UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES OBERGEFELL, et al.	:	**Civil Action No. 1:13-cv-501**
Plaintiffs,	:	
	:	**Judge Timothy S. Black**
v.	:	
	:	
THEODORE E. WYMYSLO, et. al.,	:	**EXPERT DECLARATION OF**
	:	**JOANNA L. GROSSMAN IN SUPPORT**
Defendants.	:	**OF PLAINTIFFS' MOTION FOR**
	:	**DECLARATORY JUDGMENT AND**
	:	**PERMANENT INJUNCTION**

I, Joanna L. Grossman, hereby depose and declare as follows:

I. BACKGROUND AND QUALIFICATIONS

1. I am the Sidney and Walter Siben Distinguished Professor of Family Law at the Maurice A. Deane School of Law at Hofstra University. I have actual knowledge of the matters stated in this declaration and would be prepared to testify if called as a witness.

2. My credentials and experience are summarized in my curriculum vitae, which is attached as Exhibit A to this declaration. I received a B.A. in Economics from Amherst College in 1990 and a J.D. from Stanford Law School in 1994. I joined the Hofstra Law School faculty in 1999, became a tenured professor in 2005, and a distinguished professor in 2012. I have also taught at American University School of Law, Cardozo Law School, Tulane Law School, University of North Carolina School of Law, and Vanderbilt Law School.

3. I teach in the area of family law, with special emphasis on the history of marriage regulation and the legal responses to modern family forms.

4. I am the co-author or co-editor of three books, including *Inside the Castle: Law and the Family in Twentieth Century America* (Princeton University Press 2011) (with Lawrence M. Friedman), a comprehensive sociolegal history of marriage, divorce and the family. I have also published over 30 scholarly articles, including several that address the history of marriage and divorce in the United States, trends in state regulation of marriage, the law and controversy regarding same-sex marriage, and the rules of interstate marriage recognition. I have given dozens of academic presentations and lectures on the subject of same-sex marriage, state

regulation of marriage, and interstate marriage recognition. In addition, I have given lectures and conducted training sessions for lawyers and judges on same-sex marriage law and the history of interstate marriage recognition.

5. I have been retained by Plaintiff's counsel in connection with the above-captioned matter. I am being compensated at a rate of $275 per hour for preparation of reports or declarations, preparing for and giving deposition or trial testimony, and preparing for or attending trial. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

6. I have been researching and writing about state regulation of marriage since the beginning of the modern same-sex marriage controversy in 1993. During my years in academia, I have written about and studied most every aspect of the same-sex marriage controversy, with special attention to the rules of interstate marriage recognition. I explained the same-sex marriage controversy in detailed historical context in *Inside the Castle*, as well as in two lengthy journal articles entitled *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OREGON LAW REVIEW 433 (2005) and *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons From the History of Marriage and Divorce*, 14 BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL 87 (2004). I have also written an online column about virtually every same-sex marriage development since the passage of the first civil union bill in 2000. The relevant columns are listed in Exhibit B to this Affidavit and available at writ.findlaw.com (2000 – 2010) or verdict.justia.com (June 2011 – present). The book, articles and columns were written after I studied and analyzed numerous historical sources, including cases, statutes, treatises, government documents and various non-legal sources. In preparing this declaration, I have relied on my prior research and writing, my reading of current sources on the issues relevant to this case, and my years of experience teaching and working in the field of family law.

II. SUMMARY OF EXPERT OPINIONS

7. I have been asked for my expert opinion concerning the regulation of marriage in the United States, with particular emphasis on the treatment of conflicting marriage laws among states.

a. Marriage is both a legal and social institution, with significant public and private consequences for individuals who enter it. Marriage is entered into by consent, but regulated from beginning to end.
b. Marriage is primarily regulated at the state, rather than federal level.
c. By statute, states regulate whether individuals can marry, whom they can marry, and how they can create a legal marriage. States also regulate exit from marriage, dictating whether, when and on what terms couples can divorce or annul legal marriages.
d. States regulate the terms and incidents of ongoing marriage and assign various benefits and burdens on the basis of marital status.
e. The federal government also assigns significant and numerous benefits and burdens on the basis of marital status, deferring in most instances to the state's determination as to the validity of a marriage.
f. Throughout history, states have differed on impediments to marriage – those characteristics or circumstances that prevent an individual or a particular couple from forming a legally valid union.
g. There has never been a national law of marriage, and all efforts to create uniform state laws have failed.
h. The conflicts among state marriage laws, however, have lessened as states have developed shared norms about autonomy, maturity, the inappropriateness of eugenic controls, and equality.
i. Conflicts among state marriage laws arose when couples married in one state and then sought recognition of their union in another—whether because they moved to a new state, had contracted an "evasive" marriage in another state in violation of their home state's laws, or had some transient contact with a state to which the validity of their marriage was relevant.
j. The problems created by non-uniform marriage laws have been resolved through a set of principles providing that states generally ought to recognize valid marriages from sister states regardless of whether they would have authorized the marriage in the first instance.

k. The centerpiece of these interstate marriage recognition principles was the "place of celebration rule," or *lex loci contractus*, which provided that marriages that were valid where celebrated were valid everywhere, while those that were void where celebrated were void everywhere.

l. The general rule was potentially subject to two exceptions for violations of natural law (sometimes understood as "public policy") or positive law (express statutory bans on extraterritorial recognition).

m. Interstate marriage recognition principles were commonly understood to reflect the exercise of comity—respect for the laws and policies of sister states—rather than a constitutional mandate.

n. States differed in the degree to which they recognized or made use of the exceptions to the general rule. Ohio fell on the extreme pro-recognition end of the spectrum, recognizing virtually all, if not all, marriages validly celebrated in a sister state even when clearly contrary to Ohio law and entered into by Ohio residents with the purpose of evading Ohio law.

o. The conflicts among state marriage laws significantly lessened over the second half of the twentieth century as states collectively raised the age when adolescents could marry; distanced themselves from the eugenic principles that informed early marriage laws; developed an understanding of genetics and hereditary conditions that made certain impediments to marriage illogical; and, due to constitutional mandate or changing social norms, ceased banning interracial marriage.

p. The controversy over same-sex marriage has created a non-uniformity of marriage laws that parallels other controversies from the past.

q. Ohio, like many other states, has departed from its traditional approach to interstate marriage recognition by adopting a blanket statutory and constitutional prohibition on recognition of validly celebrated same-sex marriages. There does not appear to be any historical precedent for this approach.

r. The development in the last several decades of robust protection for the right to marry under the Due Process Clause of the Fourteenth Amendment and

strong protection against discrimination under the Equal Protection Clause of the Fourteenth Amendment has likely narrowed the circumstances under which states can validly refuse to recognize marriages from sister states rather than expanded them.

III. BASIS AND REASONS FOR OPINIONS

The Significance of Marriage

8. While the meaning of marriage has changed over time, it has always been premised under American law upon a contract between consenting individuals to enter an indefinite, intimate, monogamous relationship regulated by the state.

9. The contract necessary to form a marriage gives way to a formal status, subject to significant regulation from the state, which defines the terms of entry, the rights and obligations while it endures, and the terms of dissolution through death or divorce.

10. The purposes of marriage are innumerable, but historically have included: formation of stable family relationships; encouragement and enforcement of private rather than public dependency; legitimation of children; clarity of property ownership and creation or preservation of lines of inheritance; and the inculcation of civic values necessary for meaningful participation in democratic government.

11. The legal consequences of marriage are also innumerable, but include: a right of financial support; evidentiary privileges; rights to bestow citizenship on a non-citizen spouse; benefits and burdens under state and federal tax laws; inheritance rights; parental status rights; and pension and Social Security rights.

State Regulation of Marriage

12. From its earliest iteration in the United States, marriage law has been primarily the province of the states.

13. States are generally responsible for crafting their own provisions about the right to marry, eligibility to marry, and the mode of marriage. In other words, state statutes specifically set forth who can or cannot marry, whether prohibited marriages are void or voidable, and the procedural requirements for creating a valid marriage.

14. Through the nineteenth and early part of the twentieth centuries, American states imposed a variety of different restrictions on marriage based on the capacity of the individual to understand marriage, the capacity of the individual to participate in the production of healthy offspring, or the nature of the particular union.

15. The impediments to marriage changed over time, as particular concerns or circumstances animated legislators to make their laws stricter or more lax. These changes were the product of moral, religious, social, political, and economic forces.

16. When amending marriage laws, states did not always move in lock step. State legislatures sought at some points to depart from broader trends in marriage laws, and at other points to join them.

17. Some impediments to marriage were universal in the United States. For example, all states prohibited bigamous (and polygamous) marriages, and all states prohibited consanguineous (incestuous) marriages within a certain degree. Most also prohibited marriages by the "insane" or "imbecilic."

18. Other restrictions were common, but not universal. Because of beliefs about the heredity of certain conditions, several states banned individuals with epilepsy from marrying. Because of concerns about transmission to a spouse and/or effects on future offspring, many states prohibited people with venereal disease, tuberculosis, or addiction to alcohol from marrying. Some prohibited certain types of criminals from marrying.

19. Certain non-universal restrictions were the source of most of the controversies among states.

a. All states imposed a minimum age to marry and a minimum age to marry without parental consent, but states differed significantly in setting those ages. The so-called "common law age for marriage" was 12 for girls and 14 for boys. Some states used this standard, while others imposed a higher minimum age.

b. All but a dozen states banned interracial marriage at some point in history, but many changed or lifted their bans as the twentieth century progressed, which led to greater interstate controversy. The categories of people prohibited from marrying whites varied by region and period in history.

c. Nearly half the states imposed restrictions on remarriage following a divorce, either via a waiting period or, in some states, a complete ban during the lifetime of the former spouse.

d. Beginning in the middle of the nineteenth century, some states adopted bans on marriages between first cousins because of concerns about the genetic effects on future offspring. Within a few decades, roughly half the states imposed such a restriction.

e. Common-law marriage was never universally allowed. It was common in the nineteenth century, but gradually abolished in many states as concerns about fabricated claims, casual attitudes about marriage, and the need for state control over sexual unions increased. As of 1931, roughly half the states still permitted it.

20. The early marriage laws in Ohio banned marriages that were: "nearer of kin than second cousins;" by someone with a living spouse (bigamy); by the insane or imbecilic; by individuals with epilepsy; by habitual drunkards or those drunk or under the influence of drugs at the time of the ceremony; by those with syphilis in a communicable form; and by men under 18 years of age and women under 16 years of age. Ohio permitted common-law marriages until 1991. Although Ohio did ban interracial marriage for a time in the nineteenth century, the statutory ban was repealed in 1887.

Failure of Efforts to Create Uniform Marriage Laws

21. At the height of non-uniformity in the late nineteenth and early twentieth centuries, there was a movement to create uniform marriage laws across the country.

22. One of the primary objectives of the National Conference of Commissioners on Uniform State Laws (NCCUSL) upon its founding in 1892 was to create greater uniformity of marriage and divorce laws.

23. Although many states shared the frustration of having their strict marriage standards undermined by their neighbors' laxer ones, states were, by and large, unwilling to agree to a more uniform approach. The Uniform Marriage and Marriage Regulation Law, promulgated in 1911, tackled only the procedural aspects of marriage and was adopted only by two states. A 1950 act relating to marriage was also primarily procedural and sparsely adopted.

24. Of great concern in some states, particularly in the first decades of the twentieth century, was the rise of evasive marriage practices – leaving one's home state to contract marriage (for which residency is never required) in another state and then returning home and seeking recognition of the union. This practice was seen as undermining the ability of states to maintain their own standards. To minimize the practice, NCCUSL promulgated the Uniform Marriage Evasion Act in 1912, which provided that evasive marriages would not be recognized in the couple's home state. However, only five states adopted this law.

25. There were several attempts in the late nineteenth and early to mid-twentieth century to amend the federal Constitution to ban certain types of marriages (interracial ones, for example) or to give Congress the authority to set national marriage policy. None became law.

Reconciling State Marriage Law Conflicts: The Traditional Approach

26. The variation in marriage laws described above gave rise to predictable conflicts about the portability of marriage, particularly as Americans became more mobile and had greater access to modern forms of transportation.

27. The principle of comity, or courtesy among political entities, was the historical touchstone for analyzing marriage recognition questions. That principle informed conflict of laws principles as applied to out-of-state marriages.

28. All jurisdictions followed some version of *lex loci contractus* in evaluating the validity of a marriage. Under this general rule, often called the "place of celebration" rule, a marriage that was valid where celebrated was valid everywhere, and a marriage that was void where celebrated was void everywhere.

29. The first exception to the general rule, the so-called "universal" exception, authorized courts to refuse recognition to marriages that were thought to violate "natural law." In early twentieth century treatises and case law, this exception is described as applying to closely incestuous marriages, such as between a brother and sister or ancestor and descendant, and to bigamous or polygamous unions. Despite the vehement opposition to interracial marriage in the states that banned it, courts seldom applied the universal exception to preclude recognition because such marriages were generally not deemed to violate "natural law."

30. The second exception to the general rule, the so-called "positive law" exception authorized courts to refuse recognition where the legislature had declared certain marriages

invalid or void as against public policy. The most common application of this exception was to evasive marriages in those states with a specific policy, embodied in a statute, against marriage evasion. As noted above, five states adopted the Uniform Marriage Evasion Act to express such a policy, and fifteen other states had evasion laws of some type on the books as of 1931. Beyond evasive marriages, there was little consensus on the meaning of the positive-law exception. Simply prohibiting a particular marriage was not sufficient to justify application of the exception, for that would mean that states would never give effect to marriages that they would not have authorized in the first instance. Courts looked, instead, for statutory language that went beyond the usual prohibition or directly addressed the question of extraterritorial recognition. As leading treatise-writer Joseph Vernier wrote, "[m]arriages are prohibited for many reasons but are void for few." Chester G. Vernier, 1 American Family Laws § 45 (Jan. 1, 1931).

31. As applied to a wide variety of marriage recognition cases in many states, certain trends emerged:

a. Common law marriages were routinely recognized in states that had abolished them by statute.

b. Interracial marriages were often recognized in states that prohibited them by statute, especially if they were non-evasive, i.e. contracted by residents of a state that allowed them.

c. Remarriages following divorce in violation of statutory waiting periods were almost always recognized by states other than the one that had imposed the restriction in the first instance.

d. Marriages by minors below the age of consent were treated inconsistently, in part because of procedural variations such as whether the proceeding was brought by the minor or by her parent or guardian and whether the proceeding was to annul or confirm the marriage.

32. Historically, Ohio courts have taken a very pro-recognition approach to prohibited marriages. This approach is demonstrated as follows:

a. Ohio follows the place of celebration rule strictly.

b. Ohio has never, to my knowledge, applied the universal or natural law exception to refuse recognition to a prohibited out-of-state marriage.

c. To my knowledge, Ohio never had a marriage evasion statute, nor refused to give effect to a prohibited marriage because it was evasive.

d. Until the adoption of the mini-DOMA in 2004, the Ohio legislature has never, to my knowledge, passed a law denying extraterritorial recognition to a prohibited marriage.

e. Applying the general principle of *lex loci contractus*, Ohio courts have given effect to out-of-state first-cousin marriages, marriages by a minor below the age of consent, and proxy marriages, all of which are prohibited by Ohio law.

33. The hallmarks of the traditional system of interstate marriage recognition were: (i) courts decided whether to recognize individual marriages on a case-by-case basis; (ii) the consequences of recognizing or failing to recognize the marriage were often more important to the outcome than the nature of the particular marriage (e.g., a polygamous marriage from abroad might be recognized for a limited purpose such as inheritance after the death of one party because recognition would not involve condoning an ongoing polygamous union); and (iii) the law tilted strongly in favor of recognition.

34. Courts were most likely to recognize prohibited out-of-state marriages, even ones that clearly violated the state's public policy, for purposes like inheritance or wrongful death because the marriage would no longer be ongoing.

35. Strong policies supported the pro-recognition tilt of the system, including the desire to: avoid de-legitimating children who had been born into a valid marriage; to protect the parties' expectations as they had likely ordered significant aspects of their lives based on marital status; and to protect both parties against unilateral dissolution by the other. A leading conflicts of law scholar urged a blanket rule of recognition because the "minor inconveniences" of recognition were outweighed by "[I]ntroducing distinctions as to the designs and objects and motives of the parties, to shake the general confidence in such marriages, to subject the innocent issue to constant doubts as to their own legitimacy, and to leave the parents themselves to cut adrift from their solemn obligations when they may become discontented with their lot." Joseph Story, Commentaries on the Conflicts of Laws 215 (9th ed. 1883).

36. These traditional principles of interstate marriage recognition are in full force today outside of the same-sex marriage context. Although there are fewer conflicts between

marriage laws and thus fewer cases, a modern conflict of laws treatise notes the "overwhelming tendency" in the United States to grant recognition to marriages valid where celebrated. William M. Richman & William L. Reynolds, Understanding Conflict of Laws 362 (2d ed. 1993).

Modern Variations in Marriage Laws

37. The differences in state marriage laws that had been so pronounced in the first half of the twentieth century had all but disappeared by the second half. This was the result of converging social norms and the U.S. Supreme Court's decision in *Loving v. Virginia* in 1967, in which it held that state marriage laws must comply with federal constitutional guarantees and that anti-miscegenation laws violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

38. A snapshot of state marriage laws in the 1990s, before the onset of the controversy over same-sex marriage, reveals a remarkably uniform system.

a. All states prohibit bigamous marriage.

b. All states prohibit incestuous marriage within a certain degree.

c. No state prohibits marriage based on physical, mental, or behavioral conditions because of the fear of inherited traits.

d. No state bans interracial marriage.

e. Almost every state sets the minimum to age to marry at 18 without parental consent and 16 with parental consent.

f. No state bans remarriage following divorce, and very few impose a waiting period for remarriage.

39. The most significant variations in modern marriage laws, apart from same-sex marriage, involve first-cousin marriages (permitted by roughly half the states) and common-law marriage (permitted in roughly one-fifth of the states).

The Laws For and Against Same-Sex Marriage

40. The non-uniformity of state laws on same-sex marriage dates to the mid-1990s. As of 1995, no state expressly authorized same-sex marriage, but very few states expressly prohibited it either. The passage of laws for and against same-sex marriage began in 1996 when it appeared imminent that Hawaii might legalize same-sex marriage (although it never did).

41. In 1996, Congress enacted the Defense of Marriage Act (DOMA), which provided that the definition of marriage was a union between a man and a woman for all federal law purposes and that states were not obliged by full faith and credit principles to give effect to same-sex marriages validly celebrated elsewhere.

42. In DOMA's wake, states began passing anti-same-sex marriage laws, which typically did two things: (1) prohibited the establishment of same-sex marriages within the state's borders; and (2) prohibited the recognition of same-sex marriages validly celebrated in sister states or foreign jurisdictions. Some state legislatures, such as those in Kentucky and Virginia, went further and prohibited private contracts intended to replicate the incidents of marriage such as cohabitation agreements.

43. At the high point of the anti-same-sex marriage movement, forty-four states had passed so-called mini-DOMAs to prevent the celebration and recognition of same-sex marriages. Twenty-nine also enacted constitutional amendments saying the same thing in order to avoid invalidation of the statute by court ruling.

44. In 2004, the Ohio Legislature adopted a provision declaring that "any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state." It also provides that "Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state." Ohio Rev. Code Ann. § 3101.01(C) (West 2013).

45. Also in 2004, Ohio voters, by referendum, approved an amendment to the state constitution to provide: "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." Ohio Const. art. XV sec. 11.

46. Although states began passing anti-same-sex-marriage laws in the mid-1990s, it was not until 2004 that the first American state to legalize same-sex marriage, Massachusetts, began issuing licenses to same-sex couples. As of 2013, thirteen states and the District of Columbia have authorized same-sex marriages, by judicial ruling, voter referendum, or

legislative action. Several additional states do not allow same-sex marriage, but do authorize an alternative status for same-sex couples such as civil union.

Non-Recognition of Same-Sex Marriage Laws: Departure from Tradition

47. The problems of non-uniformity and the potential for interstate and intergovernmental conflicts have been resurrected by this patchwork of laws allowing and prohibiting same-sex marriage. Resolution of these conflicts has been made difficult, if not impossible, by the widespread adoption of non-recognition laws at the federal and state level.

48. The state/federal conflicts were contained or eliminated when the U.S. Supreme Court invalidated the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013). After *Windsor*, and federal regulations and agency actions designed to implement it, valid same-sex marriages are recognized for most federal-law purposes. The state-to-state conflicts, however, remain due to the existence of mini-DOMA statutes and constitutional amendments.

49. These laws have imposed significant hardship on married same-sex couples, including:

a. The inability to divorce after moving from a state that allows same-sex marriage to a state that does not. *See, e.g., In re J.B.*, 326 S.W.3d 654 (Ct. App. Tex. 2010) (refusing to recognize Massachusetts same-sex marriage for purposes of granting a divorce). Lack of access to divorce (including equitable distribution and spousal support) has been one of the most significant problems arising from the lack of interstate recognition of same-sex marriages. This problem exists in part because the states, including those that authorize same-sex marriage, generally do not require residency as a prerequisite to marriage, but they do require residency as a prerequisite to divorce.

b. The inability to obtain benefits from public employers like spousal health insurance. *See, e.g., Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 (temporarily enjoining Michigan from enforcing law prohibiting public employers from providing same-sex partner benefits).

c. The inability to live with a spouse or civil union partner because the union is not recognized and therefore violates a child custody order barring cohabitation by a custodial parent with a non-marital partner. *See, e.g., Burns v. Burns*, 253 Ga. App. 600 (2002) (refusing to recognize civil union for purposes of custody agreement's ban on non-marital overnight guests).

d. The ability of one spouse to avoid the obligations of marriage (including the restriction on bigamy) by moving to a state that does not recognize same-sex marriage.

e. Uncertainty and the potential for protracted litigation about parentage status vis-à-vis the biological child of a same-sex spouse. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2007).

50. Unlike with past interstate marriage conflicts, state courts in mini-DOMA states have been categorically deprived of the power to decide, on a case-by-case basis, whether to give effect to an out-of-state marriage. The blanket prohibition embodied in statutes like Ohio's § 3101 preclude consideration of relevant facts as well as relevant state policies that might militate in favor of recognition in a particular case.

51. Like most states, Ohio has never adopted a blanket prohibition on interstate marriage recognition other than the one it currently applies to same-sex marriages. But for the statutory and constitutional amendments barring recognition, the traditional rules followed in Ohio would dictate recognition of same-sex marriages as long as they were valid where celebrated.

The Changing Role of Federal Law in Regulating Marriage

52. Despite the significant variations among state marriage laws and some significant conflicts between states, federal law traditionally played no role determining the validity of marriage. Noting the lack of federal marriage rules or principles, the Supreme Court wrote in 1888 that "Marriage, as the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to marriage, the duties and obligations it creates, its effects upon the

property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

53. Until 1967, when the U.S. Supreme Court struck down Virginia's ban on interracial marriage in *Loving v. Virginia*, federal law had never been invoked to invalidate a state law on marriage or divorce, despite numerous interstate conflicts. Federal law contained no substantive norms that could be brought to bear on state marriage law, and the Supreme Court never opined as to the proper definition of marriage.

54. The U.S. Supreme Court did weigh in on state conflicts over divorce because divorce decrees are judgments that are subject to the requirements of full faith and credit. *See, e.g., Williams v. North Carolina*, 317 U.S. 287 (1942). Marriage, however, was not deemed subject to those rules.

55. There is no general federal law of marriage. Instead, most federal laws that assign benefits or burdens on the basis of marital status (and there are over 1000) defer to state law, either the individual's home state or the state in which the marriage was celebrated. Congress's decision in the Defense of Marriage Act of 1996 to refuse federal-law recognition to marriages validly celebrated under state law was unprecedented, and, at least in part for that reason, struck down by the Supreme Court in *Windsor*.

56. Despite the lack of a federal definition of marriage, the Supreme Court's ruling in 1967 in *Loving v. Virginia* that anti-miscegenation bans are unconstitutional signaled the beginning of a new era in which state marriage laws would have to comport with developing constitutional principles of equal protection and due process.

57. Over the course of three opinions, the Supreme Court recognized a fundamental right to marry that prevents states from directly and substantially interfering with one's right to marry without triggering heightened judicial scrutiny. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

58. In addition, the Supreme Court has applied equal protection principles to invalidate federal and state laws that single out gays and lesbians for disadvantageous treatment, including in the context of marriage law. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Romer v. Evans*, 517 U.S. 620 (1996).

59. At the time the rules of interstate marriage recognition were developed, these constitutional constraints did not exist.

CONCLUSION

60. The categorical refusal to recognize same-sex marriage is a significant deviation from the traditional historical approach that militated strongly in favor of recognition of prohibited out-of-state marriages. The departure from tradition is even more striking in a state like Ohio, which did not recognize an exception to the place of celebration rule for evasive marriages.

Signed under penalty of perjury this 10th day of October, 2013.

Joanna L. Grossman