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# Interstate Marriage Recognition: When History Meets the Supreme Court

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# Verdict

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## Interstate Marriage Recognition: When History Meets the Supreme Court

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Today, April 28, 2015, the U.S. Supreme Court will hear oral argument in the biggest case of the term, *Obergefell v. Hodges*, in which it will weigh in on the controversy over same-sex marriage that has raged for more than twenty years.



The case is actually four cases, each arising from the U.S. Court of Appeals for the Sixth Circuit: *Obergefell v. Hodges* (Ohio), *Tanco v. Haslam* (Tennessee), *DeBoer v. Snyder* (Michigan), and *Bourke v. Beshear* (Kentucky). In each case, a federal district court invalidated the applicable state ban on celebration of marriages by same-sex couples, a ban on recognition of those marriages, or both. All four rulings were **overturned on appeal** (<http://law.justia.com/cases/federal/appellate-courts/ca6/14-5291/14-5291-2014-11-06.html>) by the Sixth Circuit—the only federal appellate court to date to rule against the right to marry for same-sex couples. The Supreme Court consolidated the four cases and rephrased the questions they presented. It agreed to answer the following questions:

- Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
- Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

Most of the attention to this case has focused on the first of the two questions, which is at the heart of the controversy. That question will turn on whether the states can offer sufficiently important reasons to justify excluding one set of couples from the right to marry. Rather than adding to the discussion of the \$64,000 question, which has received ample analysis from many sources, I'll focus here on the validity of bans on interstate recognition. This latter question involves an entirely different kind of constitutional argument, one that is likely to turn in large part on history, which I will explain in this column.

## **The Law of Interstate Marriage Recognition**

The Supreme Court separated the questions presented because the celebration of marriage within a state's borders and interstate recognition of marriages celebrated elsewhere are governed by two completely separate bodies of law—this has been the case throughout history. Celebration laws are a reflection of the state's policies about who should be permitted to marry; recognition laws are a reflection of the state's willingness to respect a different decision made by another state.

Although recent decades have been a period of relative calm, states historically had sharp and longstanding disagreements about who should be permitted to marry and under what circumstances. At various points in history, states disagreed, among other things, about the permissibility of marriage by minors, interracial marriage, marriage by those carrying a communicable disease, marriage between more distant relatives or between individuals related by marriage, and common-law marriage.

Though the full history of these disagreements is too complicated to describe here, courts developed a few general principles to guide them through the morass of conflicts that arose because of the differing state marriage laws. These principles, by and large, were not dictated by constitutional principles or mandates, but by the common law principle of comity—respect for the actions of other states.

States acknowledged that, in some cases, they might give effect to a marriage that their own laws would prohibit and would have invalidated if it had been performed in their own state. Most followed the “place of celebration” rule, which means that a marriage that is valid where celebrated is valid everywhere. (Conversely, a marriage that was void where celebrated was void everywhere.)

But the rule is not absolute. Historically, there were two exceptions. States could refuse recognition to an out-of-state marriage if it violated either “natural law” or the state's “positive law.”

Under the “natural law” exception, courts tended to refuse recognition to marriages that

were considered universally abhorrent—polygamous unions or incestuous ones between close relatives. In an early New York case, the court articulated this exception as permitting non-recognition for marriages that are “offensive to the public sense of morality to a degree regarded generally with abhorrence.”

Under the “positive law” exception, courts refused recognition to marriages when the legislature had not only prohibited celebration of a particular marriage, but had specifically provided that marriages of that type should not be given extraterritorial effect. For the most part, state marriage bans did not extend this far. Some states had so-called “marriage evasion” laws that refused recognition to marriages by their own residents who left the state for the express purpose of evading a marriage restriction. But very few other marriage bans prohibited recognition, in addition to celebration, of prohibited marriages.

Within this general framework, state approaches to marriage recognition fell along a spectrum, but the general tilt of the landscape was in favor of recognition. The exceptions were recited often but rarely applied in court rulings. And the pro-recognition stance has largely persisted to the modern day—until the controversy over same-sex marriage arose. For example, most states do not allow couples to establish common-law marriages, but most nonetheless will give effect to a common-law marriage that was validly created elsewhere.

What about more controversial marriages? Many states historically refused to license interracial marriages. But those bans were never universal—in other words, there were always states that allowed such marriages. When interracial couples married in one state and then moved to another, the destination states often gave effect to the marriages. They did this even though the celebration bans reflected deeply held views about the impropriety of interracial love, marriage, and reproduction. It was understood that a state could continue to prohibit a particular kind of marriage, despite sometimes recognizing one formed out of state. Interestingly, states that generously afforded recognition to out-of-state marriages were no quicker to eliminate particular marriage impediments under their own laws than those that were stingier about granting such recognition.

Whether an out-of-state marriage was given effect was courts recognized a particular out-of-state marriage or not was a question for courts to decide on an individualized basis. Couple by couple. Marriage by marriage. Reason for recognition by reason for recognition. These cases did not always result in recognition, but they often did. The law developed that way to allow states to co-exist and to avoid the chaotic and complicated results that would stem from having a couple’s marital status change each time they cross a state border.

Throughout the twentieth century, the exceptions to the place-of-celebration rule became less important because the most controversial marriage laws—those banning interracial marriage—were struck down by the Supreme Court in *Loving v. Virginia* (<https://supreme.justia.com/cases/federal/us/388/1/case.html>) in 1967 under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. During the same era, other state marriage laws converged as the result of changing social norms that affected decisions about which individuals and couples could and could not marry. These changes coincided with the increasing mobility of the American people, who had greater ability than ever before to travel across state lines and to move from state to state. The portability of marriage became more important, not less.

The cases on marriage recognition cite four primary reasons for giving effect to prohibited out-of-state marriages: to provide stability and predictability to families, to promote marital responsibility, to facilitate interstate travel, and to protect private expectations. It was widely understood that a system that leaned against recognition would devastate many couples, as well as their children. Given the hundreds of important things that hinge on marital status—parentage of children, eligibility for spousal benefits from private employers and public benefit programs, property and inheritance rights, medical decisions, and hospital visitation rights, to name a few—denying a couple's marital status is not something that should be done lightly.

### **Marriage Recognition in the Same-Sex Marriage Context**

The relative calm that characterized marriage law during the second half of the twentieth century was upended by two competing developments—laws in some states allowing same-sex couples to marry and laws in other states refusing to recognize those marriages.

In reaction to early indications that at least some states might begin to recognize marriages between individuals of the same sex, a number of states adopted statutory and constitutional bans on the recognition of marriages by same-sex couples. These laws—some of which are being challenged in the case currently before the Court—are at best unusual. As the discussion above notes, seldom did a state categorically ban recognition of an entire class of marriages, even those marriages that were thought to be truly unacceptable.

Whatever their motivation, the categorical restrictions on recognizing same-sex marriages fundamentally altered the terrain of marriage recognition law, which previously turned on individualized determinations by courts and tended towards recognition rather than against. But these new recognition laws shift decision-making power from courts to legislatures and shift the analysis from individual to categorical. And, unlike many traditional marriage laws, they draw no distinction between evasive

prohibited marriages and non-evasive ones (which were the most likely to be given effect in other states). Moreover, enshrining these bans in state constitutions, which was done to avoid judicial review by state courts, is yet another feature that treads new ground.

## When History Meets Supreme Court Precedent

What is the relevance of the history of interstate marriage recognition law to the case before the Court? In ***United States v. Windsor*** (<https://supreme.justia.com/cases/federal/us/570/12-307/>) (2013), in which the Supreme Court invalidated the provision of the federal Defense of Marriage Act (DOMA) that refused federal recognition to validly celebrated same-sex marriages, the Court took note of history. There, it noted the federal government's longstanding practice of deferring to state law for purposes of marital-status determination. For example, a couple can file a joint federal tax return if they are considered legally married under state law; if not, they cannot. The same holds for benefits as varied as Social Security and evidentiary privileges in federal criminal prosecutions.

The Court in *Windsor* thus deemed the federal-law provision of DOMA to be a discrimination of an "unusual character" that warranted "careful consideration" of its constitutionality and raised a strong inference of impermissible animus under the Equal Protection Clause. It based this analysis on an earlier case involving sexual orientation discrimination, ***Romer v. Evans*** (<https://supreme.justia.com/cases/federal/us/517/620/case.html>) (1996), in which the Court struck down a voter referendum in Colorado that was deemed so unusual it could only have resulted from hostility to gays and lesbians, an historically disadvantaged group.

The question before the Supreme Court in *Obergefell*, then, is whether the state bans on recognition of same-sex marriages from other states constitute discrimination of an "unusual character" that raise the same suspicions the Court had of the federal-law provision of DOMA. If the Court answers the first question in favor of the plaintiffs (and rules that bans on the celebration of same-sex marriages are unconstitutional) it will likely not reach the recognition question independently. But recognition questions have always been governed by an independent body of law and merit their own analysis here. We will have our answer at the end of June, when the Court traditionally releases its most important decisions.

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