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Victor C. Romero
Penn State Law

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Crossing Borders: *Loving v. Virginia* as a Story of Migration

**VICTOR C. ROMERO**

**INTRODUCTION: BARRIERS TO BINATIONAL SAME-GENDER MARRIAGES AND THE PARALLELS TO LOVING**

A. Lessons from an Exam Hypothetical: The Case of Maria and Jacoba

While a visiting professor at the Howard University School of Law in 2005-06, I gave the following hypothetical to my Constitutional Law II class as part of their final exam:

United States citizen Maria Camacho and Dutch foreign student Jacoba Mondriaan met and fell in love while classmates at Dickinson College. Jacoba was attending college on a temporary student visa, a federal government endorsement on her Dutch passport that permitted her to remain in the U.S. until she acquired her four-year bachelor's degree. They planned to wed after graduation and would have preferred to be married in Pennsylvania because most of their mutual friends were from college and Maria's family lived in Reading, Pennsylvania. Because Pennsylvania does not recognize same-gender marriages while the Netherlands does, Maria and Jacoba chose to marry in Amsterdam in a beautiful ceremony attended by both of their families.

Jacobian and Maria understood that while individual states typically regulate marriage, immigration policy is a federal matter left to
Congressional legislation (which reflects the Constitution's Article I mandate that Congress "establish an [sic] uniform Rule of Naturalization"1 and "regulate Commerce with foreign Nations"2). Aside from the fact that Pennsylvania does not recognize same-gender marriages, federal law does not confer benefits upon same-gender partners under Congress's Defense of Marriage Act of 1996 (DOMA)3, which limits the definition of "marriage" to heterosexual unions, to preserve the rights of states, most of which, like Pennsylvania, grant no affirmative legal rights to gay couples. Thus, after their Dutch wedding, Jacoba could not formally immigrate to the U.S. as Maria's spouse because DOMA limits family immigration to heterosexual married couples only.

Nevertheless, prior to graduating and her foreign student visa expiring, Jacoba had secured an offer of employment from a prominent engineering firm, which was willing to sponsor her immigration to the U.S. She returned to Philadelphia from Amsterdam not on a "family-based" visa (since U.S. immigration law would likely not recognize her as Maria's spouse), but on a temporary "employment-based" visa4 (since she had a position with the engineering firm). Even though she possessed a temporary visa only, Jacoba was assured by the engineering firm that it believed she would do splendidly and fully expected that after a short probationary period she would be offered a permanent position facilitated by the firm's petition that she be granted a "green card," indicating her lawful permanent residence in the U.S.5 Their futures apparently secure, Maria and Jacoba settled into a quiet townhouse in Philadelphia, looking forward to many years of marital bliss.

Unfortunately, because of the economic downturn caused in part by the September 11, 2001 terrorist attacks, the engineering firm decided not to extend her an offer of permanent employment, nor did they petition for her "green card." Before her temporary visa expired, Jacoba tried to secure other employment, but to no avail. Jacoba also considered applying for a foreign student visa6 to attend graduate school, but she and Maria had to rely on both of

2. U.S. Const., art. I, § 8, cl. 3.
5. A "lawful permanent resident" is a noncitizen allowed to reside in the U.S. permanently, and is the status that one possesses before becoming a naturalized U.S. citizen. See INA § 101(a)(20), 8 U.S.C. § 1101(a)(20).
their incomes to pay off their hefty private school loans from Dickinson College, so this was not a viable strategy.

Fearful that the federal U.S. Immigration and Customs Enforcement ("ICE")\(^7\) – the immigration enforcement arm of the executive branch – might deport Jacoba to Holland, Jacoba and Maria filed a petition to have the ICE recognize their Dutch marriage as valid, thereby allowing Jacoba to remain in the U.S. as Maria’s spouse. The ICE denied the petition citing DOMA, and it informed the couple that it intended to initiate proceedings to deport Jacoba once her temporary work visa expired.

A desperate Jacoba and Maria filed for injunctive and declaratory relief in federal district court challenging the ICE’s denial of their petition based on DOMA. Specifically, they asserted that DOMA’s limitation of “marriage” to heterosexual unions violated their substantive due process rights under the Fifth Amendment.\(^8\)

In their answer, I hoped the students would draw an analogy to *Loving v. Virginia*,\(^9\) the landmark case outlawing state antimiscegenation laws as unconstitutional under the Fourteenth Amendment’s Due Process and Equal Protection Clauses, and whose fortieth anniversary the *Howard Law Journal* has wisely sought to celebrate. The Due Process argument contends that marriage is a fundamental, constitutionally-protected right, and that *Loving* disallowed any state from preventing marriage between consenting adults of different races; analogously, same-gender couples should benefit under this broad conception of marriage, too. Nothing in *Loving* limits its application to heterosexual couples only. The equal protection argument proceeds similarly: sexual orientation, like race, is an invidious, arbitrary way of limiting the benefits of a state-sanctioned marriage.

B. Lessons from Reality: Restrictions on Free Movement Now and Then

For those who have followed the national debate on same-gender marriage, the preceding arguments may be familiar, but the one wrinkle that I add to the mix (and that I hope my better students latch on to) is the migration issue, which forces us to consider not just state laws and current cultural norms, but international and federal law as

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\(^7\) See generally Immigration and Customs Home Page, http://www.ice.gov/, for more information about Immigration and Customs Enforcement.


\(^9\) 388 U.S. 1 (1967).
well. Note that in my hypothetical, Maria and Jacoba are from different countries, which thus brings into play not only Pennsylvania's laws regarding marriage, but also the Netherlands' laws permitting same-gender marriage, the federal DOMA, and Immigration and Nationality Act (INA) as well.

This admixture of state, federal, and international legal norms is particularly interesting in light of Loving not just theoretically, but also because, sadly, many binational same-gender couples in the U.S. experience similar dilemmas today. In May 2004, the Los Angeles Times reported a surge in travel to Massachusetts by many gay and lesbian couples, hoping to capitalize on that state's monumental decision to be the first to recognize same-gender marriages. At least one couple chose not to participate in the mass nuptials: American Austin Naughton and his partner of many years, a Spanish national here on a non-immigrant visa, decided not to wed for fear that this act would signal an intent to permanently reside in the U.S., which would be forbidden under his visitor status. As Naughton put it, "If we marry, he could be deported." Like Naughton, U.S. citizen Richard Adams has a partner who is also a foreign national. Unlike Naughton's partner, Australian Tony Sullivan's visa has long since expired, and so, Adams and Sullivan are "fugitives" from the ICE, keeping a low profile, living quietly somewhere in the United States. Over twenty years ago, Adams and Sullivan sued the immigration bureau at the time, the Immigration and Naturalization Service (INS), arguing that their receipt of a marriage license in Colorado allowed Adams to petition for Sullivan's "immediate relative" status as his "spouse." The Ninth Circuit in Adams v. Howerton ruled that while the Immigration and Nationality Act (INA) did not define the term "spouse," the INS's decision to limit its reach to heterosexual relationships was ra-

10. Elizabeth Mehren, Massachusetts Begins Allowing Gays to Wed, L.A. TIMES, May 17, 2004, at A10. Currently, there is a strong movement within the state to amend its constitution to restrict marriages to heterosexuals only.
11. Id. More recently, the Supreme Judicial Court of Massachusetts barred non-resident same-gender partners from marrying in the state if their home states expressly prohibited such marriages. Cote-Whitacre v. Dept. of Pub. Health, 844 N.E.2d 623 (Mass. 2006). Hence, if Maria and Jacoba, for example, had been U.S. citizens and residents of Arkansas, which recently passed a constitutional amendment restricting marriage to heterosexuals only, the Cote-Whitacre ruling provides that they would not have been allowed to marry in Massachusetts.
13. 673 F.2d 1036 (9th Cir. 1982). In basing its decision solely on the text of the INA, the Ninth Circuit did not reach the question of whether the couple's marriage was valid under state law. Id. at 1038-39.
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tional. (It is worth noting that, in its original denial of Adams’s petition, the INS stated: “You have failed to establish that a bona fide marital relationship can exist between two faggots.”)\(^{14}\) As a consequence, Adams and Sullivan have never been able to fully receive the blessings of liberty that other American couples enjoy. Sullivan attributes their present financial difficulties to his “outlaw” status: “We would probably own our own home. We both love to travel. We would have been able to travel. I would have been a professional of some kind.”\(^{15}\) In sum, the hardships that Adams and Sullivan faced beginning in the 1980s, and those endured by Naughton and his partner today, parallel the struggles of Mildred and Richard Loving during the heyday of the Civil Rights Movement — not only in the obvious parallels between race and sexual orientation as barriers to freedom, but also in the way the law uses these immutable characteristics to limit the freedom of movement.

C. *Loving* The Freedom of Movement: Physical, Legal, and Cultural Migration

It is this freedom of movement — this migration or immigration — that I want to focus on in this essay. Lest we forget, the Lovings’ story is, importantly, a story of migration: It’s a story of the great lengths to which an interracial couple would travel — physically, culturally, and legally — to win justice and equality.

The facts of *Loving v. Virginia* are familiar to most and deserve only a brief recitation here to highlight this theme of movement and travel. Mildred Jeter, a black woman, and Richard Perry Loving, a white man, were residents of Virginia who had traveled to nearby Washington, D.C., in 1958 so that they could marry. At the time, Virginia, like many southern states,\(^ {16}\) banned intermarriages between whites and nonwhites, and made it a crime to travel to another jurisdiction to evade the ban. And so, when the Lovings returned to Caroline County, Virginia, they were promptly arrested for violating the antimiscegenation laws. The Lovings pled guilty and their one-year sentence was suspended for twenty-five years on the condition that

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14. ROMERO, supra note 12, at 153-54.
16. At the time *Loving* was decided, Virginia was one of sixteen states that had antimiscegenation laws on their books. *Loving*, 388 U.S. at 6 n.5 (naming Virginia, Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia).
they leave the state and not return for twenty-five years. Having been effectively banished from home, the Lovings took up residence in Washington, D.C. It was from the place of their marriage that they began their assault on Virginia's, and fourteen other states', antimiscegenation laws, via a class action lawsuit.

Although they predictably lost their appeal within the Virginia appeals court system, the U.S. Supreme Court, Chief Justice Warren penning the opinion, found unanimously in their favor on both due process and equal protection grounds. Under the Due Process Clause, Warren wrote: "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." And pursuant to the Equal Protection Clause, the Court concluded: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race."

*Loving* therefore reveals the extent to which the Court affirmed the couple's desire for free physical, legal, and cultural movement – to break barriers erected by the law that restricted their physical movement (they could not live in Virginia, their home state), their legal movement (they could not legally wed within Virginia), and their cultural movement (they could not wed outside of their respective races). Forty years later, Richard Adams and Tony Sullivan, Austin Naughton and his unnamed Spanish partner, and yes, my hypothetical Maria Camacho and Jacoba Mondriaan, face similar physical, legal, and cultural restrictions on their movement because of their sexual orientation. Describing the current difficulties posed by his relationship with Richard Adams, Tony Sullivan aptly put it: "We would have been able to travel..."

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17. One wonders whether the trial judge thought that in twenty-five years' time, the remaining sixteen states that had antimiscegenation laws on their books would repeal them. He may not have suspected that it would take but a few years for the Supreme Court to outlaw all such rules in the case that he in fact presided over! More recently, the twenty-five year sunset period has come into vogue once again with former Justice O'Connor's pronouncement in *Grutter v. Bollinger* that she "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further" diversity in law school admissions. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).


19. *Id.* at 11-12.
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This essay will demonstrate how the Lovings’ story is, at bottom, a story of migration across physical, legal, and cultural barriers. It is a border-crossing story that parallels and provides support for the struggles of binational same-gender partners today. I will discuss each of the three aspects of movement I’ve identified above – the physical, legal, and cultural – starting with a brief discussion of physical migration in Part I below.

I. LOVING: BREAKING DOWN THE BARRIERS TO PHYSICAL MOVEMENT

Perhaps because it is most obvious, the parallel between the immigration struggles of binational same-gender partners today and the physical travel engaged in by the Lovings during the 1960s requires little further explication than what has already been established above. Stated plainly, just as the Lovings were limited in where they could move to and reside, Richard Adams and Tony Sullivan are similarly limited in their physical movement today. In fact, Adams and Sullivan are in the same position now that the Lovings found themselves in immediately after their D.C. marriage and their return to Virginia: living in the shadow of the law, fugitives unable to reside as others would in their communities.

Although a critic might respond that the law posed no physical restraint on either the Lovings or the Adams-Sullivans, the punitive nature of the then existing antimiscegenation law in Loving and the narrow reading of the INA in Adams v. Howerton serve as the functional equivalent of a physical obstacle. Indeed, in the Lovings’ case, their violation of Virginia’s law led to their incarceration, a palpable restriction on their freedom to move; similarly, should Sullivan’s whereabouts be discovered, his deportation to Australia would constitute his physical removal from the U.S. against his will. Put differently, the intangible wall of the law is as formidable a force as a tangible barrier, limiting these couples’ movements between jurisdictions in much the same way.

After considering this physical aspect of movement, it is the legal context of migration that will be explored in Part II. I will examine the ways in which U.S. immigration law operates to erect barriers to movement that parallel the hardships the Lovings endured under Virginia’s antimiscegenation statute, while simultaneously highlighting the differences that make these parallels unpersuasive to some. Spe-
specifically, I will argue how the Supreme Court’s deference to Congress’s plenary power within immigration law creates a limit on the extent to which Loving may serve as a vehicle to revisit Adams v. Howerton’s affirmation of a limited definition of “spouse” restricted to those in heterosexual relationships only.

Part III will round out this migration trilogy by exploring the ways in which the Court has addressed the cultural migration that has occurred within race and sexual orientation, looking specifically at recent key gay rights cases and how Loving v. Virginia may or may not provide a useful lens through which to view the question of binational same-gender marriages. While progress had been made on the issue of gay rights, as evidenced by the Court’s rulings in Romer v. Evans and Lawrence v. Texas, their most recent decision, Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), should give gay rights advocates pause, suggesting that race and sexual orientation may be doomed to follow separate, and hardly ever analogous, paths.

Finally, I will conclude this essay by arguing that perhaps the best solution to the dilemma of the binational same-gender partner lies not in the courts, but in Congress. The Uniting American Families Act of 2005 (UAFA) may be the second-best solution that, while it does not elevate same-gender partners to the same status as marriage, at least allows them the opportunity to cross that physical barrier – the barrier that separates Adams from Sullivan, just as land and sea separate the U.S. from Australia – allowing the couples to fight another day the larger battles over the broader recognition of same-gender relationships in all the states of the union.

II. LOVING AND IMMIGRATION: BREAKING DOWN THE BARRIERS TO LEGAL MOVEMENT

Apart from examining how the antimiscegenation laws effectively prevented the Lovings’ physical travel to and residence in Virginia, it is likewise important to understand how these state laws compare and

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23. H.R. 3006, 109th Cong. (2005). A similar bill was also introduced in the Senate, entitled the Permanent Partners Immigration Act of 2005, S. 1278, 109th Cong. (2005), which is an updated version of a bill originally introduced in 2003. In this essay, I will refer to the House title of the bill because I think it seeks to achieve what should be the goal of the legislation – to promote U.S. immigration policy’s goal of keeping families together.
contrast with the federal immigration statutes and regulations that limit the movement of foreign guests in our country.

Aside from their ability to restrict movement, Virginia’s antemiscegenation statute and current immigration laws are alike because both preclude couples from availing themselves of benefits bestowed upon similarly situated couples deemed to be validly married under the jurisdiction’s laws. Virginia’s ban on interracial marriages meant that the Lovings could not lawfully present themselves as a married couple for purposes of state income tax, inheritance, family, and insurance laws, among others, while white couples could. Similarly, even if their civil union was recognized by Colorado, Adams and Sullivan could not avail themselves of the myriad federal benefits that attach when a U.S. citizen is able to petition lawful permanent residence status for his spouse. One advocacy group estimates that over 1,100 federal and state benefits come with the legal status of marriage.\(^2\) Clearly, aside from the physical freedom to move, there are measurable, pecuniary benefits that come with expanding the legal borders of marriage and immigration law that were denied the Lovings because of their mixed-race status in 1967, and that continue to be denied to same-gender binational couples some forty years later.

Even as they work similar disabilities upon the couples, there are differences between the antemiscegenation laws at issue in Loving and the restrictive immigration laws at work today. First and foremost, they differ because one is a state law on marriage, while the other governs federal law on the movement of noncitizens between the U.S. and other nations. This basic difference has an impact on both the scope and status of the law in American jurisprudence.

As to scope, state marriage laws govern only their state’s residents – indeed, that is why the Lovings traveled to nearby Washington, D.C. They knew that the antemiscegenation laws of Virginia held no power over them in the District of Columbia. In contrast, because immigration laws are federal, they have a broader scope, reaching across all fifty states. Thus, even if Adams and Sullivan (or Naughton and his Spanish partner, more pointedly) got married in Massachusetts, Adams’s rights to petition the Australian Sullivan to immigrate

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derive solely from his being a U.S. citizen and are accordingly governed by one uniform, federal immigration law.

A law's status follows from its scope. As state laws, marriage laws are subject to the restrictions of the federal Constitution. While the Rehnquist Court did much to limit federal power vis-à-vis the sovereign states,25 it has long been recognized that the Constitution limits what states can do within their own jurisdictions. As Chief Justice Marshall declared in Marbury v. Madison, the Constitution is the "supreme law of the land,"26 and so, Loving can be properly understood as a case in which equality principles enshrined in the Constitution prohibited Virginia's marriage laws from treating U.S. citizens within its territory differently from others based solely on skin color. Federal immigration law, by contrast, enjoys a higher status than state law in American jurisprudence, not because it is superior to state marriage law,27 but because the Supreme Court has seen fit to defer to Congress in immigration matters, finding few constitutional bases for striking down otherwise discriminatory immigration regulation.

This second difference, the way in which the Supreme Court has treated state law matters less deferentially than immigration law under due process and equal protection analysis, is worth exploring in more detail. As explained more fully below, this difference ultimately persuades me to believe that the Supreme Court will likely not find Loving particularly useful as a tool for understanding immigration restrictions on binational same-gender relationships.

From Loving we learn that a state may not bless same-race marriages only because the U.S. Constitution forbids such racial discrimination against its citizens, even if they reside within that particular state. As Chief Justice Warren stated in his equal protection analysis, "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race."28 This statement has deep roots in an earlier 19th century opinion demonstrating the

25. During the mid-1990s, the Rehnquist Court began a curtailment of congressional power over intrastate activities, thereby limiting the reach of both Congress's Commerce Clause power and its Section 5 power under the Fourteenth Amendment. See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (limiting Commerce Clause power); City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting Section 5 power).
27. Indeed, the doctrine of dual federalism recognizes that the federal and state governments and their laws stand on equal footing, although both are inferior to the U.S. Constitution. See, e.g., Printz v. United States, 521 U.S. 898, 918 (1997) (discussing the doctrine of "dual sovereignty").
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Court's willingness to tamp down state-sanctioned racial discrimination, even if not facially obvious. In *Yick Wo v. Hopkins*, the Supreme Court used the Fourteenth Amendment's Equal Protection Clause to strike down a San Francisco ordinance that required all laundries to apply for an operating permit because the municipality clearly discriminated against all Chinese laundry operators even though the ordinance itself was facially neutral.\(^2^9\) Thus, *Loving* and *Yick Wo* teach us that the Court will not abide state-sponsored racial discrimination either in the writing or in the enforcement of a statute.

In immigration law, however, the Court has taken a different path, as demonstrated by a pair of cases decided around the same time as *Yick Wo*. In *Chae Chan Ping v. United States*\(^3^0\) and *Fong Yue Ting v. United States*,\(^3^1\) the Court held that, within immigration law, the Supreme Court must defer to the political branches of government because Congress, and not the Court, was in the best position to create a national policy on immigration. At first glance, this deference seems quite reasonable. The Constitution requires Congress to make a "uniform rule of Naturalization" and immigration rules - those that govern when noncitizens may enter and must leave the U.S. - are certainly a rational outgrowth of that power.

However, both the *Chae* and *Fong* cases grew out of a national policy of excluding Chinese immigrant workers born of xenophobia and economic nativism. In 1882, Congress passed the Chinese Exclusion Act, aimed at putting an end to Chinese immigration that had begun much earlier for the purpose of supplying cheap labor to build the railroads out west. The *Chae* and *Fong* cases examined the scope of Congress's power under the Act.

*Chae* involved a long-time resident of the U.S. who, learning he would be returning to China for a visit, obtained permission from the U.S. government to return. At port, Chae presented his credentials to the immigration authorities who, without hearing an adequate explanation, revoked them, excluding Chae from re-entering the U.S. The Supreme Court held that, as a sovereign nation, the United States held absolute authority to exclude any foreign citizen it wanted, and that this power resided in the political branches of the federal government. Chae and other noncitizens had no right to be in the United States, but instead only enjoyed a privilege that could be revoked at

\(^{29}\) Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).
\(^{30}\) 130 U.S. 581 (1889).
\(^{31}\) 149 U.S. 698 (1893).
will. Justice Field's opinion was replete with racial bias. After favorably describing America's magnanimity in allowing the Chinese to work in the U.S., Field lamented that "they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living." Field also referred to the immigrants as "vast hordes [of people] crowding in upon us."  

_Fong_ extended _Chae_ 's holding by ruling that Congress had plenary power to deport noncitizens, not to be second-guessed by the judiciary. Under the Chinese Deportation Act of 1892, Fong was required to establish that he was a resident of the U.S. by producing a credible white witness to affirm his claim; he was unable to do so and was ordered deported. Arguing that the white witness provision violated due process norms, Fong challenged his deportation, but was rebuffed by the Court. Citing _Chae_ extensively, Justice Gray had no trouble finding for the government:  

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.  

While _Loving_ and _Yick Wo_ affirm the Supreme Court's commitment to racial equality, _Chae_ and _Fong_, which have never been overruled, highlight the limits of that commitment within the context of immigration law. While it is true that in recent years, the Court has provided basic due process protections to noncitizens, at least one lower court has recently held that Arab-Muslim plaintiffs who claim they have been detained longer than others based solely on their race and religion may not pursue an equal protection claim for selective prosecution. As in _Chae_ and _Fong_, the court specifically cited the

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33. Id. at 606.
34. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).
federal political branches’ plenary power over immigration law to justify its dismissal of plaintiffs’ claim. \(^{37}\)

Because of the difference between the way our constitutional jurisprudence treats state laws from immigration laws, deferring to the second but not the first, binational same-gender partners will likely have a difficult time using *Loving* to curry favor with justices whose precedents dictate a political rather than a legal solution to the thorny issue of immigration law. \(^{38}\)

From the legal issues, in Part III we move to the cultural barriers that need to be overcome. Although marriage is certainly a legal status, I treat the issue of race and same-gender marriages as cultural phenomena, and indeed, we will shortly discover that the Supreme Court appears to do this as well, as exhibited by its unwillingness to appear to second-guess the dominant culture on issues involving sexual orientation. Instead, the Court has taken the rather safe route of couching certain same-gender issues as universal ones, much in the same way that the Warren Court did in *Loving* and throughout the civil rights years.

### III. *LOVING* AND MARRIAGE: BREAKING DOWN THE BARRIERS TO CULTURAL MOVEMENT

While the legal analysis in *Loving* focused mostly on the Equal Protection Clause, the Court threw in a brief discussion of the Due Process Clause for good measure:

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State’s citizens of liberty without due process of law. . . . Under our Constitution, the freedom to marry or not marry, a person of

\(^{37}\) Id. at 77-78.

\(^{38}\) While some courts have held that immigration rules burdening bona fide spousal relationships violate the constitutional right to marry, none have held that the immigration ban against same-gender marriages is itself unconstitutional. See, e.g., Manwani v. INS, 736 F. Supp. 1367 (W.D.N.C. 1990) (holding that INA’s mandatory two year residence requirement as applied to lawful spouses is unconstitutional). See also Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 99 n.6 (1996).
another race resides with the individual and cannot be infringed by the State.\textsuperscript{39}

The thrust of Warren’s due process opinion focuses on the right of all persons to marry as a basic, fundamental right that the U.S. Constitution protects. While his equal protection analysis focuses on the unequal treatment received by nonwhites and their partners, Warren’s due process analysis rests squarely on the idea that all persons in the United States have a right to marry, and that the decision whether to marry or not is an individual, human one, not to be interfered with by the state.

Unfortunately, while the promise of such due process analysis suggests that there are no rights that can be denied any person, and indeed, race has been firmly established as a line that states may not blithely cross, the Supreme Court has not been so bold in the context of gay rights, opting instead to find only a minimum quantum of rights that gay and lesbian persons enjoy and that government is required to respect – rights which heterosexuals take for granted. The Court’s decisions in \textit{Romer v. Evans} and \textit{Lawrence v. Texas} are but two examples of this approach.

At issue in \textit{Romer v. Evans} was the constitutionality of Amendment 2 to the Colorado Constitution, passed by voters ostensibly to deny “special rights” to those of homosexual or bisexual orientation. Responding to ordinances ensuring equal treatment for gays and lesbians passed in cities like Boulder and Aspen, opponents sought to prevent this trend by way of a state constitutional amendment. Interestingly, the lead-up to the referendum was tinged with racial rhetoric in which proponents of Amendment 2 compared gays and lesbians to white males, arguing that neither group required special protection from discrimination, and that Boulder and Aspen were wasting scarce resources that should be conserved to battle true discrimination against minorities and women.\textsuperscript{40} In the end, it appeared that Coloradans were uncertain about the scope of the proposal. While the measure passed by a slim 53.4 percent to 46.6 percent margin, exit polls conducted by the Denver Post revealed that most Coloradans would have favored antidiscrimination laws to protect gays and lesbians in housing and employment.\textsuperscript{41} Whether the Supreme Court was

\textsuperscript{39} \textit{Loving}, 388 U.S. at 12.

\textsuperscript{40} See \textsc{Evan Gerstmann}, \textsc{The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection} 99-105 (1999).

\textsuperscript{41} \textit{Id.} at 105.
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aware of this history when it voted is unclear, but the Justices struck down Amendment 2 by a 6-to-3 vote.

Relying on an Equal Protection Clause analysis, Justice Kennedy viewed the measure as a clear example of unconstitutional animus visited by a hostile majority upon a vulnerable underclass:

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.42

Although it would be tempting to read this case as a strong vote in favor of gay rights and against sexual orientation discrimination, one wonders whether the suit really was about a group's access to the political process. Unlike statutes or ordinances, a state constitutional amendment has a particular force that bypasses regular legislative processes and purports to convey fundamental ideals of its citizenry. If the Post's exit polls are to be believed and Coloradans actually favored some antidiscrimination laws for gays and lesbians, then maybe the Court's ruling was meant to remedy voter confusion by allowing them the opportunity not to be bound by a constitutional provision that did not accurately express their will. Put simply, Coloradans did not get what they thought they were voting for when they passed Amendment 2, and the Court's opinion in Romer corrected that error.

In Lawrence v. Texas, however, the Court made clear that Romer was primarily about animosity toward gays and lesbians rather than about access to the political process. Writing for the majority, Justice Kennedy cited Romer as one of two important cases that influenced his thinking about the constitutionality of anti-sodomy statutes directed against gays and lesbians.43 The majority struck down Texas's anti-sodomy law, finding that its terms criminalized conduct engaged in primarily by gays and lesbians. As such, it overruled its decision in

42. Romer, 517 U.S. at 632.
43. Lawrence, 539 U.S. at 574 ("The second post-Bowers case of principal relevance is Romer v. Evans. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. ... We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose.").
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Bowers v. Hardwick, finding that the Due Process Clause guaranteed a floor of liberty for all persons to engage in private, sexual conduct free from government interference: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right." In the majority's view, moral disapproval of same-gender sexual conduct is not enough to justify the state's penal encroachment on personal privacy.

While the Court affirmed its Romer commitment to protecting gays and lesbians from animus in Lawrence, the majority did not clearly set forth the limits of its holding, prompting both Justices O'Connor and Scalia to fill the gap. Justice O'Connor chose not to join Kennedy's majority opinion, relying solely on an equal protection analysis to conclude that the Texas statute bespoke animus against gays and lesbians. She did, however, make clear that the anti-sodomy law was irrational in a way that bans against same-sex marriage were not. The latter bans, she argued, were rational because they were meant to preserve "the traditional institution of marriage."

In dissent, Scalia ridiculed O'Connor's analysis, claiming that there was no rational way to distinguish the moral basis for approving heterosexual marriages from the moral disapproval of anti-sodomy laws:

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that 'preserving the traditional institution of marriage' is a legitimate state interest. But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in [its anti-sodomy law] could be recast in similarly euphemistic terms: 'preserving the traditional sexual mores of our society.' In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as 'preserving the traditions of society' (good); or invalidate them by characterizing them as 'expressing moral disapproval' (bad).

From Romer to Lawrence, then, we can discern a positive trend to provide greater protection for gay rights, despite the Court's reluctance to apply anything more than the traditional rational basis test to

44. 478 U.S. 186 (1986).
45. Lawrence, 539 U.S. at 574.
46. Id. at 585 (O'Connor, J., concurring).
47. Id. at 601-02 (Scalia, J., dissenting).

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strike down homophobic legislation. Because nothing in the Lawrence majority opinion specifically limits its holding to anti-sodomy laws, gay rights advocates may conclude that, like Scalia, the justices may come to embrace Loving as persuasive precedent for finally outlawing state bans on same-gender marriages. Returning to the idea of traversing cultural divides, gay rights advocates might actually take heart in the following words of Justice Scalia:

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. If Scalia is right, the day may not be far away when a majority of the Court may find that bans against same-gender marriage, like anti-sodomy laws and homophobic constitutional amendments, do not reflect the appropriate cultural norm. When that time comes, the Court will be able to make that cultural move, to travel that cultural divide, using Loving as its guide.

However, lest anyone is tempted to declare outright victory in the war against same-gender marriage bans, one needs to read carefully the Court's latest statement on gay rights, Rumsfeld v. FAIR, to conclude that any optimism growing out of Romer and Lawrence must be tempered with a dose of realpolitik. Decided in 2006, FAIR was a challenge to the notorious Solomon Amendment's requirement that law schools provide equal access to students for all employment recruiters, including the military, or else the schools would forfeit federal funding. The law schools sued, arguing that the law violated their free speech rights by forcing them to promote the military's less-than-favorable view of gays and lesbians (as embodied in their infamous "Don't ask, don't tell" policy), a view that was contrary to the law

48. Id. at 602 (Scalia, J., dissenting).
49. Policy concerning homosexuality in the armed forces:
   (b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
   (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
      (A) such conduct is a departure from the member's usual and customary behavior;
      (B) such conduct, under all the circumstances, is unlikely to recur;
      (C) such conduct was not accomplished by use of force, coercion, or intimidation;
schools’ beliefs, at the risk of forgoing federal funding. A unanimous Court sided with the government, ruling that the Solomon Amendment’s requirements did not violate the law schools’ free speech rights. At best, the law regulated conduct, not speech, by requiring the law schools to provide the military the same access to students as it did to other employers. If they disagreed with the government’s stand on gays and lesbians in the military, schools were free to express that view to their students.50

For our purposes, what may be most interesting is Chief Justice Roberts’s single reference to race in this case. Among other things, FAIR had argued that because law schools were forced to communicate military recruiters’ information via e-mail and flyer, the government was compelling them to speak in violation of the First Amendment. In rejecting this view, Roberts stated that such compulsion was merely an incidental infringement on speech pursuant to a valid regulation of the schools’ conduct. To illustrate, the majority opinion used an example of an anti-racial discrimination command: “Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”51 What is unclear is why this illustration does not work in the law schools’ favor in arguing for gay rights. If the law school has an acknowledged right to advocate against sexual orientation bias, why can’t it require the military to have to modify its conduct, by, for example, setting up temporary private recruitment facilities off campus? Under this interpretation, the military would still be free to advocate and enforce its “Don’t ask,
Loving v. Virginia as a Story of Migration

don’t tell” policy, but it may not use law school resources to promote that view.

In rejecting FAIR’s arguments, perhaps the Court is promoting two ideas, relevant to the difference between race and sexual orientation, on the one hand, and the difference between congressional and private power, on the other. First, the animating force behind Roberts’s analogy is that, culturally, society has come to accept racial equality as a given. Thus, it is no surprise that a federal government would properly be able to require employers not to discriminate against nonwhites. Our culture has already made the shift from Jim Crow to integration – in our migratory metaphor, it has already immigrated to a better place of racial equality. No such migration has fully taken place with respect to sexual orientation discrimination.  

Second, and evocative of our earlier discussion about Congress’s power over immigration law, the FAIR case highlights the divide the Court draws between public and private power. In assessing the Solomon Amendment, the Court cited Congress’s plenary power over the military, noting that, while Congress chose to regulate military recruiting at schools through the Spending Clause, similar deference should be accorded to the legislative decision on how to properly support the military.  

This deference to Congress in military affairs parallels the deference the Court affords Congress over immigration law. It is not surprising, then, that when a political body like Congress attempts to legislate for the good of the United States as a whole, it will adopt policies most in line with what it perceives its constituents want. In the context of military recruiting, Congress and the military have taken a rather conservative line with respect to balancing the desire of gays and lesbians to serve in the armed forces against the corps’ concern about perceived threats to morale and unit cohesion. Congress is no less conservative in immigration policy: At the margin, it is unwilling to recognize the ability of a lesbian U.S. citizen married in the

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52. Indeed, in the analogy to gay rights that I draw above, I make a weaker claim than that presented in the Roberts hypothetical: that the military may discriminate on the basis of sexual orientation, but may not use law school facilities to do so.

53. “Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress’ decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress’ choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.” FAIR, 126 S. Ct. at 1306.
Netherlands to petition her Dutch partner as a spouse for fear of running afoul of national policy. (It is no surprise that in 2006, the Senate voted on a proposed U.S. constitutional amendment to restrict marriage to a “husband” and “wife.”) From a conservative viewpoint, moreover, the deference granted to Congress in military and immigration matters springs from a common point – the concern over national security. Perhaps unintentionally, Justice O’Connor supported this point when she identified “national security” as a valid governmental interest while implicitly noting its absence in the *Lawrence* case.54

In sum, I am less sanguine after reading *FAIR* than I was after studying *Romer* or *Lawrence*. While I hope that the unanimous opinion in *FAIR* may be due to the Court’s commitment to a robust First Amendment right55 as well as its view that law schools were free to reject the federal funding the law threatened to withhold,56 I think that the underlying message for our issue of cultural migration across the boundaries of sexual orientation and immigration policy is quite negative. For *Loving* to be fully persuasive to judges committed to the cultural norm that race is categorically different from sexual orientation may be too much to ask. Put differently, this reading of *FAIR* supports the view that *Romer* and *Lawrence* were less about gay rights than they were about individual rights: that *Romer* was about ensuring that all persons had equal access to the political process, and that *Lawrence* was about preserving the privacy of all persons to engage in sexual relations within their homes. *FAIR*, therefore, becomes less about protecting gays and lesbians than it is about respecting Congressional deference to military recruiting practices and ensuring equal treatment for the military in its access to students.

To the extent that *FAIR* affirms the power of Congress, not only over military matters, but also over antidiscrimination initiatives (implicit in its reference to fair employment rules), and given what we

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54. *Lawrence*, 539 U.S. at 585 (“Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.”) (O’Connor, J., concurring).


56. I must confess that I have never clearly understood what constitutes a valid choice for an actor in any number of Supreme Court opinions, including the question of coercion in religious observances (see, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (finding coercive attendance at a public middle school graduation that featured a nondenominational prayer)) and in Tenth Amendment jurisprudence (see, e.g., Reno v. Condon, 528 U.S. 141 (2000) (finding that South Carolina was not coerced into enforcing a federal regulatory scheme, but was simply prohibited from sending private driver’s license information interstate)).
have learned about Congress’s concomitant power over immigration law, perhaps the (second-)best solution to the physical, legal, and cultural barriers to movement faced by binational same-gender couples today is via legislative action, and not by analogy to Loving. I will explore possible congressional action in the concluding section below.

CONCLUSION: LOBBYING CONGRESS, NOT THE COURTS: THE UNITING AMERICAN FAMILIES ACT

While I wish that the legal divide that makes Congress’s immigration power different from state power over marriage law (and while I would prefer that the cultural divide that still exists between race and sexual orientation) did not persist today, perhaps the most realistic approach at this point is to advocate for the bridging of the physical gap that separates binational same-gender partners. First introduced in 2000 by Congressman Jerrold Nadler of New York, the Uniting American Families Act (UAFA) of 200557 is the most recent House version of a bill designed to allow U.S. citizens and lawful permanent residents to petition their foreign same-gender partners to immigrate on the same grounds as heterosexual couples, except that these benefits will have no broader effect on state or federal laws referencing marriage. Although it will surely not bridge all the legal and cultural divides that treat same-gender marriages differently from heterosexual ones, the UAFA will eliminate the physical barrier that effectively separates foreign same-gender partners from their U.S.-based counterparts while also leveraging Congress’s plenary power over immigration to effect a significant, if incomplete, change to the immigration law so that same-gender partners, while not the same as marital spouses, may reap the same immigrant benefits.

As of this writing, congressional support for the bill is far from overwhelming: barely a fourth of the House has agreed to co-sponsor the bill, with barely a tenth of Senators providing similar support for the Senate version.58 This is not surprising, given the large number of other important issues in immigration law that Congress and the President have had to grapple with of late.

But my modest hope is that just as Loving v. Virginia captured the imagination of the nation forty years ago, that at some point in the

58. Updated information on the co-sponsorship of these bills is available from the Library of Congress’s THOMAS website, at http://thomas.loc.gov.

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not-too-distant future, the United States will recognize the injustice it visits upon binational same-gender partnerships today. Just like the Lovings, today’s couples – from Adams and Sullivan, to Naughton and his Spanish partner, to my (perhaps not so) hypothetical Maria Camacho and Jacoba Mondriaan – are being forced either to move, to migrate, to immigrate from their homes to other more hospitable lands, or to remain fugitives from the law in these United States. This is not a choice that they should be forced to make. In a country built on immigrants and the promise of family unity, the United States should see its way clear to taking steps to bring families together, not tear them apart.\(^5^9\) Let us not forget that the Lovings’ flight from Virginia was a migration, and that their victory in the U.S. Supreme Court was a victory over the physical, legal, and cultural barriers to uniting families separated by invidious governmental discrimination.

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\(^5^9\) See also Moore v. City of East Cleveland. 431 U.S. 494 (1977) (striking local housing ordinance as unduly burdening the family unit, one in which a grandmother lived with her two grandsons who were first cousins).