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.[172]

This section seems to be suggesting that the Federal Government will only recognize a marriage under one of two conditions.[173] Either (1) the union has been entered into in a state permitting such marriages, or (2) the union has been entered into in a country permitting such marriages *and*, in addition, there is at least one state in the United States permitting such a union to be celebrated.

It is helpful to consider why Congress focused on where the union was "entered into" rather than on where it might be *recognized*. A state might recognize a marriage out of comity, even if such a marriage could not be celebrated locally.[174] For example,

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Now Pronounce You Husband and Wives": The Case for Polygamous Marriage After United States v. Windsor *and* Burwell v. Hobby Lobby Stores, 29 B.Y.U. J. PUB. L. 299, 300 (2015) ("[P]roponents of polygamous marriage now have a very strong case for validating polygamous marriages on cultural, religious, and constitutional grounds."); Samantha Slark, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 460 (2004) ("Formalization of polygamous marriage ceremonies would provide protection against the coercion of younger and more vulnerable members of polygamist communities and would ensure that polygamous marriages were entered into with the participant's true consent."); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 758 (2001) ("[T]he American institution of marriage can survive . . . polygamy.").

[171] Some states have state constitutional provisions prohibiting polygamy. *See, e.g.*, UTAH CONST. art. III ("Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited."); IDAHO CONST. art. I, § 4 ("Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes."); ARIZ. CONST. art. XX, par. 2 ("Polygamous or plural marriages, or polygamous co-habitation, are forever prohibited within this state."); N.M. CONST. art. XXI, § 1 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages and polygamous cohabitation are forever prohibited.").

[172] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305, 2306 (2022) (emphasis added).

[173] *See id.*

[174] *See supra* note 88 and accompanying text.

Windsor v. United States involved two New York residents, Edith Windsor and Thea Spyer, who went to Canada, married legally there, and then returned to New York.[175] At the time of their marriage, they could not legally marry in the state of New York.[176] Nonetheless, New York recognized the validity of their marriage, which had been celebrated in accord with the law of a different jurisdiction.[177]

While New York recognized the marriage between Spyer and Windsor out of comity,[178] such a recognition does not meet the requirement in the Act. Only after New York law permitted same-sex couples to marry within the state would New York count under the statute as a state where such a union could be "entered into."[179]

By the same token, California has recognized polygamous marriages for certain purposes.[180] But recognizing a marriage for certain purposes does not qualify as permitting such a union to be "entered into," and California does not count under the Act as a state permitting plural marriages to be celebrated within the state.[181]

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[175] United States v. Windsor, 570 U.S. 744, 749–50 (2013) ("Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City.").

[176] New York subsequently decided to recognize same-sex marriages, although that was after Spyer had died. *See id.* at 764 ("After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood." (citing Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW ANN. §§ 10–a, 10–b, 13 (West 2013)))).

[177] *Id.* at 753 ("Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one.").

[178] *See id.* at 764.

[179] Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305, 2306 (2022); *see* N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

[180] *See In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (holding that California will recognize polygamous marriages for purposes of succession); Note, *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2041 (2003) (discussing "*In re Dalip Singh Bir's Estate*, in which a California court recognized a foreign polygamous marriage to promote equity in succession"); Christine A. Hammerle, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to A Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1776 (2006) (explaining that the "court in *In re Dalip Singh Bir's Estate* recognized intestacy rights for an unlawful polygynous marriage").

[181] CAL. FAM. CODE § 2201(a) (2015) ("A subsequent marriage contracted by a person during the life of *his* or *her former spouse*, with a person other than the former *spouse*, is illegal and void, unless: (1) The former marriage has been dissolved or adjudged a nullity before the date of the subsequent marriage. (2) The former *spouse (A)* is absent, and not known to the person to be living for the period of five successive years immediately preceding the subsequent marriage, or *(B)* is generally reputed or believed by the person to be dead at the time the subsequent marriage was contracted.") (emphasis added).

The term "State" also requires explanation. The Act reads: "[T]he term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States."[182] But this means that it is mistaken to only consider state laws to determine which marriages must be recognized if validly celebrated in another country. In addition, the laws of the District of Columbia, Puerto Rico, and other territories and possessions should be considered, including tribal lands.[183]

Courts have long recognized tribal marriages under certain conditions.[184] Some tribes recognized plural marriages,[185] and some state courts recognized such plural marriages out of comity.[186]

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[182] § 7, 136 Stat. at 2306.

[183] *Cf.* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("Under our Constitution, States have no authority to reduce federal reservations lying within their borders.").

[184] *See* Mark Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 211–12 (2010) ("As a general matter, courts have held that Native American marriages established in accord with tribal customs and usages were valid, as long as the marriage involved at least one tribal member and were on Native American lands."); Philip R. Hsiao, *If I Marry A Man in New York, Could I Marry A Woman in Kentucky?: The Problem of the Fundamental Right to (Straight) Marriage*, 17 CUNY L. REV. 263, 279 (2013) ("[S]tate and federal governments as a matter of course recognized plural marriages as valid for both state and federal law purposes when they were validly contracted among Native Americans on their tribal lands in accordance with tribal customs, even when they would not recognize plural marriages occurring in other nations among those who later took up residence in the United States."); Philip Girard & Jim Phillips, *Rethinking "The Nation" in National Legal History: A Canadian Perspective*, 29 L. & HIST. REV. 607, 612 (2011) ("Consistent with its broad approach to tribal sovereignty in many areas, United States law recognized both marriage and divorce according to tribal laws, even polygamous marriage, so long as the parties in question were Native Americans and resident on a reserve."); William Lindsley, *§ 7. What Law Governs Marital Relationships*, 55 C.J.S. MARRIAGE § 7 (August 2023 update) ("[W]here tribal relations and government prevail, a marriage of persons within the tribal community and in conformation to the local customs will be recognized as valid, whether or not it would have satisfied the requirements of the state law, and although such communities may sanction polygamous unions.").

[185] *See, e.g.*, Steven J. Alagna, *Why* Obergefell *Should Not Impact American Indian Tribal Marriage Laws*, 93 WASH. U. L. REV. 1577, 1594 (2016) (discussing a marriage ritual engaged in by members of the Lakota tribe in which men would take multiple wives).

[186] *See, e.g.*, Ortley v. Ross, 110 N.W. 982, 982–83 (Neb. 1907); Kobogum v. Jackson Iron Co., 43 N.W. 602, 605 (Mich. 1889); Hallowell v. Commons, 210 F. 793, 800 (8th Cir. 1914), *aff'd,* 239 U.S. 506 (1916). This did not imply that the states themselves would have permitted such marriages to be celebrated. *See also* Strasser, *supra* note 184, at 210 ("Because tribes have the authority to govern their members, tribal unions do not have to conform to the laws of the states in which they are located.").

A separate question is whether some of the tribes continue to recognize plural marriages.[187] If not, then the fact that such marriages were once recognized would not entail that such marriages could be celebrated currently in such jurisdictions. Even if some tribes still recognize such unions, a separate question would be whether the Act provision would be triggered if, for example, a tribe only permits tribal members to contract such unions.[188] In that event, individuals who celebrated a plural marriage in another country would not be able to claim that such a marriage could have been contracted in the United States unless the requisite tribal connection were present.

The expressed policy choice denying recognition to plural marriages is not new—Congress has denied recognition to polygamous marriages validly celebrated in other countries for over a hundred years.[189] It is simply unclear whether the Court will interpret free exercise guarantees to require the protection of religious polygamous marriage when Congress has provided increased protection for certain secular marriages.[190] The language the Court sometimes employs suggests that religious practices must receive an analog of Most Favored Nation status,[191] which might make religious polygamy bans difficult to justify.[192]

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[187] *See* Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 54 (2006) ("Most, if not all, Indian tribes no longer recognize polygamous marriages . . . .").

[188] *See, e.g.*, The Code of the Sault Ste. Marie Tribe of Chippewa Indians, Chapter 31 Marriage Ordinance Section 104(2) Qualifications for License, (available at https://www.saulttribe.com/images/downloads/government/tribal%20code/Chapter-031.pdf) ("A party seeking to be married shall fulfill all of the following requirements: . . . One of the persons must be an enrolled member of the Tribe."); The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Title V–Ute Indian Domestic Relations Code, 5-1-3(2), NAT'L INDIAN L. LIBRARY (1988) (available at https://narf.org/nill/codes/ute_uintah_ouray/ utebodyt5.html) ("No marriage license shall be issued or marriage performed unless the persons to be married meet the following qualifications: . . . [A]t least one of the persons to be married is an enrolled member of the Ute Indian Tribe.").

[189] *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in A World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 583 (2010) ("[P]olygamous marriages generally are not valid for immigration purposes as a matter of federal public policy. Of course, this is not surprising: U.S. immigration statutes have expressly prohibited the admission of 'polygamists' into the United States since the enactment of the Immigration Act of 1891.").

[190] *Cf.* Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377, 441 n.247 (2012) ("[I]t would seem likely that purely religious ceremonies of marriage, such as polygamous marriage, would enjoy First Amendment protection under the Free Exercise clause.").

[191] Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) ("[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest."); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.").

[192] Noah Butsch Baron, *"There Can Be No Assumption ...": Taking Seriously Challenges to Polygamy Bans in Light of Developments in Religious Freedom Jurisprudence*, 16 GEO. J.

Although the Court previously upheld polygamy bans in *Reynolds v. United States*,[193] a few points might be made about that decision. First, the *Reynolds* Court did not accord free exercise the privileged status that it now receives but instead rejected that an exception could be made merely because polygamy was a religious practice.[194] The *Reynolds* Court reasoned:

> Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[195]

The *Smith* Court cited *Reynolds* with approval,[196] but *Smith* itself seems disfavored by the majority of the current Court.[197] Further, many commentators suggest that *Reynolds* upheld the targeting of religion.[198] If that is so, then it would be

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GENDER & L. 323, 325 (2015) ("[I]ncreased scrutiny for infringements on religious exercise . . . presents the greatest challenge to current polygamy bans."); *see also* Sealing, *supra* note 170, at 737 ("[T]he Free Exercise Clause protects polygamy.").

[193] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[194] *Id.* ("[T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free.").

[195] *Id.* at 166–67.

[196] Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1878), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.").

[197] *See supra* note 131 and accompanying text.

[198] *See* Baron, *supra* note 192, at 324 ("[T]he Supreme Court has held that laws that target the practices of a specific religion must be subject to strict scrutiny—a doctrine likewise not in place at the time of the *Reynolds* decision."); Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL OF RTS. J. 497, 533 (2000) ("The anti-polygamy laws in *Reynolds* and *Davis v. Beason* were based on hatred of the Mormon Church."); David R. Dow & Jose I. Maldonado, Jr., *How Many Spouses Does the Constitution Allow One to Have? The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America. By Sarah Barringer Gordon. University of North Carolina, Chapel Hill. 2002*, 20 CONST. COMMENT. 571, 582 (2004) ("[T]he anti-polygamy statutes did target a specific religion."). *But see Reynolds*, 98 U.S. at 166 ("[T]he statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control."); Marc O. DeGirolami, *Recoiling from Religion*, 43 SAN DIEGO L. REV. 619, 636 (2006) (discussing the view that the federal "statute did not target Mormons in particular, but merely expressed a neutral public policy preference against polygamy").

surprising for the current Court to affirm *Reynolds* in light of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[199]

It is simply unclear whether the Court will find polygamy constitutionally protected[200] or whether the Court will strike down part of the Act because of its alleged violation of free exercise guarantees. Even if a provision of the Act were struck down, the statute contains a severability provision preserving the constitutional parts of the statute.[201] In order to find that the unconstitutional provision was not severable, the Court would have to find that the Act would not have been passed but for the constitutionally offensive provision,[202] express language to the contrary notwithstanding.[203]

IV. RETROACTIVITY

Suppose that the Court were to hold that substantive due process guarantees do not protect the right to marry generally or, perhaps, the right to marry a same-sex partner or a partner of another race. Suppose further that the Court were to hold that marriage regulations do not implicate federal equal protection guarantees. A separate question would be whether such holdings would threaten the validity of existing marriages and, if so, whether the Act would protect marriages that otherwise would have been endangered.

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199 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (critiquing government officials' restrictions on religious freedoms and explaining that such restrictions must be invalidated); *see also* James G. Dwyer, *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation*, 68 SMU L. REV. 3, 58 (2015) ("The animus behind anti-polygamy laws is clear . . . ."); Jaasma, *supra* note 169, at 257 ("There is evidence that under the standard set forth in *Lukumi*, the anti-polygamy law that was examined in *Reynolds* would be considered neither neutral nor of general applicability.").

200 *Compare* United States v. Windsor, 570 U.S. 744, 795 (2013) (Scalia, J., dissenting) ("[T]he Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol."), *with* Fulton v. City of Phila., 141 S. Ct. 1868, 1913 (2021) (Alito, J., concurring) (suggesting that *Reynolds* rested upon a distinction that the Court has repudiated).

201 *See* Respect for Marriage Act, Pub. L. No. 117-228, § 7, 136 Stat. 2305, 2307 (2022) ("If any provision of this Act, or any amendment made by this Act, or the application of such provision to any person, entity, government, or circumstance, is held to be unconstitutional, the remainder of this Act, or any amendment made thereby, or the application of such provision to all other persons, entities, governments, or circumstances, shall not be affected thereby.").

202 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1482 (2018) ("In order for other PASPA provisions to fall [i.e., because the offensive provisions were not severable], it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.'" (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987))).

203 *See supra* note 201.

A. *The General Rule*

Generally, when the Court overrules a previous constitutional interpretation, that overruling is given retroactive effect.[204] Statutes that had been unenforceable because of an incorrect prior ruling might now become enforceable once that ruling had been corrected.[205] For example, after *Dobbs* was issued, laws on the books preceding *Roe v. Wade*[206] became enforceable again.[207] Although a separate question is whether state constitutional guarantees protect abortion,[208] the statutes that had remained on the books were not viewed as repealed merely because federal abortion jurisprudence made them unenforceable.[209] Separate and different questions involve how to

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[204] William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1908 (1993) (discussing "the general principle that a new rule of constitutional law applies retroactively").

[205] *Id.* at 1911 ("[T]he Court has found that statutes that were inconsistent with a previous decision automatically became enforceable when that decision was reversed.").

[206] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[207] *See* Satanic Temple Inc. v. Young, No. 4:21-CV-00387, 2023 WL 4317185, *7 (S.D. Tex. July 3, 2023) (noting that "the never-repealed criminal statutes predating Roe became enforceable again"); Lilith Fund for Reprod. Equity v. Dickson, 662 S.W.3d 355, 371 (Tex. 2023) (Devine, J., concurring) ("[A]lthough *Roe* egregiously declared the Texas abortion laws 'as a unit' unconstitutional, it did not—and could not—remove those prohibitions from the Texas law books. And because *Roe* has been overruled, these laws are now enforceable.").

[208] *Compare* Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (Okla. 2023) ("We hold that the Oklahoma Constitution creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life. We would define this inherent right to mean: a woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy."), *and* Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023) ("North Dakota's history and traditions, as well as the plain language of its Constitution, establish that the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood. After review of North Dakota's history and traditions, and the plain language of article I, section 1 of the North Dakota Constitution, it is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health."), *and* Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 785 (S.C. 2023), *reh'g denied*, (Feb. 8, 2023) ("We hold that our state constitutional right to privacy extends to a woman's decision to have an abortion."), *with* Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1149 (Idaho 2023) (holding that the Idaho Constitution does not provide heightened protection to abortion rights).

[209] *See* People v. Blair, 986 N.E.2d 75, 82 (Ill. 2013) ("Although we are obligated to declare an unconstitutional statute invalid and void . . . such a declaration by this court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Accordingly, when we declare a statute unconstitutional and void ab initio, we mean only that the statute was constitutionally infirm from the moment of its enactment and

reconcile older statutes with more recent statutes[210] or, perhaps, whether more recent statutes repealed older statutes by implication.[211]

Even if the general rule is that never-repealed statutes are enforceable when there has been a constitutional change, courts have recognized an exception to this rule. Statutes are not revived and retroactively enforced where doing so would create

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is, therefore, unenforceable. As a consequence, we will give no effect to the unconstitutional statute and instead apply the prior law to the parties before us.") (citations omitted); State v. Rondeau, 553 P.2d 688, 692 (N.M. 1976) ("An unconstitutional act is as inoperative as if it had never been passed, and the subsequent unconstitutional act cannot repeal the existing law." (citing Town of Las Cruces v. El Paso Cotton Indus., 92 P.2d 985 (N.M. 1939))).

[210] *See, e.g.*, Planned Parenthood Ariz., Inc. v. Brnovich, 524 P.3d 262, 268 (Ariz. Ct. App. 2022) (reconciling older statute with more recent statute).

[211] *Compare* McCorvey v. Hill, 385 F.3d 846, 849 (5th Cir. 2004) ("The Texas statutes that criminalized abortion . . . and were at issue in Roe have, at least, been repealed by implication. Currently, Texas regulates abortion in a number of ways. For example, a comprehensive set of civil regulations governs the availability of abortions for minors. Texas also regulates the practices and procedures of abortion clinics through its Public Health and Safety Code.") (citations omitted), *with Drummond*, 526 P.3d at 1132 ("Repeals by implication are not favored and all statutory provisions must be given effect if possible. . . . Nothing short of irreconcilable conflict between statutes accomplishes a repeal by implication. . . . Where such a conflict exists, the later modifies the earlier, even where both sections were enacted into the same official codification. . . . Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict.") (citations omitted). *See also* People v. Higuera, 625 N.W.2d 444, 449 (Mich. App. 2001) ("We think it clear that in enacting those statutes after *Bricker*, the Legislature intended to regulate those abortions permitted by *Roe* and *Doe*, and *Bricker*, and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution, as construed by the United States Supreme Court. We thus must reject defendant's argument that M.C.L. § 750.14; MSA 28.204 has been repealed by implication.").

"manifest injustice"[212] or undermine "vested rights."[213] Undermining vested rights, e.g., property rights,[214] might itself be viewed as a violation of due process.[215]

The South Carolina Supreme Court discussed why statutes should not be given retroactive application in certain circumstances, noting the need for "parties to conduct business and plan their affairs with some degree of certainty."[216] After all, "[l]ife goes on while judicial or legislative processes run their course. In the meantime, parties must arrange and conduct their business affairs under the law as it presently exists."[217] As Justice Jackson suggested in his dissent in *Estin v. Estin*, "[i]f there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."[218] Numerous

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[212] Landgraf v. USI Film Prod., 511 U.S. 244, 249 (1994) (citing Bradley v. School Bd., 416 U.S. 696, 711 (1974)); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 832 (1990) (discussing manifest injustice); Schlup v. Delo, 513 U.S. 298, 327 (1995) (discussing the need to provide "a meaningful avenue by which to avoid a manifest injustice"); Bernard v. Cosby, No. 1:21-cv-18566-NLH-MJS, 2023 WL 22486, *7 (D.N.J. Jan. 3, 2023) ("A finding of manifest injustice generally looks to reliance on existing law and the unfairness of changing that law retroactively." (citing Matter of D.C., 679 A.2d 634, 648 (N.J. 1996))).

[213] *Cosby*, 2023 WL 22486, *7 ("New Jersey courts employ a two-part test when determining whether a statute may be applied retroactively: (1) whether the Legislature intended for it to be retroactively applied and (2) 'whether retroactive application of that statute will result in either an unconstitutional interference with vested rights or a manifest injustice.'" (citing James v. N.J. Mfrs. Ins. Co., 83 A.3d 70, 77 (N.J. 2014))); *see also* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 147 (Tex. 2010) ("The presumption is that a retroactive law is unconstitutional without a compelling justification that does not greatly upset settled expectations."). *See generally* Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 110 (1993) (Kennedy, J., concurring) ("I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision.").

[214] *Cf.* McCollum v. McConaughy, 119 N.W. 539, 541 (Iowa 1909) ("[W]hen we find that the previous decisions are not in conformity with the law (*no property rights having been acquired in reliance on such previous decisions*), we feel it to be our duty to overrule them, and announce such rule as we think should have been announced in the previous cases.") (emphasis added).

[215] Harding v. K.C. Wall Prod., Inc., 831 P.2d 958, 967 (Kan. 1992) (discussing retroactive laws that "affect vested rights . . . constitute the taking of property without due process"); Waller v. Pittsburgh Corning Corp., 742 F. Supp. 581, 583 (D. Kan. 1990), *aff'd*, 946 F.2d 1514 (10th Cir. 1991) (discussing the impermissible interference with vested rights which itself violates due process).

[216] White v. J.M. Brown Amusement Co., 601 S.E.2d 342, 346 (S.C. 2004).

[217] *Id.*

[218] Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

interests hang in the balance, including interests in property and the legitimacy of children.[219] Invalidating existing marriages might cause chaos.[220]

Suppose that the Court were to overrule past precedent and hold that substantive due process guarantees do not protect the right to marry and that marital regulations do not implicate equal protection guarantees. Even if the Act had never been passed, the Court might also hold that existing marriages could not be invalidated, e.g., because doing so would be manifestly unjust or would undermine vested rights. But holding that existing marriages would remain valid would not help those who wished to marry a same-sex or different-race partner in the future and were now legally prevented from doing so.[221] Further, if the Court were to hold that substantive due process and equal protection guarantees do not protect marriage, it might also hold that existing marriages were not protected, e.g., because the Court rejected vested rights analysis[222] or believed that vested rights provide too uncertain a standard.[223] In that event, the Act might prove very important.

B. The Respect for Marriage Act and Retroactivity

The Respect for Marriage Act is designed to protect marriages even if the Court overrules existing substantive due process protections of the right to marry.[224] Yet, Congress might need to amend the law if it really wishes to offer that protection.

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219 *See* Stevenson v. Gray, 56 Ky. 193, 212 (Ky. 1856) ("The confusion and uncertainty with regard to the legitimacy of offspring, and the rights of property and succession, are not the only evils which would follow if the validity of a marriage were subject to be tried by . . . various laws.").

220 *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 285 (2016) (discussing the chaos that would result from the invalidation of existing marriages and related rights and obligations).

221 While recognizing existing marriages would provide some level of protection for those already married, nullification of due process guarantees in regard to the right to marriage would, theoretically, enable states to not permit such marriages moving forward. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (attacking substantive due process).

222 *Cf.* Campbell v. Holt, 115 U.S. 620, 628 (1885) ("It is to be observed that the words 'vested right' are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it.").

223 *See* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 143 (Tex. 2010) ("What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity.").

224 *See* Arthur S. Leonard, *Legislative & Administrative Notes: Respect for Marriage Act*, *in* LGBT LAW NOTES 26–27 (Jan. 2023) (suggesting that the Respect for Marriage Act was passed to protect same-sex marriage even were substantive due process jurisprudence to be altered).

At the time that *Loving v. Virginia* was issued striking down interracial marriage bans, several states had constitutional provisions banning such marriages.[225] Mississippi repealed that state's constitutional amendment in 1987,[226] and Alabama invalidated its constitutional provision in 2000.[227]

When *Obergefell v. Hodges* was issued striking down same-sex marriage bans, several states had constitutional provisions banning same-sex marriage.[228] Although that decision made those state constitutional amendments unenforceable, a separate issue is whether those bans have been removed from the books.[229]

Suppose the Court modifies its substantive due process (and equal protection) jurisprudence so that marriages are no longer constitutionally protected under those guarantees. The question at hand is whether state constitutional amendments will be revived and, if so, whether their being revived will invalidate same-sex or interracial marriages celebrated in those states. Perhaps the state courts would suggest that such marriages could not be invalidated by revived provisions because doing so would be manifestly unjust or would destroy vested rights and thus violate due process guarantees.[230] Perhaps not. If such marriages can be invalidated under state law, then the question will be whether the Act prevents their invalidation.

The Act determines the validity of the marriage by focusing on the law of the applicable jurisdiction at the time of celebration.[231] But this makes the analysis complicated for a few different reasons.

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225 *See* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (noting that Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee all had constitutional provision precluding such marriages).

226 *See* Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 278 (2021).

227 Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1067 (2021) ("Until 2000—thirty-three years after *Loving v. Virginia*—there was still a provision banning interracial marriage in Alabama.").

228 *Cf.* Brent G. McCune, *Judicial Overreach and America's Declining Democratic Voice: The Same-Sex Marriage Decisions*, 20 TEX. REV. L. & POL. 29, 53 (2015) ("[P]ost-*Windsor* and pre-*Obergefell*, federal courts ruled as unconstitutional over three-fourths of state constitutional amendments recognizing only traditional marriage.").

229 *See* Jessica Pacwa, *Marriage and Divorce*, 24 GEO. J. GENDER & L. 671, 675 (2023) ("As of August 2022, thirty-five states are still clinging to same-sex marriage bans in their constitution, state law, or both—even though they are currently not enforceable under *Obergefell*.").

230 *See supra* notes 214–16 and accompanying text.

231 Respect for Marriage Act, Pub. L. No. 117-228, § 7(a), 136 Stat. 2305, 2306 (2022) ("For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State."); 28 U.S.C. § 1738C(a)(1) ("No person acting under color of State law may deny full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2

Consider an interracial couple who celebrated their marriage in Alabama in 1990. At the time, the state constitutional amendment prohibiting interracial marriage was unenforceable because of *Loving v. Virginia*.[232] But if *Loving* were overruled, then the protections of *Loving* might be viewed as if they had never existed,[233] which might mean that the constitutional amendment would be viewed as the controlling law at the time. If the state constitutional amendment were revived, then the interracial marriage would be invalid according to the law of celebration (Alabama) and the domicile (also Alabama).

By the same token, same-sex marriages might be at risk if they had been celebrated in a state where *Obergefell* had made the state same-sex marriage ban unenforceable.[234] If *Obergefell* were overruled, the state ban might be thought revived and controlling with respect to marriages celebrated at that time.

The difficulties posed by the applicable jurisdiction language also are relevant here.[235] If the domicile had a same-sex marriage ban but the place of celebration did not, it is unclear from the Act's language which law would control. Even in cases where the domicile and state of celebration are the same state so that only one state's law applies, the Act does not do enough to serve the function that it was designed to serve, namely, to protect interracial and same-sex marriages celebrated in reasonable reliance that those marriages were valid because of then-existing constitutional guarantees. Unless the Respect for Marriage Act also *includes consideration of the prevailing constitutional law at the time of the marriage's celebration*, the Act may protect many fewer marriages than is commonly thought.

V. CONCLUSION

The Respect for Marriage Act was passed in response to *Dobbs* and implicit suggestions that substantive due process guarantees might be further undermined. Congress passed the Act to protect certain marriages while not affecting existing free exercise guarantees.[236]

The Court's developing free exercise jurisprudence has to be clarified, and the Respect for Marriage Act *may* provide the occasion for doing so. Although it is possible that the Court will declare plural marriage protected under free exercise

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individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals . . . .").

[232] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[233] *Cf.* Bergstrom v. Palmetto Health All., 596 S.E.2d 42, 47 (S.C. 2004) ("Generally, 'when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it . . . it constitutes a protection to no one who has acted under it.'" (citing Atkinson v. Southern Express Co., 78 S.E. 516, 519 (S.C. 1913))).

[234] *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[235] *See supra* notes 66–70 and accompanying text.

[236] *See* Respect for Marriage Act, Pub. L. No. 117-228, § 7, 136 Stat. 2305, 2306 (2022) ("Nothing in this Act, or any amendment made by this Act, shall be construed to diminish or abrogate a religious liberty or conscience protection otherwise available to an individual or organization under the Constitution of the United States or Federal law.").

guarantees (which would mean that the Act would have no effect on whether plural marriage is recognized in the United States), the Court might adopt a different route to protect such marriages. Congress clearly intends to protect certain secular marriages, and the Court may take the opportunity to make clear whether its Most Favored Nation analog for religious practice therefore requires protection of religious polygamous marriages as well.

Bracketing whether plural marriages must be permitted or recognized in the United States, Congress or the courts will have to provide clarification of what the Act does. To understand what needs to be done, it is helpful to distinguish between marriages that have already been celebrated and those that will be celebrated in the future.

Consider marriages that have already been celebrated. If the Court modifies existing substantive due process and equal protection guarantees and suggests that certain marriages or marriages as a general matter are not protected by constitutional guarantees, then Congress or the courts will have to clarify whether marriages celebrated in light of local law *as informed by then-recognized constitutional guarantees* must be recognized as a matter of federal law. Otherwise, marriages that have been in existence for fifty years might be held null and void because of a revival of a state marriage ban.

An additional clarification is necessary, and this one may impact marriages that have already been celebrated, as well as marriages that will be celebrated sometime in the future. Congress or the courts must clarify whether the applicable law at the time of the marriage is the law of celebration, the law of the domicile, or both. If both, then Congress or the courts will also have to specify which law controls if the laws conflict.

Yet another difficulty is that the Act provides one rule for federal marriage recognition and a different rule for interstate marriage recognition. But this creates the possibility that a marriage will be recognized by the federal government and not the domicile, which may create a variety of future difficulties and unwelcome surprises.

Perhaps Congress wanted to make sure that interracial and same-sex marriages could be celebrated and recognized throughout the country as long as one state permitted their celebration. Perhaps Congress wished to impose a recognition rule that a marriage valid in the state of celebration is valid anywhere in the country. Either may have been Congress's goal, but the Act as currently written involves a combination of the two, which seems unlikely to reflect congressional intent or good public policy.

Congress should act quickly to clarify what the Act means and does before courts have to guess, which will foreseeably result in relevantly similar cases being decided differently and congressional intent being thwarted. When making those clarifications, Congress should consider and account for the effect that revival of state laws will have on existing marriages in case the Court modifies the existing jurisprudence, or else millions of families could be in for a very unwelcome surprise.