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DEFENSE OF MARRIAGE ACT

Have Marriage, Will Travel

BY JASON STEED AND REX HEINKE

You have a fundamental right to migrate from one state to another. Should you be able to take your marriage with you?

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On March 26 and 27, the U.S. Supreme Court will hear arguments in two cases about the definition of marriage. It's safe to say that these are two of the term's blockbuster cases, and all eyes will be peeled for the Court's pronouncements much like they were in 2012, in anticipation of the Court's opinion on Obamacare.

The first of these cases, *Hollingsworth v. Perry*,[1] arose in California and involves the now famous (or infamous) ''Proposition 8''—an effort to amend the state constitution to ban same-sex marriage. Broadly speaking, the question in *Perry* is whether a state's ban on same-sex marriage is unconstitutional.

But there's a wrinkle. Prop 8 seeks to ban same-sex marriage *after* the California Supreme Court had previously recognized the right of same-sex couples to marry—and an estimated 18,000 same-sex couples were legally married during that window of time between the California Supreme Court's decision and the passage of Prop 8. In effect, Prop 8 seeks to withdraw a right that had been previously recognized, and to nullify those once-legal marriages. A much narrower question in *Perry*, then, is whether it is okay for a state to recognize a right only to shortly thereafter take it away.

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In other words, if the U.S. Supreme Court wants to avoid making any major pronouncement on the constitutionality of state laws that ban same-sex marriage, then the Court can simply focus on the narrower question. This would mean the Court's decision in *Perry* would apply only to California—and prospectively to other states that might try to do what California did. Thus, the Court could hold that California's Prop 8 ban on same-sex marriage is unconstitutional, but this would *not* mean that every other state ban on same-sex marriage is unconstitutional. The marriage bans in other states would be left standing. Many people suspect that this is the route that the Court is likely to take.

(The so-called ''eight-state solution,'' advocated by the Obama administration in its amicus brief in the *Perry* case, would go a little further. Under this ap-

[1] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (80 U.S.L.W. 1070), *reh'g en banc denied*, 681 F.3d 1065 (80 U.S.L.W. 1710), *cert. granted*, Hollingsworth v. Perry, 81 U.S.L.W. 3324 (U.S. Dec. 7, 2012) (No. 12-144).

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proach, the Court could rule that it is unconstitutional for the eight states, including California, that offer all the rights and protections of marriage—through civil unions, etc.—to refuse to allow actual marriages, because it creates an impermissible ''separate but equal'' status for same-sex couples. But this approach still stops short of recognizing a federal right to marry, and would leave standing the bans on same-sex marriage in other states.)

The second case the Court will consider is *United States v. Windsor*,[2] which arose in New York and involves a woman whose same-sex partner died. Edie Windsor was required to pay $363,000 in federal estate taxes because her same-sex marriage—legally recognized under New York law—is not legally recognized under Section 3 of the Defense of Marriage Act. Section 3 of DOMA defines ''marriage'' for the purposes of federal law as ''only a legal union between one man and one woman.'' Had Edie been married to a man, she would have been required to pay nothing in estate taxes. So the question in *Windsor* is whether it is constitutional for federal law to treat Edie differently just because her marriage was to a woman instead of to a man.

Both *Perry* and *Windsor* involve some procedural questions about standing, too, but substantively they are about equal protection. *Windsor* falls under the Fifth Amendment's guarantee of equal protection, asking whether federal law can treat same-sex and opposite-sex couples differently; and *Perry* falls under the Fourteenth Amendment's guarantee of equal protection, asking whether state law can treat same-sex and opposite-sex couples differently.

But this article isn't about *Perry* or *Windsor*, because neither *Perry* nor *Windsor* is likely to say anything about what is rapidly becoming one of the biggest problems facing same-sex couples nationwide. The problem is this: How should same-sex couples who are legally married in one state be treated when they move to another state that refuses to legally recognize same-sex marriage?

Or, for example: Can Texas refuse to recognize the validity of a same-sex marriage that was legally created in Massachusetts?

Moving a Marriage

The question whether Texas has to recognize a Massachusetts marriage is ostensibly answered by Section 2 of DOMA. Section 2 says, in sum, that no state is required to ''give effect'' to a same-sex marriage created under the laws of another state. And many states, like Texas, have enacted ''mini DOMAs''—state statutes that explicitly refuse to recognize same-sex marriages that were legally created in other states. These laws raise obvious legal questions. But Section 2 of DOMA and its offspring are not at issue in *Perry* or *Windsor*, so the Supreme Court isn't likely to provide answers to this growing problem anytime soon.

(Actually, the Supreme Court *could* answer this problem this term, if it were to address the broad question in *Perry* by declaring unconstitutional all state laws banning same-sex marriage. But as noted, this seems unlikely, given the escape hatch that enables the Court to avoid such a broad pronouncement either by ruling only on the constitutionality of Prop 8 in California, or by following the Obama administration's eight-state solution. So it seems the Section 2 problem will remain.)

Why are Section 2 and its progeny a growing problem? Because nine states and the District of Columbia have now legalized same-sex marriage, and others (like Rhode Island, Illinois, and New Jersey) have been moving in that direction. Already an estimated 75,000 same-sex couples have been legally married—a number that will only increase over time. And these same-sex couples, like other couples, have a tendency to move.

So, for example, if a couple is legally married in Massachusetts and lives and works and builds a household as a legally married couple for two, nine, or 27 years—and then that couple relocates to Texas for a job promotion or to be closer to family, or to retire, or for whatever reason—then according to Section 2 of DOMA and under Texas state law, that couple's legal marriage (and all the legal rights and protections that go with it) evaporates the minute the couple crosses the border.

This is not a crazy law school hypothetical. It's reality. Two cases—*In the Matter of the Marriage of J.B. and H.B.* and *Texas v. Naylor*—involve scenarios that look something like the one described. *J.B.* and *Naylor* have been pending before the Texas Supreme Court for more than a year.[3] (One of the co-authors is co-counsel in these cases.) And in each case, a same-sex couple was legally married in Massachusetts, came to Texas, then later—like roughly 50 percent of all married couples—sought a divorce. But in each case the State of Texas intervened to prevent the divorce from being granted, arguing that no divorce is possible because under Texas law the marriage never existed.

In each case the couple has argued that same-sex marriage laws (and their constitutionality) are irrelevant, because those laws are about *getting married* and these cases are about *getting divorced*—and the couples have contended that ''divorce is different.'' But Texas disagrees. Granting a divorce would be ''giving effect'' to the marriage, says Texas. And under Section 2 of DOMA and Texas's own ''mini DOMA,'' Texas doesn't have to do that. Thus, the constitutionality of Section 2 and its state-law counterparts comes into play.

Predictably, both sides make arguments about equal protection that sound a lot like the arguments made in *Perry* and *Windsor*. But in *J.B.* and *Naylor* there are other constitutional questions that will never come up in the cases that are currently before the U.S. Supreme Court. Questions about national identity and what it means to be a union of 50 individual states. And questions about a fundamental constitutional right that we don't hear about very often. Everyone knows about equal protection. But rarely do we hear about the individual right to migrate uninhibited from one state to another—or what is more commonly known as the individual right to travel.

[2] United States v. Windsor, 699 F.3d 169 (2d Cir. 2012) (81 U.S.L.W. 568), *cert. granted*, 81 U.S.L.W. 3324 (U.S. Dec. 7, 2012) (No. 12-307).

[3] In the Matter of the Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. Ct. App. 5th Dist. 2010), *petition for review filed*, (Tex. Sup. Ct. 2011) (No. 11-0024); Texas v. Naylor, (Tex. Ct. App. 3rd Dist. 2011), *petition for review filed*, (Tex. Sup. Ct. 2011) (No. 11-0114).

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The Right to Travel

In 1866, a Virginia resident named Samuel Paul was appointed the agent of several New York insurance companies. In accordance with Virginia law, Paul made the necessary filings and applied for an agent's license. But Virginia law also required out-of-state insurance companies to make a ''deposit of bonds'' with the state treasurer—which Paul failed to make—so his license was denied. Paul nonetheless acted as an insurance agent in Virginia and issued New York insurance policies to Virginia residents. For this, Paul was indicted and convicted, and sentenced to pay a fine of $50.[4]

Paul appealed his case all the way to the U.S. Supreme Court, arguing that the Virginia law regarding out-of-state insurance companies and their in-state agents violated the Privileges and Immunities Clause of the U.S. Constitution, which states that ''the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.''[5] The argument was that, under this constitutional provision, Virginia could not treat a New York insurance company differently from a Virginia insurance company.

The Supreme Court disagreed. The Court held that corporations were not ''citizens'' within the meaning of the Privileges and Immunities Clause; therefore, Virginia's law imposing special burdens on out-of-state insurance companies and their agents was not unconstitutional.[6]

Along the way, however, the Court opined on what the Privileges and Immunities Clause means for those who *are* actual citizens. In doing so, the Court articulated what would later come to be known as the right to travel.

''It was undoubtedly the object of the clause in question,'' said the Court, ''to place citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'' The Privileges and Immunities Clause ''relieves [citizens] from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.''[7]

The Court then went on to emphasize the great national importance of the Privileges and Immunities Clause, declaring that ''no provision in the Constitution has tended so strongly to constitute the citizens of the United States [as] one people.'' The Court continued: ''without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.''[8]

The Court's decision in *Paul v. Virginia* was announced in 1869, and the case involved a Yankee insurance company trying to do business in the former capital of the Confederacy. The Court's emphasis on ''the Union'' and on the importance of constituting the citizens of the United States as ''one people'' was not casual or accidental. According to the Court, the purpose of the Privileges and Immunities Clause was to reduce and suppress the differences between the ''several States,'' and to bring Americans together equally as a nation.

And according to the Court, the Clause does this, in part, by providing a constitutional right to travel—or, more precisely, a right to migrate from one state to another, without penalty.

The Clause itself does not explicitly mention a ''right to travel'' or a ''right to migrate,'' of course. But the Articles of Confederation—the precursor to the U.S. Constitution—did. Article IV of the Articles of Confederation provides that ''the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof.'' Article IV of the Articles of Confederation also explicitly protects migrants against any restriction that would prevent them from bringing their property with them when they migrated.[9]

Sound familiar? When one compares the Supreme Court's interpretation of the Privileges and Immunities Clause in *Paul v. Virginia* with Article IV of the Articles of Confederation, it is obvious the Court relied directly on Article IV as the basis for its interpretation. And more recently, in 1999, the Court acknowledged that the right to travel or migrate ''was expressly mentioned in the text of the Articles of Confederation,'' and that it ''may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created''[10]—suggesting that the right was perhaps so obvious and fundamental in the eyes of the Founders as to not need mentioning in the new constitution they were creating.

Incidentally, *Paul v. Virginia* was not the first case in which the Supreme Court addressed the right to travel. In 1865, Nevada sought to take advantage of its position between California and the rest of the nation by imposing a tax on railroad and stage coach companies, for every passenger carried through the state. But the Court—in another post-Civil War decision that preceded *Paul* by two years—said, ''We are all citizens of the United States, and as members of the same community must have a right to pass and repass through every part of it without interruption, as freely as in our own states.''[11] The power to impose a tax on those who enter a state's territory ''could produce nothing but discord and mutual irritation,'' said the Court—and the states ''very clearly do not possess'' such power.[12] In short, people have a right to move from one part of the country to another, uninhibited.

Since the 1860s, this right to travel has been developed and expounded upon by the Court many times. In 1958 the Court said that the ''freedom of movement'' is ''deeply engrained in our history'' and ''part of our heritage,'' and that the right to travel dates back to the

[4] Paul v. Virginia, 75 U.S. 168, 169 (1869).
[5] U.S. Const. Art. IV, § 2.
[6] 75 U.S. at 178-180, 185.
[7] *Id.* at 180.
[8] *Id.*
[9] Art. of Confed., Art. IV.
[10] Saenz v. Roe, 526 U.S. 489, 501 (1999).
[11] Crandall v. State of Nevada, 73 U.S. 35, 49 (1867).
[12] *Id.*

Magna Carta.[13] Temporary travel or permanent migration ''may be necessary for a livelihood. It may be as close to the heart of an individual as the choice of what he eats, or wears, or reads.'' In fact, in discussing the many reasons for travel or migration that are ''close to the core of personal life,'' the Court even identified ''marriage'' as one of them.[14]

In 1970, James Blumstein moved to Tennessee to take a position as an assistant professor at Vanderbilt University, and when he discovered that Tennessee law required him to have state residency of at least one year before he could register to vote, he sued. The Supreme Court affirmed that the Tennessee law violated not only Blumstein's right to equal protection and his right to vote, but also his fundamental right ''to enter and abide in any State in the Union.'' The residency requirement was unconstitutional, said the Court, because it penalized those who had exercised their right to migrate.[15]

In fact, the Court has determined that the right to travel is so fundamental that in 1969 it held that any law serving to ''penalize the exercise of that right'' is subject to the strictest scrutiny, and can be justified only if it is necessary to serve a compelling government interest.[16]

''In determining whether a law infringes on the right to travel, the Court does not have to determine whether the class of people affected by the law constitutes a 'suspect class'—because the class of people affected by the law is simply those who have exercised their right to travel.''

Significantly, this strict scrutiny required under the right to travel is different from that which is required under equal protection. The big question in equal-protection cases involving same-sex marriage (like *Perry* and *Windsor*) is whether gays and lesbians constitute a ''suspect class.'' If they do, then laws affecting them deserve the same strict or heightened scrutiny as laws that affect other such classes—like those based on race or gender, for example. The core argument put forward by the proponents of Prop 8 in *Perry*, and by the defenders of DOMA in *Windsor*, is that the Court should decline to recognize gays and lesbians as a specially protected class because homosexuality is not the same as race. And under the right to equal protection, if the targeted class is not specially protected, then strict scrutiny does not apply. Instead, the Court asks merely whether there is a rational basis for the law, making it much more likely that the law will be upheld as constitutional.

But this is not how it works, where the right to travel is concerned. In determining whether a law infringes on the right to travel, the Court does not have to determine whether the class of people affected by the law constitutes a ''suspect class''—because the class of people affected by the law is simply those who have exercised their right to travel. The only question is whether the law at issue *penalizes* those who have exercised that right. As the Court put it in the Blumstein case, the right to migrate from one state to another is ''an *unconditional* personal right,'' and ''a State may not impose a penalty upon those who exercise [that] right.''[17]

In 1974 the Court further clarified that the law in question does not have to intentionally target those who have exercised their right to migrate, nor does it have to actually impede migration. Where a law simply ''operates to penalize those persons who have exercised their constitutional right of interstate migration, [that law] must be justified by a compelling state interest.''[18] In short: if the law in question has the effect of penalizing migrants, then it is subject to strict scrutiny.

Moving a Marriage, Part 2

Marriage, as we all know, provides a number of legal protections—not the least of which is a set of property rights. Typically, when a legally married couple moves from one state to another, the parties to that marriage stay married and they retain their individual claims to marital property. In other words, the move from one state to another doesn't really change anything.

This is in keeping with constitutional principles. Going back to the Articles of Confederation, and to the Supreme Court's earliest interpretations of the Privileges and Immunities Clause, a key purpose of the right to travel is the protection of a migrant's property. To wit: a state cannot enact a law that would penalize migrants by depriving them of their property. In other words, moving from one state to another *shouldn't* really change anything, when it comes to an individual's property rights.

But doesn't a state law that refuses to recognize a legal marriage from another state—and thereby refuses to recognize individual claims to marital property—effectively deprive those individuals of their property as a result of their migration? Put another way: Doesn't a state law refusing to recognize a migrant couple's marital property rights violate the couple's right to migrate?

Moreover, marriage is not only about property; it is also a legal status. To many, the formal status and the ability to say ''we are married'' is the most important aspect of being married. Setting aside all property issues, a law that refuses to recognize a legal marriage from another state literally strips those who were legally married of their marital status—it strips them of their cherished ability to declare ''we are married''—and it does so only by reason of the couple's decision to relocate. Isn't it fair to say that such a law ''operates to penalize those persons who have exercised their constitutional right of interstate migration''?[19]

To be sure, there are counterarguments to be made. In *Paul v. Virginia*, after interpreting the Privileges and Immunities Clause as protecting the right to migrate from one state to another, the Supreme Court clarified that the Clause secures for migrants from another state

[13] Kent v. Dulles, 357 U.S. 116, 125-126 (1958).
[14] *Id.* at 126.
[15] Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972).
[16] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
[17] *Id.* at 340-341 (emphasis in original).
[18] Memorial Hospital v. Maricopa County, 415 U.S. 250, 258 (1974).
[19] *See id.*

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only ''those privileges and immunities which are common to the citizens in the latter States under their constitution and laws.'' According to the Court, the provision does not ''give to the laws of one State any operation in other States.'' [20]

In other words, the State of Texas can argue that, because its own citizens do not have the right to same-sex marriage under Texas law, no migrant to Texas can claim a right to same-sex marriage just because it was legal in, say, Massachusetts. The migrant to Texas has only the same rights as any other Texas resident.

But this counterargument glosses over a key factor in the equation. True enough, under Texas law Texas residents currently cannot *enter into* a same-sex marriage in Texas. And no migrant to Texas from a state like Massachusetts could ever claim a right to *enter into* a same-sex marriage in Texas, just because they had that right in Massachusetts—because that would impermissibly give the law of Massachusetts operation in Texas.

But the migrant from Massachusetts who is *already legally married* is not asking to enter into a same-sex marriage in Texas. Instead, in both *J.B.* and *Naylor*, for example, the couples who migrated to Texas are seeking a divorce. And under Texas law, Texas residents who are already legally married are entitled to a divorce. Thus, a same-sex couple already legally married in Massachusetts, that now resides in Texas and wants a divorce, is not asking for anything an already-legally-married Texas resident couple cannot get.

Put another way: this married couple had a right to divorce in Massachusetts, before they migrated, and Texas residents also have a right to divorce. By denying this migrant couple the right to divorce that they previously enjoyed, and which Texas residents otherwise typically enjoy, doesn't Texas law penalize legally married same-sex couples for their migration?

And can't the same be said for Section 2 of DOMA, which indirectly penalizes legally married same-sex couples who migrate from one state to another by providing legal ''cover'' to those states that want to strip those couples of their marital status and of their claims to marital property—and of their right to divorce?

Possible Futures

Again, there are counterarguments to be made. There always are. The Texas Supreme Court is currently facing these arguments and counterarguments in *J.B.* and *Naylor*. Most likely, however, the Texas Supreme Court will wait, like the rest of the nation, to what the U.S. Supreme Court decides in *Perry* and *Windsor*, before it makes any decisions in *J.B.* or *Naylor*. There's always the possibility, after all, that the U.S. Supreme Court could transform *J.B.* and *Naylor* into easy cases by declaring all laws banning same-sex marriage to be unconstitutional.

But consider the following possible future.

After the dust settles in *Perry* and *Windsor*, states could retain their ability to disallow the creation of same-sex marriages within their own jurisdiction. That is, the Court could strike down California's Prop 8 in *Perry*, for trying to take away a right that had been previously granted; and the Court could hold that Section 3 of DOMA is unconstitutional in *Windsor*, for treating legally married couples in different states differently under federal law. Yet, even after these significant and historic victories for same-sex couples, same-sex marriage could remain illegal in more than 30 states. In fact, it's quite possible that the more conservative members of the Court will go out of their way (in a concurring opinion, for example) to say that, as long as they don't offer ''separate but equal'' civil unions, or try to provide the right and then take it away, individual states still have the power to ban same-sex marriages.

''[A] same-sex couple already legally married in Massachusetts, that now resides in Texas and wants a divorce, is not asking for anything an already-legally-married Texas resident couple cannot get.''

Then later, in a case like *J.B.* or *Naylor*, the Court could hold that, while states are able to ban the creation of same-sex marriage within their own jurisdiction, they cannot refuse to recognize the validity of a same-sex marriage legally created in another state, because to do so impermissibly penalizes the same-sex couple for exercising its fundamental right to migrate.

In this possible future, same-sex couples in Texas would still be denied the right to marry in Texas, while other same-sex couples in Texas—who married elsewhere before migrating—would be recognized as legally married. Could Texas residents simply travel to another state to get married, then return and force Texas to recognize their marriage? Can states like Texas effectively *force* same-sex couples to leave the state to get married? (How does that jibe with the right to travel—does the right to travel include a right to not be forced into traveling?) And if Texas is treating resident same-sex couples differently from migrant same-sex couples, wouldn't we be facing some of those arguments about equal protection all over again?

Consider the absurd possible future where every state is required to recognize the validity of same-sex marriages from another state—but *not* required to actually provide valid same-sex marriages of their own.

Maybe, in the end, this article is about *Perry* and *Windsor* after all. Just think: the Court, in *Windsor*, could declare that the federal definition of marriage in Section 3 of DOMA is impermissibly discriminatory. Then, in *Perry*, the Court could address the broader question, and could declare as unconstitutional any state law that uses this discriminatory definition to forbid same-sex marriage. In this possible future, a few short months from now our national debate over same-sex marriage would be over. The era of legal discrimination against same-sex couples would be ended.

[20] 75 U.S. at 180.