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The Unconstitutionality of State Bans on Marriage Between First Cousins

Rachel Frommer
Baker Botts LLP

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THE UNCONSTITUTIONALITY OF STATE BANS ON MARRIAGE BETWEEN FIRST COUSINS

Rachel Frommer†

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† Law Clerk, Baker Botts LLP.* J.D., Benjamin N. Cardozo School of Law. This Article has benefited from the insight and support of many individuals. Particular thanks to the *Cardozo Law Review de•novo* team of Volume 43, Professor Edward Stein, and my family and friends for their feedback and encouragement on this project from its inception. This Article is dedicated to those who continue to struggle against this country's discriminatory marriage fiats. **The views expressed in this Article are exclusively those of the author and do not necessarily reflect those of Baker Botts, its staff, or its clients.*

INTRODUCTION

Angie Peang and Michael Lee were happily joined in matrimony in Colorado.[1] But when they crossed the border into Utah, where they resided,[2] their union transformed into one that was "incestuous and void"[3]—for the spouses were first cousins.[4] While Colorado is one of nineteen jurisdictions that place no bar on marriage between first cousins, Utah is among the majority that prohibit or severely restrict such unions.[5] Utah not only strips the Peang-Lee marriage of legal recognition, but should the couple engage in sexual intercourse in their home state, they may be charged with a third-degree felony, punishable by up to five years

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1 Caitlin O'Kane, *First Cousins in Love with Each Other Petition to Get Legally Married in Utah*, CBS NEWS (Mar. 6, 2019, 11:44 AM), https://www.cbsnews.com/news/first-cousins-in-love-with-each-other-petition-to-get-legally-married-in-utah [https://perma.cc/68P6-JMV5].

2 *Id*.

3 UTAH CODE ANN. § 30-1-1(1)(e) (West 2021) ("The following marriages are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate: . . . marriages between first cousins . . . .").

4 O'Kane, *supra* note 1.

5 *See infra* Section I.B.

in prison and a $5,000 fine.[6] Utah does offer an exception to its bar on marriage for first-cousin couples who reach a statutory age of sixty-five, or who are at least fifty-five and can prove one partner's infertility to a district court's satisfaction.[7] However, for Peang and Lee, married many years before the age thresholds, these exceptions offered little comfort.[8] Indeed, the couple launched a campaign petitioning the Utah legislature to legalize their love.[9]

The Peang-Lees are not alone in their effort.[10] Since 1970, the unanimous recommendation of the National Conference of

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6 UTAH CODE ANN. §§ 30-1-1(1), 76-7-102 (West 2021) (making it a third-degree felony under the state incest statute for first cousins to engage in sexual intercourse); *Criminal Penalties*, UTAH CTS., https://www.utcourts.gov/howto/criminallaw/penalties.asp [https://perma.cc/VGF2-VMA2]. As of January 2020, the Peang-Lees were expecting their first child, increasing their risk of being charged under Utah's incest statute. Jane Ridley, *Meet the Kissing Cousins Who Could Face Prison for Having a Baby*, N.Y. POST (Jan. 8, 2020, 6:57 PM), https://nypost.com/2020/01/08/meet-the-kissing-cousins-who-could-face-prison-for-having-a-baby/?utm_campaign=iosapp [https://perma.cc/RU4A-GVJC].

7 The statute provides: "First cousins may marry under the following circumstances: (a) both parties are 65 years of age or older; or (b) if both parties are 55 years of age or older, upon a finding by the district court . . . that either party is unable to reproduce." § 30-1-1(2)(a)–(b). *See also* § 76-7-102 (state incest statute that functions as a companion to the marriage ban by making it a third-degree felony for first cousins to engage in sexual intercourse).

8 *See generally* Nate Carlisle, *Two First Cousins Are Upset They Couldn't Get Married in Utah. Here's What the Law Says*, SALT LAKE TRIB. (last updated Mar. 7, 2019, 9:04 PM), https://www.sltrib.com/news/politics/2019/03/07/two-first-cousins-love [https://perma.cc/6HU4-HJK6] (reporting that, at the time of marriage, Peang and Lee were thirty-eight and thirty-seven, respectively).

9 Angie Peang, *Allow First Cousins to Marry in Utah*, CARE2 PETITIONS, https://www.thepetitionsite.com/954/693/035/allow-first-cousins-to-marry-in-utah [https://perma.cc/8PCF-RAJ3] (seeking 2,000 signatures to urge the Utah legislature to overhaul its "outdated" laws).

10 *See, e.g.*, Morgon Mae Schultz, *Lawmaking Is a Little Like Test-Taking: A Day with Representative Phyllis Kahn*, WAKE, Jan. 26, 2005, at 4, 7, https://web.archive.org/web/20110717015436/http://www.wakemag.org/archive/20050125.pdf [https://perma.cc/QZF2-9WQZ] (reporting that a Minnesota state legislator was inspired to introduce a bill to repeal the state's cousin ban after learning of the popularity of the practice among minorities, including the Hmong and Somali populations). Meanwhile, Maryland legislators launched a failed attempt in 2000 to pass a law making it a misdemeanor for first cousins to marry in the state. While the law passed in the House with a vote of 82-46, H.D. 459, 2000 Leg., 414th Sess. (Md. 2000), some House members expressed concerns over the discriminatory tenor of the law and the mocking discussion of such relationships on the floor. Matthew Mosk, *Md. House Votes to Ban First-Cousin Marriages*, WASH. POST (Mar. 4, 2000), https://www.washingtonpost.com/archive/local/2000/03/04/md-house-votes-to-ban-first-cousin-marriages/2d37c4b4-ac23-4505-8151-5aa60eaeb0b3 [https://perma.cc/5YYF-L4UN]. The law ultimately died in the Senate. *See* MD. CODE ANN., FAM. LAW § 2-202 (West 2021) (showing first-cousin marriage remains excluded from the list of prohibited partners). *See generally* A.H. Bittles, *The Bases of Western Attitudes to Consanguineous Marriage*, 45 DEVELOPMENTAL MED. & CHILD NEUROLOGY 135, 137 (2003). Professor Bittles of the Murdoch University Centre for Comparative Genomics is the leading expert in the study of consanguineous marriage. *See, e.g.*, Camilla Stoltenberg, *Commentary: Of the Same Blood*, 38

Commissioners on Uniform State Laws has been for states to strike restrictions on first-cousin marriage.[11] The Model Penal Code incest statute excludes first cousins from the class of blood relatives between whom marriage, cohabitation, or sex ought to be criminalized.[12] The National Society of Genetic Counselors advised in 2002 that first-cousin couples be treated no differently than other partners for purposes of reproductive genetic testing and counseling.[13] Yet, none of this has sparked national change; instead, one state—Texas—codified a ban on first-cousin intercourse after these recommendations were made.[14] Meanwhile, a national activist organization has emerged to destigmatize first-cousin marriage, provide couples with community, and lobby for statutory change.[15]

This Article will examine the constitutionality of these stubborn prohibitions on first-cousin marriage in light of the fundamental right to marry as articulated by the Supreme Court in a series of decisions over the last century.[16] This Article will not rehash the discussion over the constitutionality of statutes governing intimacy between relatives writ large.[17] Rather, it will focus on first cousins as a discrete subcategory in the regulation of marriage and sex between blood relatives that has until

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INT'L J. EPIDEMIOLOGY 1442, 1443 (2009) (stating that in study of "the prevalence and medical consequences of consanguineous marriage . . . [Bittles] is the leading international authority within the field"). My analysis of the biogenetic justification for cousin bans relies heavily upon his research. *See infra* Section II.B.1.

11 79 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 1, 186–87 (1970) (striking first cousins from the model Uniform Marriage and Divorce Act to align with "the recent legislative trend toward permitting first cousin marriages").

12 MODEL PENAL CODE § 230.2 (AM. L. INST. 2019).

13 *See* Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97 (2002).

14 Jacob Sullum, *Not Tonight, Honey. It's a Felony*, REASON (Aug. 20, 2010, 1:35 PM), https://reason.com/2010/08/20/not-tonight-honey-its-a-felony [https://perma.cc/5BH6-DJ8G].

15 *In the Beginning*, COUSIN COUPLES, https://cousincouples.org/in-the-beginning [https://perma.cc/8X7J-5EYB]. The website was launched in 1998 by one half of a first-cousin couple in search for community. *Id.* The site has grown to include hundreds of cousin-couple members who exchange advice and discuss their relationships in the safety of the message board. *Id.*

16 For a detailed discussion of the fundamental right to marry, see *infra* Section I.C.

17 That question has already been taken up by a host of law review articles and student notes. *See, e.g.*, Andrew J. Pecoraro, Note, *Exploring the Boundaries of* Obergefell, 58 WM. & MARY L. REV. 2063 (2017); Y. Carson Zhou, *The Incest Horrible: Delimiting the* Lawrence v. Texas *Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187 (2016); Brett H. McDonnell, *Responses to* Lawrence v. Texas: *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337 (2004); Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257 (1984).

now been overlooked for independent analysis in legal scholarship, to the detriment of the equality and constitutional rights of cousin partners.[18]

Part I will introduce the history of first-cousin relationships and the national statutory landscape regarding first-cousin relations, to be referred to throughout as the "cousin bans." Part II will outline the constitutional right to marry, how this right works in conjunction with the states' significant role in regulating marriage, and the appropriate standard of judicial review applied to a right to marry challenge. Part III will analyze whether the leading policy justifications for the bans, namely the birth of biogenetically healthy children, protection of family harmony, and maintenance of social progress, overcome the constitutional test. Part IV will address two counterarguments: the first based on principles of federalism, the second rooted in the fear of the slippery slope. Finally, the Article will conclude the cousin bans are unconstitutional, discriminatory holdovers from a dark period in American history, and suggest first cousins' right to marry be taken up as the next battle in the fight for family law equality.

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[18] Analogously, prohibitions on marriage between step-relatives and affinal relatives have received constitutional analysis separate from incest generally, given the unique character of those relationships. Christine McNiece Metteer, *Some "Incest" Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 KAN. J.L. & PUB. POL'Y 262 (2000) (discussing relatives by affinity); Margaret M. Mahoney, *A Legal Definition of the Stepfamily: The Example of Incest Regulation*, 8 BYU J. PUB. L. 21 (1993) (analyzing relationships between step-relatives). One article explores the pitfalls of classifying first-cousin marriage as "incest," but does not broach the question of the cousin bans as infringing on the constitutional right to marry. *See generally* Marvin M. Moore, *A Defense of First-Cousin Marriage*, 10 CLEV.-MARSHALL L. REV. 136 (1961). A 2002 legal analysis from CNN discusses some of the issues analyzed in this Article, but that report predates crucial developments in constitutional law, as well as expansions to the cousin bans themselves. *See* Joanna L. Grossman, *FindLaw Forum: A Genetic Report Should Cause a Rethinking of Incest Laws*, CNN (Apr. 10, 2002, 2:51 PM), https://www.cnn.com/2002/LAW/04/columns/fl.grossman.incest.04.09 [https://perma.cc/U7EM-DFD4]. The need for a discrete treatment of the cousin bans can perhaps be best articulated by the lazy inaccuracy of the following throwaway remark by the Supreme Court in the majority opinion of *United States v. Windsor*: "[M]ost States permit first cousins to marry, but a handful . . . prohibit the practice." 570 U.S. 744, 767–68 (2013). As will be explained, *infra* Section I.B, a great deal more than "a handful" of states prohibit first-cousin marriage.

I. BACKGROUND

A. *Historical Overview*

1. Practice of First-Cousin Marriage

Though prohibitions against sexual relations and marriage between partners within some degree of consanguinity have always been part of developed societies,[19] with a panoply of religious and legal traditions drawing differing boundary lines,[20] first cousins are a unique class.[21] Prohibitions on relations between those in the ascendant and descendant line—for instance, parents and children—have remained relatively stable since antiquity,[22] yet first cousins have moved dynamically in and mostly out of the banned class of marriageable kin over the centuries.[23] First-cousin marriage has been the most widely sanctioned and consistently practiced form of consanguineous marriage throughout history and into modernity, emphatically embraced across cultures, religions, and social strata.[24]

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19 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 80–83 (1988); *see also* MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE 1–22, 61–78 (1996). It is important to mention here that modern scholars treat the incest taboo as neither ingrained nor biological, but as a changeable man-made construct with arguable social benefits. *See generally* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998). Even so, first-cousin relationships remain an exceptional case, as any social interest underpinning the incest construct is moot as applied to first cousins. *See infra* Section II.B.3.

20 *See e.g.*, OTTENHEIMER, *supra* note 19, at 10–15, 63–69. The medieval Catholic church went so far as to prohibit marriage up to the seventh degree of consanguinity, meaning fifth cousins could not marry. King Henry VIII, great slayer of marriage regulation, removed that bar for the United Kingdom, and England has never questioned the validity of cousin marriage since. *Id.* at 70–72, 86–88; *see* George H. Darwin, *Marriages Between First Cousins in England and Their Effects*, 38 J. STAT. SOC'Y LONDON 153, 153 (1875) (reporting the Victorian-era Commons met a push to research cousin marriage with "scornful laughter"); ALFRED HENRY HUTH, THE MARRIAGE OF NEAR KIN 355 (1875) (scientists seeking information on cousin marriage were rejected as "meddling animals"). The United Kingdom has been no stranger to restrictive marriage laws. *See* Deceased Wife's Sister's Marriage Act, 1907, 7 Edw. 7 c. 47 (lifting longstanding prohibition on marriage between a man and his sister-in-law); *see also infra* note 27 and accompanying text. Yet, even there, restricting or prohibiting cousin marriage was considered too absurd even to consider.

21 *See infra* Section I.B.

22 OTTENHEIMER, *supra* note 19, at 61–78.

23 *See id.* at 61–66, 89–91.

24 *Id.* at 1–20. Medical genetics studies frequently collapse first and second cousins, as well as avuncular relationships, in their definition of consanguineous marriage, but the preeminent scholar on the subject, Alan Bittles, has identified first cousins specifically as the leading form of in-marriage. *See* A.H. Bittles, *Consanguinity and Its Relevance to Clinical Genetics*, 60 CLINICAL GENETICS 89, 89 (2001) [hereinafter Bittles, *Consanguinity*] ("[I]n many . . . populations there is a strong preference for consanguineous unions, most frequently contracted between first

2. Global Consensus on First-Cousin Marriage

Across large swaths of the globe, first-cousin marriages remain permitted, prevalent, and preferential.[25] These unions are legal without limitation in nearly every jurisdiction in the world.[26] Western legislation of consanguineous intimacy relies heavily on the Old Testament's Levitical decrees and tabulations by the Anglican Church, both of which sanction first-cousin marriage.[27] In an illustration of the ancient sanction of first-cousin marriage, the Bible includes multiple divinely licensed examples of such relationships.[28] First-cousin unions are favored by other traditions as well, and no major religion prohibits it absolutely.[29]

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cousins . . . ."); Alan H. Bittles, *The Role and Significance of Consanguinity as a Demographic Variable*, 20 POPULATION & DEV. REV. 561, 561–65 (1994) [hereinafter Bittles, *Role and Significance*]; *accord* Adam Kuper, *Changing the Subject: About Cousin Marriage, Among Other Things*, 14 J. ROYAL ANTHROPOLOGICAL INST. 717, 724–28 (2008).

25 ALAN H. BITTLES, CONSANGUINITY IN CONTEXT 29–40 (2012). According to one study published in 2014, 20–50 percent of marriages or more are consanguineous in North and Sub-Saharan Africa, the Middle East, and West, Central, and South Asia, regions with a collective population of over a billion persons. Giovanni Romeo & Alan H. Bittles, *Consanguinity in the Contemporary World*, 77 HUM. HEREDITY 6, 7 (2014); *see also* Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, 6 PLOS BIOLOGY 2627, 2629 (2008). The United States emerges as a standout example of a country where cousin marriage was once popular, before taking a sharp turn to prohibition. *See infra* notes 36–38. Contrast this with other Western countries, like the United Kingdom, where first-cousin marriage may have decreased in popularity but remains legal. *See* Romeo & Bittles, *supra* note 25, at 6; *supra* note 20.

26 OTTENHEIMER, *supra* note 19, at 61–66, 89–91; Sullum, *supra* note 14 ("The United States is the only Western country in which marriage between first cousins is widely prohibited."); BITTLES, *supra* note 25, at 31 (noting only "[t]hree major sets of countries" have laws specifically prohibiting consanguineous marriage—the United States, China and Taiwan, and North and South Korea).

27 OTTENHEIMER, *supra* note 19, at 20–22, 72–74. The Old Testament's list of prohibited marriages includes parent-child, grandparent-grandchild, aunt-nephew, and sibling-sibling, whether of the full or half-blood. *Leviticus* 18:6–20. The Anglican list is even more robust, prohibiting affinal kin from marrying as well, yet still it excludes first cousins. *Table of Kindred and Affinity*, BOOK OF COMMON PRAYER.

28 Instances of such unions in the Bible are Jacob, Rachel, and Leah in *Genesis* 29:18–28, and the daughters of Zelophehad. *Numbers* 36:10–11 ("As the Lord had commanded Moses, so did Zelophehad's daughters do/Mahlah, Tirzah, Hoglah, Milcah, and Noah married their cousins.").

29 In addition to Jewish law and the Protestant tradition, *supra* note 27 and accompanying text, first-cousin marriage is permitted by Islam, Buddhism, the Parsee, and the Druze. OTTENHEIMER, *supra* note 19, at 72–74; Bittles, *Consanguinity*, *supra* note 24, at 90–91; SURAH AN-NISA 4:22–24; Jona Schellekens, Guy Kenan & Ahmad Hleihel, *The Decline in Consanguineous Marriage Among Muslims in Israel*, 37 DEMOGRAPHIC RSCH. 1933, 1934 (2017); Bittles, *Role and Significance*, *supra* note 24, at 565. Hinduism is split on the practice, with one stream finding it preferable. Bittles, *Consanguinity*, *supra* note 24, at 91. The Roman Catholic Church permits first-cousin marriage by special dispensation. 1983 CODE c.1091, § 2; OTTENHEIMER, *supra* note 19, at 90; *see also* Cathy Caridi, *Can Cousins Marry in the Church?*, CANON L. MADE EASY (Sept. 9,

First-cousin marriage has been popularly practiced throughout eras and regions.[30] Ancient Mesopotamia, Greece, and Rome permitted first cousins to marry.[31] In Victorian England, approximately one out of every fifty marriages was between first cousins, with the proportion growing as one climbed the socioeconomic ladder.[32] Albert Einstein and Charles Darwin both married their first cousins.[33] The Rothschild banking family was so keen on the practice that a whopping seventy-eight percent of its Victorian-era marriages were between first or second cousins.[34] In areas of Asia and Africa, first-cousin marriage currently accounts for twenty to over fifty percent of all marriages.[35]

The American consensus was once in favor of the practice as well. First-cousin marriage in the United States was commonplace, legal, and socially acceptable from the colonial period through the nineteenth century.[36] The Southern legal tradition explicitly ratified first-cousin marriage.[37] Any state that today prohibits first-cousin relations wholly permitted them within the last century and a half.[38]

3. Empirical Evidence Regarding First-Cousin Marriage

Absent precise data indicating what percentage of all marriages in the United States today occur between first cousins,[39] the lowest estimate puts them at less than one percent.[40] Others posit the unions are more frequent but underreported.[41] Researchers have certainly ascertained

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2010), http://canonlawmadeeasy.com/2010/09/09/can-cousins-marry-in-the-church [https://perma.cc/8GV4-37WK].

30 OTTENHEIMER, *supra* note 19, at 61–63.

31 *Id*.

32 *Id*. at 81. Approximately one in twenty aristocratic marriages was between first cousins. *See generally* Kuper, *supra* note 24, at 722.

33 Nikki Racklin, *We Are Family*, GUARDIAN (Dec. 8, 2002, 5:08 PM), https://www.theguardian.com/theobserver/2002/dec/08/magazine.features7 [https://perma.cc/2QFJ-AMPP].

34 Kuper, *supra* note 24, at 728.

35 Bittles, *Role and Significance*, *supra* note 24, at 563–65.

36 Paul & Spencer, *supra* note 25, at 2627–29; *see also* OTTENHEIMER, *supra* note 19, at 58.

37 Bienen, *supra* note 19, at 1529 n.90 (noting the South utilized Archbishop Parker's *Table of Degrees*, which excludes first cousins, to define "incest" and prohibited marriage relations).

38 *See infra* Section I.B.

39 Mona Chalabi, *How Many Americans Are Married To Their Cousins?*, FIVE THIRTY EIGHT (May 15, 2015, 11:22 AM), https://fivethirtyeight.com/features/how-many-americans-are-married-to-their-cousins [https://perma.cc/282J-Z86L].

40 Bittles, *Consanguinity*, *supra* note 24, at 89–90.

41 The stigma attached to the practice may be responsible for such underreporting. Bennett et al., *supra* note 13, at 99, 112; *accord* Denise Grady, *No Genetic Reason to Discourage Cousin Marriage, Study Finds*, N.Y. TIMES (Apr. 3, 2002), https://www.nytimes.com/2002/04/03/health/

these relationships continue to occur,[42] and the national decline correlates only with the sudden emergence of the cousin bans in the decades immediately after the Civil War.[43]

B. *Regulatory Landscape*

1. The Cousin Bans

First cousins are currently limited or barred outright from either marrying, cohabitating, or having intercourse in thirty states.[44] Six states provide exceptions to blanket prohibitions.[45] In five of these jurisdictions,

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no-genetic-reason-to-discourage-cousin-marriage-study-finds.html [https://perma.cc/GRX2-WHG4].

42 *See* OTTENHEIMER, *supra* note 19, at 58–59; *see also* Paul & Spencer, *supra* note 25, at 2627–29.

43 Paul & Spencer, *supra* note 25, at 2627–29. In 1858, Kansas became the first state to prohibit cousin marriage. Before 1930, twenty-eight states passed a cousin ban. Only three states have taken prohibitory action in the last century: Kentucky (1946), Maine (1985), and Texas (2005). *Id.* at 2627; OTTENHEIMER, *supra* note 19, at 58–59.

44 *See* OTTENHEIMER, *supra* note 19, at 11. The states imposing some form of a cousin ban are: Arizona, Arkansas, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Texas, Washington, West Virginia, Wisconsin, and Wyoming. ARIZ. REV. STAT. ANN. §§ 13-3608, 25-101 (2021); ARK. CODE ANN. § 9-11-106 (West 2021); DEL. CODE ANN. tit. 13, § 101 (West 2021); 750 ILL. COMP. STAT. ANN. 5/212 (West 2021); IND. CODE ANN. § 31-11-8-3 (West 2021); IOWA CODE ANN. § 595.19(1)(c) (West 2021); KAN. STAT. ANN. § 23-2503 (West 2021); KY. REV. STAT. ANN. § 402.010(1) (West 2021); LA. CIV. CODE ANN. art. 90 (2021); ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (2021); MICH. COMP. LAWS ANN. § 551.3(3)–(4) (West 2021); MINN. STAT. ANN. §§ 517.03-3, 518.01 (West 2021); MISS. CODE. ANN. §§ 93-1-1, 93-7-1, 97-29-27 (West 2021); MO. ANN. STAT. §§ 451.020, 451.115 (West 2021); MONT. CODE ANN. § 40-1-401(1)(b) (West 2021); NEV. REV. STAT. ANN. § 122.020(1) (West 2021); N.H. REV. STAT. ANN. § 457:2 (2021); N.C. GEN. STAT. ANN. § 51-3 (West 2021); N.D. CENT. CODE ANN. § 14-03-03 (West 2021); OHIO REV. CODE ANN. § 3101.01 (West 2021); OKLA. STAT. ANN. tit. 43, § 2 (West 2021); OR. REV. STAT. ANN. § 106.020 (West 2021); 23 PA. STAT. AND CONS. STAT. ANN. §§ 1304, 1703 (West 2021); S.D. CODIFIED LAWS § 25-1-6 (2021); UTAH CODE ANN. §§ 30-1-1(2), 76-7-102 (West 2021); TEX. FAM. CODE ANN. §§ 2.004, 6.201 (West 2021); TEX. PENAL CODE ANN. § 25.02 (West 2021); WASH. REV. CODE ANN. § 26.04.020(1)(b) (West 2021); W. VA. CODE ANN. § 48-2-302(a)–(b) (West 2021); WIS. STAT. ANN. § 765.03 (West 2021); WYO. STAT. ANN. § 20-2-101 (West 2021).

45 They are Arizona, Illinois, Indiana, Utah, Wisconsin, and Maine. ARIZ. REV. STAT. ANN. § 25-101(b) (first cousins may not marry unless both partners are over sixty-five, or they present proof to a judge of one partner's infertility); 750 ILL. COMP. STAT. ANN. 5/212(4) (first cousins may not marry unless both partners are over fifty, or they produce a doctor-certified attestation of their permanent and irreversible sterility); IND. CODE ANN. § 31-11-8-3 (first cousins may not marry unless both partners are over sixty-five); UTAH CODE ANN. § 30-1-1(2) (first cousins may not marry unless both partners are over sixty-five, or fifty-five and the court finds either party unable to reproduce); WIS. STAT. ANN. § 765.03(1) (first cousins may not marry unless the female

first cousins are permitted to marry if the partners meet a statutory age threshold, ranging from fifty to sixty-five years old, or present affirmation to the court of their infertility or sterility.[46] The age restriction has been paired with a proof of sterility requirement in most instances.[47] Maine allows first cousins to marry, provided the couple first presents certification of having received special genetic counseling.[48]

2. Regulation of Other Consanguineous Relationships

While marriage law and incest criminalization are distinct regulatory schemes—the former governing who may marry, the latter establishing who may legally engage in sexual intercourse—legislation of consanguineous relationships often operates cohesively across both systems.[49] States will frequently use the language of "incest" in their marriage regulations, defining who may marry by reference to who may have sex.[50] Consequently, all fifty states prohibit marriage between members of the nuclear family,[51] and all states with incest statutes criminalize intercourse between parents and children.[52] All but one do the same for siblings, with Ohio the sole outlier.[53]

The cousin bans depart from the general pattern that if a category of prohibited partners appears in one type of statutory scheme, it appears in

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is over fifty-five or an affidavit signed by a medical professional is produced indicating either partner is permanently sterile); ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (first cousins may not marry unless they present a certificate that they have received genetic counseling).

46 They are Arizona, Illinois, Indiana, Utah, and Wisconsin. ARIZ. REV. STAT. ANN. § 25-101(b); 750 ILL. COMP. STAT. ANN. 5/212(4); IND. CODE ANN. § 31-11-8-3; UTAH CODE ANN. § 30-1-1(2); WIS. STAT. ANN. § 765.03(1).

47 Bratt, *supra* note 17, at 267. Incidentally, age and fertility restrictions reveal state legislatures' ongoing preference for hetero-normative marital structures; age and fertility would appear to be entirely irrelevant bases upon which to restrict a same-sex first-cousin couple from marrying. *See* Baskin v. Bogan, 766 F.3d 648, 661–62 (7th Cir. 2014).

48 ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B).

49 CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 241 (15th ed. 2020).

50 *Id.*; *see, e.g.*, MISS. CODE. ANN. § 97-29-27 (West 2021) ("If any person shall marry within the degrees prohibited by law, he shall be guilty of incest . . . ."). To be very clear, a prohibition on marriage does not de facto make such a relationship incestuous. WILLIAM MACK, WILLIAM BENJAMIN HALE & DONALD J. KISER, 31 CORPUS JURIS: BEING A COMPLETE AND SYSTEMATIC STATEMENT OF THE WHOLE BODY OF THE LAW AS EMBODIED IN AND DEVELOPED BY ALL REPORTED DECISIONS 376 (1923). These are separate, distinct areas of legislation. *Id*.

51 JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 45 (2011).

52 McDonnell, *supra* note 17, at 349. In general, statutory variation increases as one moves further away from the biological nuclear family. *Id*. at 348–50.

53 *Id*. at 349; *see also* OHIO REV. CODE ANN. § 2907.03 (West 2021).

the other.[54] Consequently, the vast majority of states banning or limiting marriage or cohabitation between first cousins exclude them from their incest prohibitions.[55] Only nine states currently prohibit sex between first cousins.[56]

These incongruities lead to striking results. Arizona prohibits and voids marriage between first cousins and considers sex between them incestuous.[57] Yet, the state will retract its prohibition on marriage provided both partners are over the age of sixty-five, or are younger but can prove infertility.[58] Presumably, at that time, sex between first cousins in Arizona ceases to be statutory incest. Meanwhile, Texas will not conduct a marriage between first cousins but does not void those conducted legally elsewhere; yet, the State does criminalize sexual intercourse between first cousins.[59] As a result, legally married first cousins who engage in sexual intercourse in Texas face a maximum of ten years in prison, a $10,000 fine, and registration as sex offenders.[60]

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54 TORCIA, *supra* note 49; GROSSMAN & FRIEDMAN, *supra* note 51, at 45–46; *accord* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 437–38 (2005).

55 *Compare* WYO. STAT. ANN. § 20-2-101 (West 2021) (declaring first-cousin marriages "void") *with* UTAH CODE ANN. § 30-1-1(1)(e) (West 2021) (declaring first-cousin marriages "*incestuous* and void" (emphasis added)). Whether a statute declares cousin marriage "void" or "incestuous and void" has serious consequences because the specific language influences jurisdictional approaches whether to recognize cousin marriages legally solemnized abroad. *See generally* Frederic P. Storke, *The Incestuous Marriage—Relic of the Past*, 36 U. COLO. L. REV. 473 (1964). Courts have struggled to settle these contradictions. *See, e.g.*, Ghassemi v. Ghassemi, 998 So. 2d 731 (La. Ct. App. 2008); State v. Couvillion, 42 So. 431 (La. 1906). For a longer discussion of the jurisdictional chaos, see *infra* Part II.

56 The nine states that currently prohibit sex between first cousins are Arizona, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wisconsin. ARIZ. REV. STAT. ANN. §§ 13-3608, 25-101 (2021); MISS. CODE ANN. §§ 97-29-5, 93-1-1 (West 2021); NEV. REV. STAT. ANN. §§ 122.020, 201.180 (West 2021); N.D. CENT. CODE ANN. §§ 12.1-20-11, 14-03-03 (West 2021); OKLA. STAT. ANN. tit. 21, § 885, tit. 43, § 2 (West 2021); S.D. CODIFIED LAWS §§ 22-22A-2, 25-1-6 (2021); TEX. PENAL CODE ANN. § 25.02(a)(6) (West 2021); UTAH CODE ANN. § 76-7-102 (West 2021); WIS. STAT. ANN. §§ 944.06, 765.03 (West 2021). These are not toothless laws that are on the books but never enforced. Compare that number to the thirteen states that banned sodomy before *Lawrence* struck such statutes as unconstitutional. McDonnell, *supra* note 17, at 350 n.93 (counting eight states with such prohibitions, as that article was published prior to Texas's enactment of its regulation in 2010).

57 ARIZ. REV. STAT. ANN. §§ 13-3608, 25-101.

58 *Id*.

59 TEX. FAM. CODE ANN. §§ 1.101, 2.004, 6.201 (West 2021); TEX. PENAL CODE ANN. § 25.02.

60 TEX. PENAL CODE ANN. § 12.34 (West 2021); *see also* Sullum, *supra* note 14. For the bizarre results of criminalizing sex between consenting, adult first cousins, see State v. Nakashima, 114 P. 894 (Wash. 1911).

C. *Constitutional Implications*

Two principles enjoy near-universal recognition. First, the state plays a central role in regulating marriage.[61] Second, the Supreme Court has recognized a constitutional right to marry embodied in the Fourteenth Amendment.[62] This Section will articulate the contours of the right to marry. It will then consider how this constitutional right exists beside the state's recognized role in regulating marriage. Finally, it will discuss what level of scrutiny applies to state infringements upon the fundamental right to marry.

1. The Right to Marry

For over one hundred years, the Supreme Court has articulated some notion of the right to marry as basic and integral to individual liberty.[63] Since 1923, the Court has listed marriage as a fundamental, unenumerated right protected by the Constitution's "liberty" promise.[64] Marriage was understood as essential to personal freedom and, therefore, resistant to unbridled state intrusion.[65]

2. Due Process or Equal Protection?

The Court has, however, been coy about where the constitutional cover for the right to marry arises.[66] It has emphasized the fundamental quality of the right, clearly grounding it in the Due Process Clause of the

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61 Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 338–39 (2005) ("[T]he history of American family law (in particular, American marriage law) has been one of state control . . . .").

62 Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997) (listing the right to marry among a limited number of well-established unenumerated rights); Washington v. Harper, 494 U.S. 210, 224 (1990) (reaffirming without elaboration that the "right to marry . . . [is] a right protected by the Due Process Clause"); *see also* Metteer, *supra* note 18, at 265.

63 For discussion at length of the Supreme Court's right to marry jurisprudence, see Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289 (1998).

64 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . ."); *see also* Metteer, *supra* note 18, at 265.

65 *See, e.g.*, Paul v. Davis, 424 U.S. 693, 713 (1976) ("[M]atters relating to marriage, procreation, contraception, family relationships, and child rearing . . . [are] areas it has been held that there are limitations on the States' power to substantively regulate conduct."); *see also supra* Section I.C.5.

66 *See infra* notes 89–90 and accompanying text.

Fourteenth Amendment.[67] But it has also repeatedly infused its opinions with explicit concern for the identities of the persons who have had their exercise of the right infringed upon—an appeal to the Equal Protection Clause.[68] This Section will show that in relying on both doctrines, the Court has indicated that the right to marry protects the right specifically as it is vested in individuals, making the right all the more resistant to state intrusion.

The fusion of due process and equal protection doctrines for marriage purposes began in *Loving v. Virginia*, the first case in which the Court struck down a state law as an infringement on a fundamental right to marry.[69] Calling marriage a "vital personal right[]," and among "the 'basic civil rights of man,' fundamental to our very existence and survival," the Court invalidated racial classification systems as an unconstitutional means of prohibiting marriage.[70] Marriage was not merely a permitted activity a state could encroach upon with little justification, but a right expressly protected by the Constitution from a measure of state intrusion.[71]

Loving explicitly established that the Due Process Clause of the Fourteenth Amendment protects the right to marry and that, in the future, states would stand in direct opposition to the Constitution by enacting statutes that infringe upon marriage.[72] In *Boddie v. Connecticut*, the Court held a law barring indigents' access to divorce courts based only on their inability to pay to be a denial of due process.[73] The fundamental nature of the marriage relationship itself[74] was key to the Court's reasoning.[75] The payment requirement was an impediment, impassable for some, to a key right protected by due process and the state could not justify it.[76] Yet,

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67 GROSSMAN & FRIEDMAN, *supra* note 51, at 38–39; *see also* Metteer, *supra* note 18, at 265–67.

68 GROSSMAN & FRIEDMAN, *supra* note 51, at 38–39; *see also* Metteer, *supra* note 18, at 265–69.

69 388 U.S. 1 (1967).

70 *Id*. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

71 *Id*. ("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."); *see also* GROSSMAN & FRIEDMAN, *supra* note 51, at 37–38.

72 *See generally* Wardle, *supra* note 63.

73 401 U.S. 371, 376–81 (1971).

74 *Id*. at 374 (noting that "given the *basic* position of the marriage relationship in this society's hierarchy of values," due process acts as a stay on the state's ability to regulate it (emphasis added)).

75 *Id*. at 379 ("[T]hat a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of *a protected right* although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." (emphasis added)).

76 *Id*. at 382–83 ("We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by [due process] . . . [but] in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.").

due process does not serve as an absolute bar to government regulation.[77] In *Califano v. Jobst*,[78] the Court held due process had not been violated because the challenged regulation had only a tenuous tie to marriage, with spousal choice implicated as a mere downstream effect of other regulatory objectives.[79]

Importantly, the classification scheme in *Loving* proscribing marriage based on the partners' race triggered the Equal Protection Clause as well.[80] While the racial discrimination itself would have independently called for heightened scrutiny under equal protection separate from the marriage issue,[81] *Loving* did not recognize a highly specialized fundamental right to interracial marriage.[82] Rather, it found suspect a classification scheme in the context of the right to marry and suggested that interracial marriage could not be constitutionally constrained because of the right to freely choose whom to marry.[83]

The Court would continue over decades to turn a particularly sharp eye to marriage regulations that isolated a particular group for uniquely impaired exercise of the right. In *Zablocki v. Redhail*, the Court invalidated a regulation forbidding marriage without prior court approval to noncustodial parents who were delinquent in their child support payments.[84] State court approval would not be granted without showing the support obligation had been met and that the children were not then nor likely to become public charges.[85] The Court applied an equal protection analysis even though "noncustodial parents" are not a canonically protected identity because an identity-based classification had been used to attack a fundamental right.[86] Like in *Loving*, the Court

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77 *See infra* Section I.C.4.

78 434 U.S. 47 (1977).

79 The regulation under review specified that certain secondary benefits under the Social Security Act received by a disabled dependent would terminate upon the dependent's marriage to an individual not entitled to those benefits. *Id.* The Court applied the general rule that entitlement as a dependent to statutory benefits terminates upon the dependent's marriage. *Id*. at 52–54. The Court applied a mere reasonableness standard to hold that "favored treatment of marriages between secondary beneficiaries does not violate the principle of equality embodied in the Due Process Clause of the Fifth Amendment." *Id.* at 56–58.

80 Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

81 *Id*. at 8–11.

82 Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (stating that "*Loving* did not ask about a 'right to interracial marriage'"); Metteer, *supra* note 18, at 266–69 (explaining that *Loving* began "the development of the right to marry . . . as a protected activity whose 'Constitutional shelter' is the Fourteenth Amendment, rather than simply a permitted activity").

83 Hamby v. Parnell, 56 F. Supp. 3d 1056, 1065 (D. Alaska 2014) (finding *Loving* "hinged on" recognition of "the freedom to marry, without an additional descriptor").

84 434 U.S. 374 (1978).

85 *Id*. at 375.

86 *Id*. at 383–84; GROSSMAN & FRIEDMAN, *supra* note 51, at 39.

did not find a unique, constitutionally-protected right to marry that was exclusive to this certain group, but insisted that the persecuted class, like all individuals, enjoys a right to marry.[87] Repeatedly, the Court would act in defense of a class against state impairment of class members' ability to exercise their marriage right, independent of whether the distinguishing personal characteristic used to define the class was itself traditionally protected.[88]

Justice Potter Stewart's *Zablocki* concurrence criticized the majority exactly for this unusual approach to equal protection doctrine.[89] Justice Stewart emphasized that the due process "liberty" promise normatively and sufficiently accomplished protection of fundamental rights, including the right to marry.[90] Yet, by avoiding being wedded to a standard due process fundamental rights analysis, the *Zablocki* majority indicated the right to marry is ingrained in the individual and that personal identities could not easily serve as the basis for losing that right.[91]

This elision of due process and equal protection doctrines for right to marry purposes was taken to its furthest bounds in *Obergefell v. Hodges*.[92] There, the majority resisted stating altogether in what way specifically it deployed either clause in finding same-sex couples had a constitutional right to marry.[93] Instead, the Court wrote that the two doctrines are "connected in a profound way," working dynamically together to identify and define fundamental rights as expressed by every

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87 *Compare Zablocki*, 434 U.S. at 383–85, *with* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

88 *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) ("*Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'"); Turner v. Safley, 482 U.S. 78, 79 (1987) (recognizing the right to marry for incarcerated persons); Boddie v. Connecticut, 401 U.S. 371 (1971) (recognizing the right to marry for indigents).

89 *Zablocki*, 434 U.S. at 391–96 (Stewart, J., concurring) (approving of the lower court's approach to the right to marry as a due process issue, and insisting, "[t]he problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom," as it conflicts with the "liberty" promise).

90 *Id*. Such an approach would have required expansion of substantive due process but, in Justice Stewart's view, broadening that murky doctrine would have been preferable and more consistent with past principles of constitutional analysis. *Id*. at 395–96.

91 *Id*. at 386–88, 390–91 (majority opinion).

92 576 U.S. 644.

93 *Id*. at 663–72; *see also* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 152–64 (2015). For criticism of *Obergefell*'s adoption of this approach, see generally Charles Adside III, *Constitutional Damage Control: Same-Sex Marriage,* Smith's *Hybrid Rights Doctrine, and Protecting the Preacher Man After* Obergefell, 27 GEO. MASON U. C.R.L.J. 145, 169–74 (2017). *See also* RODNEY M. PERRY, CONG. RSCH. SERV., R44143, OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED 6–8 (2015) (illustrating the murkiness of *Obergefell*'s reliance on due process and equal protection doctrines). Dissenting Justices in *Obergefell* criticized the majority for abandoning careful substantive due process analysis. *Obergefell*, 576 U.S. at 737 (Alito, J., dissenting); *id.* at 697–98 (Roberts, C.J., dissenting).

individual's unique character or identity.[94] The Court coined the term "equal dignity" to describe this fusion of equal protection and due process in the marriage context.[95]

Kenji Yoshino[96] credits the *Obergefell* Court with introducing an artistic approach to due process and equal protection, infusing the former with a concern that liberties be granted to subordinated groups, a matter historically relegated to the latter clause.[97] Laurence Tribe[98] emphasizes that, by intertwining the clauses, the Court expressly protected the identity of the individual exercising the right to marry.[99] In this way, *Obergefell* continued the Court's long project of establishing that any regulation utilizing an identity-based classification model in the marriage context tangles with both the Due Process and Equal Protection Clauses.[100] Beginning in *Loving*, continuing in *Zablocki*, and pushing forward in *Obergefell*, the Court expressed that the right to marry inherently includes the freedom to follow one's personal path in exercising it.[101]

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94 *Obergefell*, 576 U.S. at 672 (majority opinion) ("In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.").

95 *Id*. at 674 ("These classifications denied the equal dignity of men and women."). Previously in *Lawrence v. Texas*, Justice Kennedy had repeatedly referenced "dignity" in striking sodomy statutes as unconstitutional invasions of the due process right to privacy. Lawrence v. Texas, 539 U.S. 558, 560, 567, 575 (2003). Yet, in *Lawrence*, Kennedy eschewed an equal protection argument. *Id*. at 579–81 (O'Connor, J., concurring). Kennedy's use in *Obergefell* of the term "equal dignity" lends support to the proposition that the term may be referencing something more than mere dignity alone and was intending to establish a fused equal protection-due process doctrine. *See generally* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015).

96 Kenji Yoshino is the Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law. *Kenji Yoshino*, NYU L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=22547 [https://perma.cc/B38B-PY4K].

97 Yoshino, *supra* note 93, at 171–79 (describing *Obergefell* as introducing an "antisubordination liberty" doctrine).

98 Laurence Tribe is the Carl M. Loeb University Professor, Emeritus, at Harvard Law School. *Laurence H. Tribe*, HARV. L. SCH., https://hls.harvard.edu/faculty/directory/10899/Tribe [https://perma.cc/4PTG-2XTT].

99 Tribe, *supra* note 95, at 17, 23–32.

100 *See generally* Laurence C. Nolan*, The Meaning of* Loving*: Marriage, Due Process and Equal Protection (1967–1990) as Equality and Marriage, from* Loving *to* Zablocki, 41 HOW. L.J. 245, 246 (1998); *see also* Wardle, *supra* note 63, at 336–42; *but see* Ashutosh Bhagwat, Liberty or Equality? (Sept. 23, 2015), 2015 Anthony M. Kennedy Lecture, *in* 20 LEWIS & CLARK L. REV. 381 (2016) (arguing Justice Kennedy hinged *Obergefell* almost entirely on due process rather than equal protection).

101 Loving v. Virginia, 388 U.S. 1, 12 (1967) ("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."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) (citing *Loving* for the proposition that "the right to marry means little if it does not include the right to marry the person of one's choice").

3. Defining Marriage

The Supreme Court has never articulated the exact parameters of the right to marry, but its marriage jurisprudence offers guideposts for what the right includes.[102] For many decades, the Court understood the importance of marriage as a functional vehicle for reproduction and the propagation of the traditional nuclear family.[103] Pragmatically, marriage was the sole means for producing legitimate children and ensuring that engaging in intimate relations would not bar one from entry into heaven.[104] *Skinner v. Oklahoma* directly linked the right to marry with a fundamental right to reproduce.[105] In striking down mandated sterilization of individuals with allegedly heritable criminal traits, the Court described reproduction and marriage as co-dependent, both being fundamental to one's existence.[106]

In *Griswold v. Connecticut*, the Court expanded the activities protected by their association with the right to marry to include marital intimacy, holding a state could not ban or abet the use of contraceptives by married couples.[107] While still facially limited to marriage's childbearing and child-rearing purposes,[108] *Griswold* hinted at something more.[109] The Court described marriage as a near-sacrosanct union of individuals.[110] The value of marriage was expressly understood not in light of its promotion of any political, commercial, or social cause,

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102 Wardle, *supra* note 63, at 346–47.

103 Reynolds v. United States, 98 U.S. 145, 165–66 (1878) ("Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties . . . ."); Maynard v. Hill, 125 U.S. 190, 211 (1888) (without marriage "there would be neither civilization nor progress"); *see* Jill Lepore, *To Have and To Hold*, NEW YORKER (May 18, 2015), https://www.newyorker.com/magazine/2015/05/25/to-have-and-to-hold [https://perma.cc/98JW-WJG4] (discussing the modern effort to disassociate marriage and sex from reproduction in constitutional analysis).

104 OTTENHEIMER, *supra* note 19, at 49–53.

105 316 U.S. 535 (1942); *see also* Wardle, *supra* note 63, at 299–300.

106 *Skinner*, 316 U.S. at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."). A lengthier discussion of *Skinner*'s implications for the cousin bans follows. *See infra* Section II.B.1.

107 381 U.S. 479, 479–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."). A "liberty" right to privacy in intimate association has since been protected outside of the context of marriage, which carries important implications as society expands to include non-marital relationships. *See* Lawrence v. Texas, 539 U.S. 558, 573–74 (2003); Troxel v. Granville, 530 U.S. 57, 63 (2000).

108 *See* Zhou, *supra* note 17, at 224.

109 *Griswold*, 381 U.S. at 485–86.

110 *Id.* ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

project, or system; rather, marriage itself was cherished and protected because it carries a "noble . . . purpose" and offers those involved "a harmony in living."[111]

The Court eventually explicitly expanded the right to marry as containing more than a concern for human perpetuation and the intimate association reproduction requires.[112] In *Turner v. Safley*, the Court invalidated a state regulatory scheme prohibiting inmates from marrying without express prior permission from the prison warden, expressly extending constitutional protection to the non-reproductive characteristics of marriage.[113] The Court found that the right to marry includes within it an appreciation for marriage as a public manifestation of support and commitment, as an expression of spiritual and personal significance, and as a necessary precondition for many desirable government benefits.[114] Notwithstanding the impossibility of procreation in a marriage, these aspects remained present in and were sufficient to sustain the fundamental right.[115]

Obergefell further detached the right to marry from procreation.[116] Neither the ability nor the desire to procreate is requisite to having or exercising the right to marry.[117] In *Obergefell*, marriage's contours included an exercise of individual autonomy, an intimate expression of commitment between partners, and service as a bulwark to social order.[118] These aspects of marriage applied to same-sex couples no less than they applied to heterosexual couples, and as such the former could not be barred from exercising their fundamental right.[119]

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111 *Id*.

112 *See* Bratt, *supra* note 17, at 260 nn.12–16.

113 482 U.S. 78, 95–96 (1987).

114 *Id.*; *see also* Maggie Gallagher, *Why Marriage Is Good for You*, CITY J. (2000), https://www.city-journal.org/html/why-marriage-good-you-12002.html [https://perma.cc/93Z2-UDTV] (discussing marriage's many enviable benefits).

115 *Turner*, 482 U.S. at 95–96; *see also* Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1996 (2005) ("The Turner [sic] Court had to evaluate whether prisoners—prisoners!—with no procreative justification still have a fundamental right to marry, and it held unanimously that they do."); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1202 (2004); Baskin v. Bogan, 766 F.3d 648, 661–62 (7th Cir. 2014) (invalidating a prohibition on same-sex marriage in part by reasoning that the state's position that the right to marry was solely a procreative interest must be hogwash because that same state granted an exception to its ban on first-cousin marriage to couples past their reproductive years).

116 Obergefell v. Hodges, 576 U.S. 644, 664–68 (2015).

117 *Id*. at 669 (stating marriage is no "less meaningful for those who do not or cannot have children," and rejecting the "ability, desire, or promise to procreate" as a precondition to marriage).

118 *Id*. at 657, 664–68.

119 *Id*. *But see* Tribe, *supra* note 95, at 30–32 (criticizing the *Obergefell* Court's continued elevation of the right to marry above nonmarital relationships).

4. State Role in Marriage

All states impose limitations or restrictions on marriage to some extent,[120] and the Supreme Court has recognized states' particularly wide sphere of power in the marital scheme.[121] Simultaneously, though, state power cannot be unlimited if marriage exists as a protected right.[122] As early as 1877, in *Meister v. Moore*, the Court recognized this clash.[123] In *Meister*, the Court held the state's power would not be presumed to curtail traditional forms and methods of marriage because of the great importance of the right to the individual.[124] Only clear, explicit, and precise statutory language indicating an intention to and method for circumscribing marriage might potentially overcome the right.[125]

The *Obergefell* majority went even further.[126] The Court indicated the established state role may and should be leap-frogged entirely when

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120 *See generally* Shane R. Martins, *Consistency Is Key: To Preserve Legislative Intent the IRS Must Afford Legal Recognition to Non-Marital Relationships in a Post-DOMA World*, 15 MARQ. ELDER'S ADVISOR 245, 258 (2014); Ashby Jones, *Why Do We Need the State's Permission to Get Married Anyway?*, WALL ST. J. (Jan. 14, 2010), https://www.wsj.com/articles/BL-LB-23836 [https://perma.cc/XT5M-XTG5].

121 Reynolds v. United States, 98 U.S. 145, 165–67 (1878) (holding, for instance, polygamy unprotected by the Constitution, the Court wrote, "there cannot be a doubt that . . . it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion"). Marriage's perceived central role in two critical spheres—ensuring social order and civilization's continuity—has traditionally been relied upon to justify state-crafted, localized approaches to matters of family life. Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating 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."). *But see* Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 44–45 (2015) (arguing states must get out of the business of marriage).

122 Meister v. Moore, 96 U.S. 76, 78–79 (1877) ("Statutes in many of the States, it is true, regulate the mode of entering into the [marriage] contract, but they do not *confer* the right." (emphasis added)).

123 *Meister* involved a Michigan statute requiring all valid marriages have a minister or magistrate present. *Id*. at 78–79. The Supreme Court held the jury had been erroneously instructed to disregard all evidence of a common-law marriage between the parties and to determine whether a marriage existed solely based on the statutory requirements. *Id*. The Court explained that as a rule of statutory construction, "formal provisions" of marriage regulation are to be construed as directives only, indicating how marriages should be performed but not expressly categorizing as void all other forms of marrying. *Id*. at 79–83.

124 *Id*. at 81 (stating that "marriage is a thing of common right"); *see also supra* note 122 and accompanying text.

125 The language in the statute at issue failed to satisfy this test. *Id*. at 81–82; *see also* Wardle, *supra* note 63, at 293. The state's justification for a statutory intervention must also survive heightened scrutiny. *See infra* Section I.C.5.

126 Obergefell v. Hodges, 576 U.S. 644, 677 (2015); *see also* Yoshino, *supra* note 93, 168–69 (explaining that marriage negotiates a strange dichotomy as simultaneously a positive right requiring the state to grant the parties certain recognition and benefits, and a negative right creating

the state's legislative power has been abused to suffocate individuals' access to this fundamental right.[127] The Court construed its role as saving the right to marry from being subjected to the typical legislative process if that process itself had been used to illegitimately constrain the right.[128] The *Obergefell* decision emphasized that the principal aim of the American political structure was to ensure no arm of government could deprive individuals of the rights the system was created to protect.[129]

5. Standard of Review

Typically, fundamental rights automatically trigger strict scrutiny.[130] However, in marriage cases the Court has applied everything from rational basis review to more searching scrutiny.[131] The *Obergefell* development of the equal dignity doctrine untethered the stricter scrutiny available in standard equal protection cases from a particular protected class and bound it to the right to marry itself.[132] The right to marry itself imposes the heavier burden.[133]

Prior opinions had flirted with increasing the scrutiny stakes in marriage cases. In *Turner*, the Court engaged in a reasonableness discussion but hinted it was looking for something more than rational basis review.[134] The Court insisted on a multi-prong test, requiring the state to present a "valid" connection between the interest and the regulation, that no alternative means be available for accomplishing that end, and that the regulation not be an "exaggerated response" to the state

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"a zone of privacy into which the state cannot intrude"). *But see* Adside, *supra* note 93 (criticizing *Obergefell* as a dramatic departure from the established paradigm that states control marriage).

127 *Obergefell*, 576 U.S. at 676–77 ("[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.").

128 *Id*. at 679 ("Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.").

129 *Id*. at 674 (construing the Court's role as "to identify and correct inequalities in the institution of marriage"); *see also* Tribe, *supra* note 95, at 17–20, 28–32.

130 *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993); *see also* Wardle, *supra* note 63, at 325 n.156.

131 Wardle, *supra* note 63, at 341–42.

132 *Obergefell*, 576 U.S. at 675, 681 ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. . . . [Petitioners] ask for equal dignity in the eyes of the law.").

133 *See* Tribe, *supra* note 95, at 20–28.

134 Turner v. Safley, 482 U.S. 78, 89–91 (1987).

interest.[135] The Court rejected the state's position that prisoners' right to marry could be impinged because of the valid penological interest in security where there were "obvious, easy alternatives" to obtain security without banning marriage.[136] A harsher standard of review than typical rational basis review was imposed in light of the marriage right implicated.[137] Similarly, *Zablocki v. Redhail* applied "critical examination" to the challenged law and demanded a legitimate, substantial state purpose be produced to support a law that "significantly discouraged" marriage, a fortiori one that placed an absolute bar on the right.[138]

Obergefell avoided announcing reliance on any one level of scrutiny, appearing instead to apply a malleable balancing test.[139] Though the *Obergefell* standard of review is undeniably murky,[140] the approach recalls that of Justice Stewart's concurrence in *Zablocki*.[141] There, Justice Stewart had asserted that where a state interest was based on an uncertain policy prediction of harms, it was insufficient to defeat a constitutionally-protected right.[142] *Obergefell* appeared to utilize a similar calculus,[143] but with the addition of putting a leaden finger on the scale in favor of the individual to intensify the pressure on the states.[144]

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135 *Id*.

136 *Id*.

137 Metteer, *supra* note 18, at 270. *Cf.* Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, SCOTUS BLOG (Aug. 23, 2011, 8:38 AM), https://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review [https://perma.cc/R3L6-558F] (suggesting it is the animus being expressed toward the class more than the nature of the right itself that primarily guided the heightened inquiry in certain marriage cases).

138 Zablocki v. Redhail, 434 U.S. 374, 383, 387 n.12 (1978); *id*. at 391 (Burger, C.J., concurring) (contrasting the *Zablocki* statute's "intentional and substantial interference with the right to marry" with the *Califano* law, which "did not constitute an 'attempt to interfere with the individual's freedom to make a decision as important as marriage,' and, at most, had an indirect impact on [it]." (quoting Califano v. Jobst, 434 U.S. 47, 54 (1977))); *see also* Bratt, *supra* note 17, at 263–64 n.47; GROSSMAN & FRIEDMAN, *supra* note 51, at 38–39.

139 Adside, *supra* note 93, at 152–55; *see also* Yoshino, *supra* note 93, at 150, 162–74 (finding *Obergefell* employed a common-law "balancing methodology"). *But see* Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER SOC. POL'Y & LAW 1, 53–54 (2015) (finding *Obergefell* crafted and applied some new heightened scrutiny methodology).

140 Perry, *supra* note 93, at 6–8 (discussing the oddities of the *Obergefell* standard of review).

141 434 U.S. at 391–95 (Stewart, J., concurring).

142 *Id*. ("[I]nvasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great.").

143 Obergefell v. Hodges, 576 U.S. 644, 673–75 (2015).

144 Tribe, *supra* note 95, at 17–23.

II. ANALYSIS

The cousin bans violate the basic right to marry, which over a century of Supreme Court jurisprudence has been grounded in both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[145] This Section will demonstrate that by placing direct prohibitions or severe limitations on the liberty of a particular identity group to exercise this fundamental right, the bans trigger a heightened, stringent form of scrutiny.[146] It will show that the states must prove the bans are closely tailored means toward accomplishing substantial or compelling interests.[147] It will then review the leading justifications for the bans and demonstrate that none can vault this constitutional threshold.[148]

A. *Triggering the Right to Marry*

The cousin bans are classification schemes that intentionally circumscribe the individual's freedom to choose who to marry based on a discrete characteristic,[149] namely, the nature and degree of partners' consanguinity.[150] Identity-based regulatory mechanisms raise the Supreme Court's suspicion of an unjustified impairment of marriage, and not only when the laws attack a canonically protected identity group, like race.[151]

Laws targeting particular groups for restricted exercise of the marriage right based on that group identity, regardless of the identity at issue, have been repeatedly invalidated.[152] Consequently, indigence,[153]

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145 *See supra* Section I.C.

146 *See infra* Section II.A.

147 *See infra* Sections II.B–II.C.

148 *See infra* Sections II.B–II.C.

149 An effective analysis of the unconstitutionality of a classification scheme proceeds as follows: (i) find a legal regime "defined by traits that are irrelevant, in that the trait provides no basis to deny full rights of citizenship," and (ii) explain that persons in that class have been "subject to systematic, irrational discrimination" based on belonging to that identity group. *See* Bhagwat, *supra* note 100, at 395–96.

150 See analysis of the cousin bans, *supra* Section I.B.1, articulating that the statutes place first-cousinhood status as the barrier to marriage.

151 Loving v. Virginia, 388 U.S. 1 (1967) (striking down anti-miscegenation laws).

152 See *supra* Section I.C.2 for an in-depth description of the concern the Court has shown for all to have equal access to marriage; *accord* Bhagwat, *supra* note 100, at 395–96 (explaining how equal protection can be applied to far-reaching classification schemes).

153 *See generally* Boddie v. Connecticut, 401 U.S. 371 (1971).

incarceration,[154] and noncustodial single parenthood[155] are all identities for which the Court has intervened in the face of regulations that significantly restricted access to marriage based on those characteristics.[156] Similarly, sexual orientation was not clearly categorized as a protected class in *Obergefell*;[157] rather, a gender-based classification was struck down based on an "equal dignity" doctrine that all persons enjoy the constitutionally-protected autonomy to pursue a personally satisfying marriage.[158]

First cousinhood defines a specific, limited class of persons,[159] a particular identity the states have weaponized[160] for the sole purpose of invading the marriage right of those in the class.[161] One might argue the cousin bans are not a true marriage-infringing classification scheme as

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154 *See generally* Turner v. Safley, 482 U.S. 78 (1987); *accord* Jones v. Perry, 215 F. Supp. 3d 563 (E.D. Ky. 2016) (holding that a requirement for both parties to be physically present when applying for a marriage license was an unconstitutional infringement of an incarcerated woman's right to marry).

155 Zablocki v. Redhail, 434 U.S. 374, 375 (1978) ("The class is defined by the statute to include any 'Wisconsin resident having minor issue not in his custody and which he is under obligation to support . . . .'").

156 *See supra* Section I.C.1.

157 Carl H. Esbeck, *A Post*-Obergefell *America: Is a Season of Legal and Social Strife Inevitable?*, 11 CHRISTIAN LAW. 3 (2015) ("*Obergefell* did not extend the rigor of the Equal Protection Clause to 'sexual orientation' as a protected class."). *But see* Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 15–17 (2016) (arguing that *Obergefell* did apply the standard equal protection analysis and found sexual orientation a suspect class deserving heightened scrutiny).

158 Yoshino, *supra* note 93, at 171–79; Tribe, *supra* note 95, at 17, 23–32.

159 It may be argued that the immutability of race and sexual orientation were relevant to the heightened protection afforded by those classes, as alluded to by the *Obergefell* majority. *See* Obergefell v. Hodges, 576 U.S. 644, 658 (2015) ("[P]etitioners seek [to marry] . . . [a]nd their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."). Conversely, cousinhood is an alterable status. *See, e.g.*, UNIF. PROB. CODE § 2-119 (amended 2010) (adoption severs familial ties to genetic relatives). However, the immutability of the classified characteristic has never been made a requisite factor for heightened protection in the marriage context. *See, e.g.*, *Turner*, 482 U.S. at 96 (protecting the right to marry of inmates, "most [of whom] eventually will be released").

160 "Weaponized" is used intentionally here: scholars have traced the emergence of the cousin bans to the surging racial and ethnic discrimination in the closing decades of the nineteenth and the early twentieth centuries, the period in which nearly all the bans were introduced; with first-cousin marriages more popular among minorities, they were a natural target for animus-motivated restrictive regulations. Paul & Spencer, *supra* note 25, at 2628; *accord* Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm*,*"* 64 CASE W. RES. L. REV. 1045, 1058–61 (2014) ("Certain legislative classifications are so closely associated with prejudice that courts presume an illegitimate purpose."); see *infra* Section II.B.3 for discussion of the legal implications of the discriminatory origins of the cousin bans; *see also* OTTENHEIMER, *supra* note 19, at 50.

161 See *supra* Sections I.B.1–I.B.2 for discussion of the ways in which the cousin bans purposely invade on the right of first cousins to marry.

they merely limit the right of cousins to marry each other, the states declaring off-limits only a narrow slice of the general population.[162] However, the Supreme Court rejected this rationale in *Loving* and *Obergefell*: the state may not announce that one can marry everyone in the world except for the individual one wishes to wed.[163] The class of first cousins may itself be limited, but the right to marry means very little if it excludes the partner of one's choosing.[164]

The cousin bans directly and significantly interfere with the right to marry by either absolutely prohibiting or heavily restricting marriage between first cousins.[165] Those that prohibit first-cousin marriage without exception—the majority approach[166]—are directly analogous to the *Loving* or *Obergefell* statutes: the state places an identity, be it race,[167] gender,[168] or cousinhood,[169] as the insurmountable obstacle between persons seeking to marry.[170]

Meanwhile, the six jurisdictions that contrive exceptions to general bans based on age and infertility[171] are reminiscent of the prior permission

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162 In *Keeney v. Heath*, the Seventh Circuit suggested the number of persons one is restricted from marrying may bear on a law's constitutionality; the larger the prohibited class of potential partners, the more suspect the law. 57 F.3d 579, 582 (7th Cir. 1995) ("[T]he ratio of male prisoners to female guards . . . will impair the marital prospects of women far more than those of men.").

163 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *Obergefell*, 576 U.S. at 665 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.").

164 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) (citing Perez v. Sharp, 198 P.2d 17, 21 (Cal. 1948)); *Loving*, 388 U.S. at 12.

165 *See generally supra* Section I.B.1.

166 *See supra* notes 44–45 and accompanying text.

167 The Virginia statute in *Loving* provided that it was a felony for "any white person [to] intermarry with a colored person, or any colored person [to] intermarry with a white person." *Loving*, 388 U.S. at 4 (quoting Racial Integrity Act of 1924, VA. CODE ANN. § 20-59). One's race conclusively defined and constrained whom one could marry.

168 *Obergefell* reviewed four state laws that defined marriage as between a man and a woman. 576 U.S. at 653–54. For instance, the Constitution of Michigan provided that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage"—clearly placing one's gender as the controlling characteristic for marriage. MICH. CONST. of 1963, art. I, § 25.

169 See *supra* note 44 and accompanying text for a full national survey of the cousin bans. The Delaware statute is representative, providing that "[a] marriage is prohibited and void between a person and his or her . . . first cousin." DEL. CODE ANN. tit. 13, § 101 (West 2021). The statutory language is unequivocal: the degree of consanguinity between partners ineluctably defines their right to marry.

170 See generally discussion *supra* Section 1.C.2 of the Court's approach to direct bars on the right to marry.

171 *See supra* notes 45–47 and accompanying text.

provisions the Court invalidated in *Zablocki*[172] and *Turner*.[173] In those cases, the circumscribed identities—persons delinquent in child support payments and inmates, respectively—were not by the statutes' terms absolutely barred from marriage, but the statutes tied the classified identities' access to marriage on obtaining dispensations from designated state officials.[174] Yet, the Court held such requirements were far too invasive.[175] Similarly, the cousin bans with age and infertility exceptions may peacock as permissive, but practically they function as coercive prohibitions, with only inflexible time or self-inflicted infertility releasing the partners from state invasion.[176]

The cousin bans with so-called exceptions may intrude even more substantially than the prior permission cases. The *Zablocki* and *Turner* statutes theoretically kept marriage within grasp of the couple, with the right immediately exercisable after obtaining state permission.[177] The cousin bans offer no such quick-release valve: the exceptions merely subordinate the right to further characteristics of the partners—age, infertility—inalterable by a simple court order.[178]

Having found a direct imposition on marriage based on an identity-classification scheme, the cousin bans must be subjected to a heightened standard of review, which the Supreme Court applies in its reflexive protection against encroachments upon the right to marry.[179] The state's

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172 Zablocki v. Redhail, 434 U.S. 374 (1978) (requiring noncustodial parent receive court assent prior to marrying).

173 Turner v. Safley, 482 U.S. 78 (1987) (requiring inmates obtain prison warden consent prior to marrying).

174 *Compare Zablocki*, 434 U.S. at 375–78 (permitting a noncustodial parent to marry after "first obtaining a court order granting permission to marry"), *with Turner*, 482 U.S. at 96 (permitting inmates to marry provided "the prison superintendent has approved the marriage after finding that there are compelling reasons for doing so").

175 *Compare Zablocki*, 434 U.S. at 387 (holding prior permission functioned actually as a total bar for those in the affected class who "either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges," "sufficiently burdened" those who "will in effect be coerced into forgoing their right to marry," and acted for all in the class as "a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental"), *with Turner*, 482 U.S. at 99 (interpreting the prior permission requirement as an "almost complete ban on the decision to marry" by inmates).

176 *See supra* notes 45–47 and accompanying text.

177 The *Zablocki* and *Turner* plaintiffs may not have received the necessary permission, but the statutes were by their terms designed to allow for dispensation. *See supra* notes 174–175 and accompanying text.

178 See *supra* Section I.B.1 for analysis of the varieties of cousin bans. *Cf.* Metteer, *supra* note 18, at 269–70 (discussing the *Turner* Court's determination that prison officials do need the autonomy to take action they deem necessary for security purposes—an administrative flexibility absent in any of the cousin bans).

179 *See supra* Sections I.C.4–I.C.5; *see also* Wardle, *supra* note 63, at 335 (finding the Supreme Court very rarely overturns state marriage regulations, but where it does, it has been in protection

burden is particularly heavy given that the intrusion on the right is direct and intentional.[180]

B. *Evaluating the State Interests*

The questions emerge, then, whether the states can claim a sufficient interest in placing a direct bar on first cousins' right to marry, and whether the bans are closely tailored to effectuate only those interests.[181] This Section will discuss the three leading justifications[182] presented for the cousin bans: (1) first cousins produce diseased, defective offspring; (2) in-marrying generates family chaos; and (3) endogamous marriage impedes the progress of an ordered civilization. Applying the necessary heightened scrutiny, the Section will weigh whether any of these interests succeed in raising a compelling interest to support the cousin bans, and find them all wanting.

1. Biogenetic Research Empirically Weighs Against the Cousin Bans

The most persistently produced justification for the cousin bans insists that close kinship between partners portends deleterious genetic consequences for their offspring.[183] However, the Supreme Court has suggested that a weakly validated medical concern cannot support a

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of an "egregious deprivation of the marriage rights of members of extremely vulnerable, severely disadvantaged, and politically impotent groups").

180 *See supra* Section I.C.5. Recall the issue in *Califano* was the requirement that marriage be sufficiently directly impacted to ratchet up the level of scrutiny. *See supra* note 79 and accompanying text. The cousin bans clearly meet that test.

181 *See supra* Section I.C.5.

182 OTTENHEIMER, *supra* note 19, at 42–60; Grossman, *supra* note 18.

183 *See generally* Bratt, *supra* note 17, at 267–81 (discussing the genetic justification in the context of incest statutes). This horrified response to cousin marriage as genetically dangerous was captured by Gabriel Garcia Marquez: "They were cousins. . . . [W]hen they expressed their desire to be married their own relatives tried to stop it. They were afraid that those two healthy products of two races that had interbred over the centuries would suffer the shame of breeding iguanas." GABRIEL GARCIA MARQUEZ, ONE HUNDRED YEARS OF SOLITUDE 20 (Gregory Rabassa trans., Editorial Sudamericanos 1967). The cousin bans rely on the bio-genetic concern even more so than incest regulations generally, as the bans emerged only in the period where bio-evolutionary scientists began seriously considering whether consanguinity is tied to children's outcomes. OTTENHEIMER, *supra* note 19, at 1–7, 46–55 (attributing the bans in part to the emerging focus on ideal breeding and superiority by biology, and suggesting that incest laws that emerged prior to genetic scientific advancements cannot be justified on a contemporary bio-genetic understanding); *see* McDonnell, *supra* note 17, at 352 (arguing the "problems" of the genetic justification).

statute impairing a fundamental marriage-related right.[184] In *Skinner v. Oklahoma*, the Court invalidated a mandatory sterilization scheme for "habitual" criminals, as the state's interest in avoiding inheritable criminality was too pseudo-scientific to support the intrusion into the right to reproduction,[185] which is bound up with the right to marry.[186] The state must produce sufficient grounds for believing the "definite and observable characteristics" of a disease are transmissible and likely to manifest in future generations to justify such a shocking infringement of a constitutionally-protected right.[187] The Court found insufficient empirical evidence to support the regulation and chastised the state for playing with eugenics.[188]

The cousin bans do not clear this threshold, as they impair a fundamental marriage right despite empirical evidence not weighing conclusively against a widespread high risk of negative genetics-based results for the progeny of first cousins.[189] Bio-evolutionary scientists have

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184 *See* Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942) ("Marriage and procreation are fundamental . . . . The [state] power to sterilize . . . may have subtle, farreaching [sic] and devastating effects. . . . Any experiment which the State conducts is to [one's] irreparable injury. [One] is forever deprived of a basic liberty."). *But see* Cornelia Dean, *When Questions of Science Come to a Courtroom, Truth Has Many Faces*, N.Y. TIMES (Dec. 5, 2006), https://www.nytimes.com/2006/12/05/science/05law.html [https://perma.cc/KK9M-SQYH] (discussing the benefits and pitfalls of the court using science in deciding cases).

185 *Skinner*, 316 U.S. at 541–42 ("We have not the slightest basis for inferring that . . . the inheritability of criminal traits follows the neat legal distinctions which the law has marked . . . .").

186 See *supra* Section I.C.3 for discussion of the scope of the right to marry interpreted to embody a broad spectrum of activities and interests, with the right to procreation the most basic and direct of them all.

187 *Skinner*, 316 U.S. at 546 (Jackson, J., concurring) (rejecting the state's "plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility").

188 *Skinner*, 316 U.S. at 541–42 (majority opinion) (warning the sterilization scheme threatened to "cause races or types . . . inimical to the dominant group to wither and disappear"); *id.* at 544–45 (Stone, C.J., concurring) (finding neither "common knowledge [n]or experience, [nor] scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable" (footnote omitted)); *id.* at 546 (Jackson, J., concurring) (criticizing the state). It must be mentioned here that the Court permitted a state's compulsory sterilization scheme for persons with mental illness in the notorious *Buck v. Bell*, 274 U.S. 200 (1927). However, even if accepting *Bell* as having merit, it set a high bar for how miserable the genetic odds must be for the Court to validate state interference in the procreation interest. *Id.* at 207 ("In view of the general declarations of the Legislature and the specific findings of the Court *obviously* we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result." (emphasis added)).

189 In his 2012 book, Professor Alan H. Bittles provides a sweeping, in-depth review of the available studies measuring the deleterious consequences of consanguineous marriage to conclusively establish the known risks. BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25. A fulsome overview of all the data analyzed is outside the scope of this Article, but this section's concern—namely, the question of whether reproduction between first cousins produces negatively-

long established that consanguinity does not cause diathetic[190] tendencies in offspring;[191] rather, the inheritance of two identical mutations of the same gene causes disease, abnormality, or defect in offspring.[192] The presence of the same heritable characteristic and recessive gene mutation in both parents causes heritable or genetic disease in children, not the degree of kinship between the parents.[193]

It has been argued the genetic children of consanguineous couples are more liable to receive the "double dose" of the mutated gene necessary for the defect to express itself,[194] as partners of the same ancestral line are more likely to inherit an identical recessive genetic mutation from a common ancestor.[195] However, a definitive 2002 report

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impacted children—can be summed up by the following conclusion Bittles offers: "Given our present knowledge of the quite limited adverse effects of consanguinity on health at the population level . . . it is difficult to discern how laws prohibiting first-cousin marriage can continue to be required or justified." *Id*. at 38. For a comprehensive discussion of the data, see *id.* chs. 7–11. For a far briefer discussion of Bittles' findings, see *Why Not Marry Your Cousin? Millions Do*, EUREKALERT! (Apr. 25, 2012), https://www.eurekalert.org/news-releases/508067 [https://perma.cc/M75M-6MZW] (quoting Bittles as stating that there is a mere 3 to 4% higher risk of illness and early death in children of consanguineous couples above the general population and that "the risks apply primarily to couples who are carriers of disorders that are normally very, very rare," while "[f]or over 90% of cousin marriages, their risk [of having a child with a genetic abnormality] is the same as it is for the general population" (second alteration in original)).

190 Derived of the word diathesis, meaning "permanent (hereditary or acquired) condition of the body which renders it liable to certain special diseases or affections." *Diathesis*, OXFORD ENGLISH DICTIONARY (2020).

191 LESLIE A. WHITE, THE SCIENCE OF CULTURE 305 (1949) ("[I]nbreeding intensifies the inheritance of traits, *good or bad*. If the offspring of a union . . . are inferior it is because the parents were of inferior stock . . . ." (emphasis added)). Please note that the quoted language here, as well as in other citations using older sources found in this Article, may be offensive to modern readers. Their inclusion should not be taken as an endorsement of those eugenicist views.

192 *See* Bittles, *Consanguinity*, *supra* note 24, at 91–95; *accord* Bratt, *supra* note 17, at 267–81.

193 A medical journal excerpt over a century old remains an accurate assessment: "If the cousins have behind them an ancestry physically, morally, and mentally without blemish, then such a marriage is certainly unobjectionable and may even be regarded as advantageous. . . . It is, we think, quite clear that any dogmatic condemnation of cousin marriages is not warranted by the present state of knowledge." *Hospital Finance: Cousin Marriage*, 1 BRIT. MED. J. 164 (1910).

194 *See* Bratt, *supra* note 17, at 271. Note that, on average, any child born of any parents who are both carriers for the same genetic disease has a one-in-four chance of manifesting the disease. *Genetic Disorders: Carrier Screening*, NORTON & ELAINE SARNOFF CTR. FOR JEWISH GENETICS, https://www.juf.org/cjg/Carrier-Screening.aspx [https://perma.cc/S7JU-25PE]. In fact, most humans carry at least one recessive genetic mutation with the potential to cause infant death or to manifest in severe genetic defect should two copies of the same mutation be inherited. Ziyue Gao, Darrel Waggoner, Matthew Stephens, Carole Ober & Molly Przeworski, *An Estimate of the Average Number of Recessive Lethal Mutations Carried by Humans*, 199 GENETICS 1243, 1252 (2015). Less than one percent of humanity carries no recessive genetic mutations. *See* Bratt, *supra* note 17, at 271 n.78. Consequently, nearly without exception, every incident of reproduction carries a risk that resulting offspring will manifest a genetic disease recessive and latent in the parents. *Id*.

195 *See generally* Alan H. Bittles, *Inbreeding in Human Populations and its Influence on Fertility and Health*, 27 J. BIOLOGICAL EDUC. 260 (1993); *see also* Bittles, *Consanguinity*, *supra*

by the National Society of Genetic Counselors (NSGC) reviewing and consolidating the research of many consanguinity studies[196] debunked the theory that first cousins as a class pose an appreciably greater risk of passing on the genetic defect to their offspring.[197] The risk for congenital defects in the offspring of first cousins was approximately three percent above the population background risk.[198] The stigma associated with cousin marriage in the United States was rejected as having "little biological basis."[199] Routine genetic counseling and testing for family planning purposes was recommended,[200] with the solitary supplemental testing suggested being one neonatal screening for inherited metabolic

note 24, at 91–95; Bennett et al., *supra* note 13, at 114–15. Analogously, communities that are historically highly endogamous, where there are a very small number of ancestors of the general population, have a statistically increased probability of sharing identical genes—and the identical genetic mutations that come with it. The smaller antecedent gene pool increases the possibility that the problematic gene may be inherited by both partners from a mutual ancestor. Bittles, *Consanguinity*, *supra* note 24, at 91–95; *see also* Paul & Spencer, *supra* note 25, at 2629 (discussing genetic disease in the British-Pakistani community). Of course, researchers have by now concluded that all humans have descended from a small ancestral population, making us all, ultimately, the products of one in-marrying family of overlapping genetic code. Boyce Rensberger, *Human Ancestors Traced to 1 Small Group*, WASH. POST (May 26, 1995), https://www.washingtonpost.com/archive/politics/1995/05/26/human-ancestors-traced-to-1-small-group/5a5a1a80-3cfe-4b68-b6ac-d1144e402293 [https://perma.cc/38AK-JUD4]; *see* Lev A. Zhivotovsky, Noah A. Rosenberg & Marcus W. Feldman, *Features of Evolution and Expansion of Modern Humans*, *Inferred from Genomewide Microsatellite Markers*, 72 AM. J. HUM. GENETICS 1171 (2003).

196 It must be noted that many reports warning of greatly increased genetic risk in first-cousin reproduction have been criticized as infected by confirmation bias. *See, e.g.*, Alan H. Bittles, *Consanguineous Marriages and Congenital Anomalies*, 382 LANCET 1316, 1316–17 (2013) (criticizing studies associating consanguineous marriage with congenital anomalies as "hampered by deficiencies in study design and small sample sizes"). Researchers spanning the nineteenth to the twenty-first centuries have been guilty of concluding, against all data they personally collect, that cousinhood is the root cause of childhood disease. OTTENHEIMER, *supra* note 19, at 82–85 (reporting on Scotland's deputy commissioner for lunacy maintaining that cousin marriages create "idiots, madmen, cripples, and mutes," even as the commissioner's studies throughout the 1850s repeatedly failed to conform to his hypothesis). Critically, studies of consanguineous-born children have often failed to account for the effects of socioeconomic variables on infant health, mortality, and childhood disease. Bennett et al., *supra* note 13, at 102; BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 226–27 ("In a majority of consanguinity studies there continues to be no credible control for non-genetic variables, even in the investigation of complex disorders in which social and 'environmental' factors are known to operate."). These factors likely play a pronounced causative role in determining the health of children born to first cousins, as cousin marriage occurs heavily in communities where healthcare access is of acute concern and where pregnant women are less likely than the general population to engage in prenatal testing or pregnancy termination. *Id.*; Gao et al., *supra* note 194, at 1244; Paul & Spencer, *supra* note 25, at 2628–29. The issue is health care, education, and access, not consanguinity.

197 *See generally* Bennett et al., *supra* note 13.

198 *Id.* at 115.

199 *Id.* at 116.

200 *Id.*

disorders, which are relatively common among newborns.[201] Data compiled in 2012 concurred with the NSGC study, showing a small minority of first-cousin offspring have a low, single-digit greater risk of certain defects than their non-consanguineous peers.[202]

The courts have adopted the view that the alleged health risks associated with reproduction between first cousins are insufficiently proven to support the bans.[203] The Supreme Court of Kansas, in *Estate of Loughmiller*, recognized a first-cousin marriage legally solemnized in a foreign jurisdiction despite the state's cousin ban.[204] The court rejected the genetic science as simply too uncertain to justify a theory of detrimental inbreeding,[205] and it refused to abrogate the normative comity rule of recognizing marriages conducted legally out of state.[206] Similarly,

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201 Morteza Pourfarzam & Fouzieh Zadhoush, *Newborn Screening for Inherited Metabolic Disorders; News and Views*, 18 J. RSCH. MED. SCIS. 801, 801 (2013) ("Each disorder is individually rare, but their cumulative incidence is relatively high, around 1 in 1500 to 1 in 5000 live births."); Edinen Asuka, Donald Jeanmonod & Rebecca Jeanmonod, *Inborn Errors of Metabolism*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., https://www.ncbi.nlm.nih.gov/books/NBK459183 [https://perma.cc/L356-DACZ] (noting that these disorders can be inherited as both autosomal recessive mutations or as autosomal dominant and X-linked mutations).

202 BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 226–29 ("First-cousin marriage has been legal in England and Wales since the sixteenth century, apparently without imposing significant dysgenic effects on the population.") (internal citation omitted).

203 *See, e.g.*, *In re* Est. of Loughmiller, 629 P.2d 156 (Kan. 1981); *cf.* Mazzolini v. Mazzolini, 155 N.E.2d 206, 208 (Ohio 1958) (finding no reason "shocking to good morals [or] unalterably opposed to a well defined public policy" that warranted voiding a first-cousin marriage); Garcia v. Garcia, 127 N.W. 586, 589 (S.D. 1910) (concluding that there was no reason to void a valid first-cousin marriage, an extreme move that would have unnecessarily caused "very serious" consequences for children of the marriage in trusts and estates and criminal law). Interestingly, the cousin bans bear a marked similarity to erstwhile state statutes barring persons with a physical or mental "inferiority" from marrying, reproducing, or engaging in sexual intercourse. GROSSMAN & FRIEDMAN, *supra* note 51, at 39–42. Some of these classifications were based on conditions genetic and hereditable, others on conditions contracted and treatable. *Id*. These included prohibitions on persons with epilepsy from marrying and requiring men to obtain medical certificates affirming they were free of venereal diseases before they could receive marriage licenses. *Id*. at 40–41. By the turn of the last century, most laws restricting marriage based on supposed health concerns had been repealed. *Id*. at 42. Cousin bans are among the holdouts.

204 629 P.2d at 157–60.

205 *Id*. at 158 ("[I]nbreeding is thought to cause a weakening of the racial and physical quality of the population according to the science of eugenics . . . [but] there are opposing views regarding the effects of inbreeding from first-cousin marriages.").

206 *Id*. ("The general rule with regard to the recognition of marriages solemnized elsewhere is that if the marriage is valid where contracted, it is valid everywhere."); *accord Mazzolini*, 155 N.E.2d at 208 ("The policy of the law is to sustain marriages, where they are not incestuous . . . . [S]exual relations between cousins are not incestuous. . . . [W]e are persuaded to [uphold the marriage]."); *see also* Storke, *supra* note 55, at 493–97 (discussing conflict of laws issues arising with conflicting cousin marriage regulations); *see generally* P. H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriage*s, 117 A.L.R. 186 (1938) (discussing recognition of foreign marriage when challenged by the forum state).

the Court of Appeals of Louisiana in *Ghassemi v. Ghassemi* found the bans pursued no legitimate state concern for the creation of diseased children.[207]

2. Cousin Bans Do Not Forestall Family Chaos

A second justification for the cousin bans is avoidance of family chaos.[208] Permitting marriage between close relatives would undermine a precious safety found only in the camaraderie of asexual family ties.[209] Relations between near kin likely involve coercion, abuse,[210] psychological trauma, and social stigmatization, for those in the relationship and their families.[211]

While this justification may have some weight for marriage between a parent and their child or between siblings, it is inapplicable to first cousins.[212] The *Loughmiller* and *Ghassemi* courts vociferously dismissed the notion that sociological consequences of oversexualizing the family

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207 998 So. 2d 731, 748 (La. Ct. App. 2008) (finding that as "first cousins may legally cohabitate, have intimate relations, and even produce children," the state could not claim production of children as the risk it guarded against).

208 Metteer, *supra* note 18, at 276–78.

209 41 AM. JUR. 2D *Incest* § 1 (2020) ("The laws against incest are designed to protect the integrity of the family and the welfare of minor children . . . ."); McDonnell, *supra* note 17, at 353; J. Kelly Strader, Lawrence's *Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 104 n.338 (2011) ("The harm of adult incest seems speculative but plausible: If close relatives (cousins) or people raised together (siblings by affinity) could engage in sex once they became adults, the family as a sexually 'safe' place would be undermined." (quoting William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1090 (2004))).

210 *See generally* Zhou, *supra* note 17, at 239–41. Even those who have argued the constitutionality of prohibitions on parent-child or sibling incest do not deny the profoundly damaging consequences of those relationships but rather argue that there are better methods of ensuring such harm is not inflicted upon a person. *See* Bratt, *supra* note 17, at 289–91.

211 Metteer, *supra* note 18, at 274–78; Richard P. Kluft, *Ramifications of Incest*, PSYCHIATRIC TIMES (Jan. 12, 2011), https://www.psychiatrictimes.com/sexual-offenses/ramifications-incest [https://perma.cc/M4AC-KEEV] (asserting that sex between relatives "often leads to traumatic bonding, . . . abuse, threats, intimidation, beatings, humiliations, and harassment"); Dorothy Willner, *Definition and Violation: Incest and the Incest Taboos*, 18 MAN 134, 139–50 (1983) (discussing the trauma, stigma, and damage to self-identity wrought by incest between parents-children and siblings).

212 Moore, *supra* note 18, at 147 ("[C]ivilized society is based upon the institution of the family and . . . consanguineous mating constitutes a threat to this institution . . . . This contention would doubtlessly have merit were it restricted to mating within the immediate family . . . but it loses its force when applied to cousin-marriages."); *see also* Grossman, *supra* note 18 ("[I]t is fairly unusual for first cousins to grow up in close confines.").

were relevant to first-cousin unions.[213] Both courts cited their respective state legislatures' glaring omissions of sexual intercourse between first cousins from their definitions of "incest" as particularly persuasive evidence that family harmony could not be the basis for the cousin ban.[214] In *State v. Couvillion*, the Supreme Court of Louisiana relied on the fact that first cousins share a "remote relationship," unlike nuclear relatives, in upholding a marriage despite a cousin ban.[215] The Indiana Court of Appeals in *Mason v. Mason* similarly found no public policy had been articulated in support of that state's cousin ban.[216] The conclusions of the Kansas, Louisiana, and Indiana courts are supported by the research into the reasons why incest is harmful.[217]

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213 *In re* Est. of Loughmiller, 629 P.2d 156, 158–61 (Kan. 1981) (raising and rejecting prevention of "the sociological consequences of competition for sexual companionship among family members" as irrelevant to cousin marriage); Ghassemi v. Ghassemi, 998 So. 2d 731, 747–48 (La. Ct. App. 2008) ("[W]e reiterate that in finding no violation of a strong public policy, we make a clear distinction between the marriage of first cousins and marriages contracted between more closely-related collaterals.").

214 *Loughmiller*, 629 P.2d at 161 (finding the alleged odiousness of cousin marriage "has become less compelling in recent years as evidenced by the legislature's omission of sexual intercourse between first cousins in the definition of incest"); *Ghassemi*, 998 So. 2d at 748 ("Our recognition of this distinction [between first cousins and closer kin] is further buttressed by the fact that relations between first cousins are not encompassed by our criminal incest statute . . . ."); *accord* Mazzolini v. Mazzolini, 155 N.E.2d 206, 208 (Ohio 1958) ("The policy of the law is to sustain marriages, where they are not incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited." The court found first cousins failed to rise to that level.).

215 42 So. 431, 431 (La. 1906). First cousins largely are not raised in one household, and do not hold themselves out as and are not perceived to be family of one nuclear household. *Accord* Metteer, *supra* note 18, at 275; *see also* D'vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 5, 2018), https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households [https://perma.cc/QBZ7-ABWH] (noting the rise of two adult generation households, i.e., parents living with their adult children, not a rise in multiple lines of extended family living under one roof). *But see* Moore v. City of E. Cleveland, 431 U.S. 494, 496–500 (1977) (striking down as a violation of due process a zoning ordinance excluding first cousins from the "family" category that may reside together). Importantly, though, *Moore* did not hold that first cousins must be defined as family of one household; rather, the decision focused on the importance of permitting families to make such determinations for themselves. *Id*. at 504–06.

216 775 N.E.2d 706, 709 n.3 (Ind. Ct. App. 2002). The Indiana court's reasoning rested in part, regrettably, on contrasting the cousin ban with the policy support for the state's then-operative prohibition on same-sex marriage. *Id*.

217 For instance, an insurmountably asymmetrical power dynamic inherently exists between parents and children, but first cousins are typically in equal positions of authority relative to one another within the family structure. Mariam Alizade, *Incest: The Damaged Psychic Flesh*, *in* ON INCEST: PSYCHOANALYTIC PERSPECTIVES 106–08 (Giovanna Ambrosio ed., 2005) (discussing the repercussions of incest). Meanwhile, romance between siblings is rife with potential trauma, but first cousins' dynamic may be more analogous to childhood friends than siblings. *Cf.* Metteer, *supra* note 18, at 275–78; ANTHONY TROLLOPE, THE VICAR OF BULLHAMPTON 136 (1870) ("Cousins probably know all or most of your little family secrets. Cousins, perhaps, have romped with you,

The family harmony justification recalls the pre-*Obergefell* argument that the state may ban same-sex marriage based on its belief that the nuclear family unit is best served by heterosexual marriage.[218] In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts found even rational basis review unsatisfied by this argument.[219] The Supreme Court in *Obergefell* took a dim view of the rationale, as well.[220] Family stability is similarly unthreatened, and actually possibly promoted, by cousin marriage, as demonstrated in studies of communities where cousin marriage has been widely practiced.[221]

3. The Fabric of Society Is Not Threatened

The third justification proposes first-cousin marriage visits harm upon society at large.[222] The theory claims that marriage between non-kin, or exogamy, promotes social cohesion by forcing intergroup alliances, increasing humanity's ability to survive, while in-marriage, or endogamy, reinforces humans' natural tribalism.[223] A civilization's

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and scolded you, and teased you, when you were young. Cousins are almost the same as brothers, and yet they may be lovers. There is certainly a great relief in cousinhood.").

218 *See* Cross-Motion for Summary Judgment at 57–67, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. 01-1647-A).

219 *Goodridge*, 798 N.E.2d at 961–69.

220 Obergefell v. Hodges, 576 U.S. 644, 738–39 (2015) (Alito, J., dissenting) (relying on the state's argument for heterosexual marriage being the ideal family unit, which had failed to convince the majority).

221 Moore, *supra* note 18, at 147; Bennett et al., *supra* note 13, at 113. These studies show that cousin marriage increases economic stability by retaining property within the family and strengthens emotional ties across branches of the extended family. *Id.*; *see also* Kuper, *supra* note 24, at 728–30; TALIA SCHAFFER, ROMANCE'S RIVAL: FAMILIAR MARRIAGE IN VICTORIAN FICTION 123 (2016) (arguing that cousin marriage, a popular trope in Victorian literature, empowered women to engage with the public world while "reinforcing and consolidating family ties that may have been frayed"). First-cousin marriages also result in simplified, smoother wedding arrangements, and more congenial post-marital dynamics. Bittles, *Consanguinity*, *supra* note 24, at 91. These benefits have been recognized by communities as diverse and widespread as South Indians, Burmese Chin and Kachin, Siberian Gilyaks, Australian Aborigines, and Victorian English. Kuper, *supra* note 24, at 724–28. Rather than worrying society might discover a dirty secret of a first-cousin couple in the family, many communities have pursued these matches as ideal. *See generally* Bittles, *Consanguinity*, *supra* note 24.

222 Moore, *supra* note 18, at 147; *see also* Metteer, *supra* note 18 at 273 ("The states' interests are . . . to protect society at large from the effects of incest, rather than to protect the individuals involved from the effects of their incestuous liaisons.").

223 OTTENHEIMER, *supra* note 19, at 134–44. This formulation, known as the "alliance theory," is described by CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 21–51 (James Harle Bell, John Richard von Sturmer & Rodney Needham trans., Beacon Press 1969), who

success in refraining from indiscriminate intimacy with relatives purportedly signifies progressive human evolution beyond barbarism and savagery.[224]

The Chancery Court of New York in *Wightman v. Wightman*—decided in 1820, decades before cousin bans were introduced anywhere in the country—challenged the wisdom of this theory of consanguineous marriage.[225] Relying on common law, natural law, and ecclesiastic law, the court concluded that while marriage within the nuclear family may be per se repugnant, marriage between further relatives, like cousins, could not be called de facto detrimental to society and could reasonably be left to personal determinations.[226]

Following the introduction of the cousin bans, courts have continued to recognize cousin marriage as innocuous.[227] In *Etheridge v. Shaddock*, the Supreme Court of Arkansas, when validating a marriage despite the state's cousin ban, announced it was adopting the majority view in finding cousin marriage to be an innocent form of consanguineous unions.[228] Similarly, in *Schofield v. Schofield*, the Superior Court of Pennsylvania validated a cousin marriage legally celebrated elsewhere because it found no basis to consider such a marriage harmful and necessary to be voided.[229] The long history of cousin marriage as practiced successfully across cultures and the socioeconomic gamut demonstrates the accuracy of the judiciary's view that first-cousin marriage does not endanger social progress; in fact, it boasts stabilizing effects.[230]

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imagines the incest taboo as a man-made ideal upon which a modern, cohesive, thriving society is founded.

224 OTTENHEIMER, *supra* note 19, at 134–48. This principle is tied to the bio-genetic justification, as the end of indiscriminate sex leads to more careful selection of reproductive partners and conception of stronger offspring. *Id.*

225 4 Johns. Ch. 343 (N.Y. Ch. 1820) (holding void the marriage of a "lunatic").

226 *Id.* at 347–51 (rejecting parent-child and sibling relationships as "monstrous connections, and repugnant to the law of nature . . . binding on all mankind"). The *Wightman* court concluded line-drawing between further relatives should be left "to the injunctions of religion, and to the control of manners and opinion." *Id.* at 351. The court did leave the door open for the legislature to replace individual choice on non-nuclear consanguineous marriage. *Id.* Of course, this Article argues for a constitutional approach.

227 *See generally* Storke, *supra* note 55, at 493–97.

228 706 S.W.2d 395, 396 (Ark. 1986) ("[A] marriage between first cousins . . . does not create 'much social alarm,' so that the marriage will be recognized if it was valid by the law of the state in which it took place.").

229 51 Pa. Super. 564, 578 (Pa. Super. Ct. 1901) ("[T]his act cannot be taken as a declaration that the marriage status between first cousins is either contrary to the Divine law or immoral.").

230 For example, immigrant communities have found cousin marriage to be integral to their continuity, ensuring propagation of valued and valuable cultural beliefs and social traits. *See* Kuper, *supra* note 24, at 732–33; *see also* OTTENHEIMER, *supra* note 19, at 151–52; BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 58–73; *see generally supra* Section I.A.1.

This entire theory of cousin marriages as anathema to social progress carries a distinctly discriminatory mien.[231] In *Loving v. Virginia*, the Supreme Court rejected anti-miscegenation regulation because of its basis in the white supremacist project.[232] The cousin bans share that torrid history, arising in the same era as the anti-miscegenation regulations and in response to similar anti-minority sentiment.[233] For instance, the alleged affinity Native Americans had for cousin marriage was cited by cousin ban agitators to advance their cause.[234] Like the anti-miscegenation laws, the cousin bans persist under the guise of maintaining social progress, but function as a pretext for a machine of discrimination.[235] The cousin bans restrict marriage based on an irrelevant characteristic, for reasons motivated by at best ignorance and at worst bigotry.[236]

C. *The Bans Are Not Closely Tailored*

The justifications undergirding the cousin bans are extremely weak on their merits,[237] but even assuming they represent some legitimately valuable state interests, the cousin bans fail when scrutinized for whether they are closely tailored to meet only those purposes.[238] The Supreme

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231 OTTENHEIMER, *supra* note 19, at 50, 139–44 (discussing the wholly modern and well-functioning societies that have practiced cousin marriage); Zhou, *supra* note 17, at 198–200 (noting the alliance theory has been criticized as promoting outdated social norms and gendered roles).

232 388 U.S. 1, 7–12 (1967); Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 191 (2015) ("According to the Court's reasoning, the Virginia law violated the equal protection clause not simply because it employed racial classifications, but because its racial classification system furthered the state's impermissible white supremacist mission."). Indeed, the *Loving* Court cites two notorious World War II opinions—Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018)—upholding regulations persecuting Japanese-Americans based on the proposition that racial classification schemes are not de facto unconstitutional. 388 U.S. at 11.

233 *See supra* note 160 and accompanying text.

234 OTTENHEIMER, *supra* note 19, at 50.

235 *See id*. at 51–56; *see Bratt*, *supra* note 17, at 276–81; *see also* I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1209–10 (2012).

236 BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 38–39 (arguing that the U.S. cousin bans may run afoul of international human rights law protecting the right to marry). The discriminatory reasoning for limiting first-cousin marriage is reminiscent of the now-refuted arguments put forth against same-sex marriage. *See, e.g.*, Ryan T. Anderson, *Marriage and the Constitution: What the Court Said and Why It Got It Wrong*, REAL CLEAR POL. (July 3, 2015), https://www.realclearpolitics.com/articles/2015/07/03/marriage_and_the_constitution_what_the_court_said_and_why_it_got_it_wrong_127220.html [https://perma.cc/S2PK-2ERX] (discussing the unconstitutionality of limiting marriage based on "irrelevant" characteristics).

237 *See supra* Sections II.B.1–II.B.3.

238 As is required by the legal standard for examining impairments of the right to marry. *See supra* Section I.C.5.

Court requires the state to justify the nature and scope of the means employed to regulate marriage, and demands tempered, logical responses to valid objectives with no alternative means.[239]

1. The Bans Go Too Far and Not Far Enough to Serve the Biogenetic Interest

Assuming, then, that the state may legitimately be intolerant of any increased risk of disease to potential offspring—even less than three percent[240]—the bans must prove to be measured, finely-honed tools toward eliminating that risk. They are not.[241]

First, the bans are overinclusive, as they cover the roughly ninety-three percent of cousin couples who will have children without any risk of defect.[242] Second, they are underinclusive on two fronts: (1) they prohibit marriage, which may deter but surely does not prevent children from being born to first cousins,[243] and (2) they tolerate unrestricted marriage, sex, cohabitation, and reproduction between persons who pose much higher risks to offspring than first cousins.[244] To that latter point,[245] no state prohibits marriage or criminalizes intercourse with women over

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239 Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."); Turner v. Safley, 482 U.S. 78, 97–98 (1987) (overturning a regulation that "represents an exaggerated response" to legitimate concerns where "[t]here are obvious, easy alternatives").

240 *See supra* Section II.B.1.

241 *See* Bennett et al., *supra* note 13; *Grossman*, *supra* note 18 (discussing the over and under-inclusiveness of the cousin bans).

242 *Grossman*, *supra* note 18.

243 *See generally* George A. Akerlof & Janet L.Yellen, *An Analysis of Out-of-Wedlock Births in the United States*, BROOKINGS INST. (Aug. 1, 1996), https://www.brookings.edu/research/an-analysis-of-out-of-wedlock-births-in-the-united-states [https://perma.cc/89YQ-YSHA] (presenting the data of rising numbers of babies born outside of marriage in the United States, and the policy implications of this trend). *Compare* Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. REV. 1 (2018) (arguing against the hegemony marriage enjoys over nonmarriage relationships in America), *with* Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, HERITAGE FOUND. (Mar. 11, 2013), http://s3.amazonaws.com/thf_media/2013/pdf/bg2775.pdf [https://perma.cc/ES5K-R6N9] (mounting a defense of marriage as an institution with proven benefits).

244 *See supra* notes 193–195 and accompanying text.

245 BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 228–29 (comparing the low risks of first-cousin reproduction to the significantly increased dangers inherent in both geriatric pregnancies and as a result of alcohol consumption during pregnancy).

thirty-five,[246] between individuals with autosomal dominant disorders,[247] and among members of certain ethnicities[248]—yet all those groups present risks of genetic disease in offspring substantially higher than first cousins.[249] The bans function as clumsily as the statute invalidated in *Turner*, barring marriage by a class in an attempt to protect a legitimate social welfare interest, but empirically missing its mark by failing to target the issue that statistically poses the greatest risk.[250]

The Maine statute may be the narrowest in scope[251] of the bans, demanding proof of attending mandatory genetic counseling as the

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246 *Having a Baby After Age 35*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (July 2018), https://www.acog.org/womens-health/faqs/having-a-baby-after-age-35-how-aging-affects-fertility-and-pregnancy [http://perma.cc/8UUL-4A7M]; *see also* Bratt, *supra* note 17, at 274–75.

247 LISTER HILL NAT'L CTR. FOR BIOMEDICAL COMMC'NS ET AL., HELP ME UNDERSTAND GENETICS: INHERITING GENETIC CONDITIONS 20–22 (2016), https://www.medschool.lsuhsc.edu/lungcancer/docs/Help%20me%20understand%20genetics_ingeriting%20genetic%20conditions_genetics%20home%20reference_booklet.pdf [https://perma.cc/H45Z-8Q6X]. For instance, there is a one-in-two chance a child of partners who are both carriers of recessive genes of autosomal dominant disorders, like cystic fibrosis or Huntington's disease, will manifest the disease. *Id.*; *see also CF Genetics: The Basics*, CYSTIC FIBROSIS FOUND., https://www.cff.org/What-is-CF/Genetics/CF-Genetics-The-Basics [http://perma.cc/M7E7-56RQ]; *Who Is at Risk*, HUNTINGTON'S DISEASE SOC'Y AM., https://hdsa.org/what-is-hd/history-and-genetics-of-huntingtons-disease/who-is-at-risk [http://perma.cc/N39E-9JLV].

248 Some genetic conditions appear as much as twenty to one hundred times more frequently among Jews of Central and Eastern European descent than they do in the rest of the population. One in thirty Ashkenazic Jews carry the recessive gene for Tay-Sachs disease, a devastating fatal nerve disorder in infancy that carries a three- to six-month life expectancy. Robert Graboyes, *DNA and the Shadowland of Ethics*, NEWSDAY (Apr. 25, 2018, 2:08 PM), https://www.newsday.com/opinion/commentary/dna-testing-genes-ethics-1.18255356 [https://perma.cc/T5HJ-9JD3].

249 *See supra* notes 242–244 and accompanying text. In a perverse twist, it has also been suggested that if first cousins do, in fact, birth diseased children at increased rates, the states' bio-genetic interest may be better served by permitting the marriages because research demonstrates diseased children are less likely to reproduce, allowing the "bad" gene to be more quickly eradicated and future genetic disease avoided altogether. *See generally* OTTENHEIMER, *supra* note 19, at 116–33 (discussing at length the biogenetics of cousin marriage); McDonnell, *supra* note 17, at 353. Of course, this theory raises to the fore the evil lurking close to the surface of the cousin bans: eugenics. *See* Bratt, *supra* note 17, at 276–81; *see also* Cohen, *supra* note 235, at 1209–10 (2012). With their bans, states communicate the supremacist message that government may wield its power to intervene in the birth of defective children, telegraphing to children that genetic difference renders their lives not worth living. Bratt, *supra* note 17, at 276–81; *see also* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 447, 500 (2011).

250 In *Turner v. Safley*, the Supreme Court had found the marriage regulation to be ineffectual in obtaining the interest in prison safety, 482 U.S. 78, 97–100 (1987), while the cousin bans target a class that poses no genetic threat. *See* Metteer, *supra* note 18, at 274–75; Bratt, *supra* note 17, at 280–81.

251 The five states that permit marriage where the couple is old or infertile may already be in active violation of the right to privacy. Baskin v. Bogan, 766 F.3d 648, 661–62 (7th Cir. 2014) ("It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile (although later we'll see Wisconsin flirting

prerequisite to marriage.[252] Yet, this fails close tailoring, as well. First, to logically and effectively accomplish a genetics-focused goal, Maine must require that all marriage license applicants seek genetic counseling, not only first cousins.[253] Second, Maine has impermissibly erected what amounts to an economic toll on the right to marry by forcing couples to pay for genetic counseling as a gateway to marriage,[254] a mechanism the Supreme Court found in *Zablocki v. Redhail* and *Boddie v. Connecticut* to be an illegitimate barrier to accessing the right.[255]

Finally, the biogenetic justification wrongly suggests the right to marry is confined to its procreative function, a view the Supreme Court has expressly rejected.[256] The right to marry includes matters of personal significance and fulfillment, independent of a desire or ability to procreate.[257] Those elements of marriage—support, commitment, government benefits[258]—are desirable and achievable by first cousins as much as any other couple.[259]

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with such an approach with respect to another class of infertile couples) [i.e., the state's cousin ban with a fertility exception].").

252 ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (2021). The Maine restriction stands in stark contrast to all other cousin bans, as it allows marriage between first cousins at any age so long as they seek genetic counseling, an educational exercise, while all the other statutes with exceptions require actual certifications of infertility to be presented before a court. See the lengthy discussion of each permutation of a cousin ban *supra* Section I.B.1. However, as discussed here, even the Maine regulation invades the right to marry arbitrarily and discriminatorily.

253 Moore, *supra* note 18, at 148 (proposing that regulation of marriage between individuals with inheritable defects, not a senseless ban on first-cousin marriage, would be the method to accomplish a genetics-based goal).

254 Genetic counseling is sometimes covered by insurance, but that may exclude exorbitant specialist fees and travel costs, while testing itself can cost hundreds or thousands of dollars, rendering the entire process very costly. *What is the Cost of Genetic Testing, and How Long Does It Take to Get the Results?*, GENETICS HOME REFERENCE (last updated July 28, 2021), https://medlineplus.gov/genetics/understanding/testing/costresults [https://perma.cc/N6EU-NBDV]; *How Much Does Genetic Testing Cost for Pregnancy?*, GENOME MED., https://www.genomemedical.com/genetic-testing-pregnancy/cost [https://perma.cc/DYR4-GR7D].

255 *Compare* 434 U.S. 374, 387 (1978), *with* 401 U.S. 371, 380–83 (1971). A potential cure for this defect is for the state to subsidize voluntary counseling and testing for marriage license applicants. A model may be found in the Jewish community's self-regulating effort to eradicate the recurrence of incurable diseases particularly common in their ethnic group via the creation of genetic compatibility screening programs for potential spouses. *See* Graboyes, *supra* note 248.

256 *See supra* Section I.C.3.

257 *See supra* notes 112–119 and accompanying text.

258 *See generally* Greene, *supra* note 115.

259 Cousin bans with exceptions for age or infertility, *see generally supra* Section I.B.1, do appear to at least acknowledge the existence of other facets of marriage, with the state's only concern being the supposed genetic risk.

2. Better Alternatives Already Exist for Protecting the Family

The interest in intra-family harmony cannot survive close tailoring, either. First, the state tolerates many activities which arguably pose a danger to family harmony, making the bans underinclusive.[260] Second, the bans do not systematically protect against coercive relationships or child abuse, which are extensively regulated by setting statutory ages of consent for marriage and sex, and criminalizing child abuse and rape.[261] These are extant mechanisms directly intended to ensure no one, blood relative or otherwise, leverages an intimate relationship for traumatic ends.[262]

3. Society Is Neither Served nor Controlled by the Bans

The bans do not truly advance the theory that effectuating social progress requires exogamy. Actual adherence to that rule would demand a bar on all intra-ethnic marriage, i.e., no partners of any shared cultural or racial backgrounds should be permitted to marry in the interest of preventing tribalism.[263]

Further, if the concern is to weaken intrafamily bonds in favor of interfamily mixing, first-cousin cohabitation must also be prohibited, yet it is largely permitted.[264] That discrepancy—prohibiting marriage but allowing cohabitation—motivated the Board of Immigration Appeals in *Matter of Hirabayashi* to conclude the jurisdiction in question could not claim any powerful social good was being advanced by its marriage prohibition.[265] In *Ghassemi v. Ghassemi*, the Louisiana court discussed at length what appeared to it as the complete ineffectiveness of the cousin

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260 For example, there is ongoing research into the effects of pornography on relationships, but the creation and distribution of pornography remains largely unregulated in recognition of First Amendment protections. David Ludden, *How Porn Affects Relationships*, PSYCH. TODAY (Aug. 25, 2020), https://www.psychologytoday.com/us/blog/talking-apes/202008/how-porn-affects-relationships [https://perma.cc/4U6J-6TC6]; Shankar Vedantam, *Researchers Explore Pornography's Effect on Long-Term Relationships*, NPR (Oct. 9, 2017), https://www.npr.org/2017/10/09/556606108/research-explores-the-effect-pornography-has-on-long-term-relationships [https://perma.cc/88XP-K9V9]; Thomas C. Arthur, *The Problems with Pornography Regulation: Lessons from History*, 68 EMORY L.J. 867 (2019). The contours of the pro- and anti-pornography movements are beyond the scope of this Article; the relevant point is that there are no widespread, wholesale statutory prohibitions on the consumption of pornography in an effort to supposedly save romantic partners from themselves.

261 *Id*. *See* Bratt, *supra* note 17, at 288–96.

262 *Id*. at 288–96.

263 OTTENHEIMER, *supra* note 19, at 134–37.

264 *See supra* Sections I.B.1–I.B.2.

265 10 I. & N. Dec. 722 (B.I.A. 1964).

bans at advancing any legitimate societal interest, given that cousins remained permitted to live together, have sex, and bear children.[266]

Finally, if social cohesion is the intended effect of the bans, the state has failed abysmally.[267] The bans subject first-cousin couples to stigmatization for behavior that courts and most of the globe believe unworthy of opprobrium, harming rather than furthering societal unity.[268]

D. *Counterargument*

1. Federalism and Line-Drawing

The bans may yet be defended by relying on principles of federalism, which suggest marriage regulation normatively fluctuates between states.[269] Just as we trust the states to legislate a permissible age for marriage, so too the acceptable level of kinship between partners.[270]

The Supreme Court in *United States v. Windsor* appeared to lend credence to this view by noting that states tolerate varying degrees of consanguinity, specifically remarking that a "handful" of states prohibit first-cousin marriage.[271] However, *Windsor* likely referenced the cousin bans innocuously, merely as an example of regulatory realities, rather than to settle the constitutionality of the cousin bans.[272] Even more

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266 998 So. 2d 731 (La. Ct. App. 2008). The court wrote: "[F]irst cousins may legally cohabitate, have intimate relations, and even produce children; however, they are merely prohibited from regularizing their union by marriage. This disparity would tend to negate any contention that [the State] has a *strong* public policy against marriages between first cousins, since it is in conflict with this state's policy to legally solidify such unions for the good of society at large and for the benefit of any potential posterity." *Id.* at 748.

267 *See supra* Section II.B.3.

268 OTTENHEIMER, *supra* note 19, at 19–22, 51–52, 135–53; *see* Storke, *supra* note 55, at 474, 476–78, 481–83, 499; *see also* 52 AM. JUR. 2D *Marriage* § 74 (noting that only "sometimes" do states go so far as to find bans "*even*" on first-cousin marriage to be based in strong public policy (emphasis added)).

269 United States v. Windsor, 570 U.S. 744, 767–68 (2013) (explaining "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next"). *See generally* Bix, *supra* note 61.

270 *Windsor*, 570 U.S. at 767–68.

271 *Id.* Of course, we have by now established that more than half the nation prohibits or severely restricts cousin marriage, a percentage that cannot accurately be called a "handful." *See supra* Section I.B.

272 The Court's comment was made in passing, placed in parentheses as obiter dictum. It is a throwaway comment in a paragraph whose core purpose, i.e., outlining the federalism principle behind varying state marriage laws, was not relied upon for *Windsor*'s holding, which utilized instead a rational basis review with bite/animus analysis. *Windsor*, 570 U.S. at 767–75. Yet, this

critically, the *Windsor* holding indicated that federalism cannot be the controlling factor in deciding a marriage case.[273] The Court's focus is on whether the state has significantly impaired the right to marry, not on providing as much breathing room as possible for the state to act.[274] Regulations are all the more suspect when they isolate a specific class for detrimental treatment.[275]

Importantly, state courts that have directly confronted the legal implications of the cousin bans have largely settled in favor of the couple, meaning that this particular legislative action is found wanting.[276] When faced with conflict of laws issues arising from competing marriage regulations,[277] courts usually validate first-cousin marriages solemnized in jurisdictions where such unions are legal.[278] The courts have found greater value in showing interstate comity by recognizing marriages

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line bears mentioning, as it is the only time the Supreme Court has ever spoken directly on the matter of the cousin bans.

273 *Id*. at 768–75 ("The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."). Perhaps the Court would have avoided its offhand remark on consanguinity had it realized the extent of the discriminatory treatment first cousins face in exercising the marriage right. *See supra* Section II.B.3.

274 *See supra* Section I.C.

275 *See supra* Section I.C.4.

276 In instances where courts have held first-cousin marriage void, courts were not swayed by a strong public policy weighing against this kind of relationship. Rather, they have been primarily motivated by an independent concern for dissuading evasion of the law. Storke, *supra* note 55, at 493–97 (finding that in twelve cases where a state statute prohibited first cousins from marrying, the out-of-state marriage was held valid in seven and void in five, but that "[t]o a greater extent than is indicated by these figures, the tendency is to uphold the marriage in the absence of a local marriage evasion act"); *see, e.g.*, *In re* Est. of Mortenson, 316 P.2d 1106 (Ariz. 1957) (explaining that voiding a marriage for state policy cannot be so easily defeated); Johnson v. Johnson, 106 P. 500 (Wash. 1910) (alteration in original) (quoting *In re* Est. of Wilbur v. Bingham, 35 P. 407, 408 (Wash. 1894)) (finding the cousins "committed a fraud upon the law of [their] domicile"). *But see* State v. Nakashima, 114 P. 894, 896 (Wash. 1911) (quoting State v. Brown, 23 N.E. 747, 750 (Ohio 1890)) (invalidating first-cousin marriage, as the court is "not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy").

277 *See generally* Storke, *supra* note 55.

278 *See, e.g.*, *In re* Est. of Loughmiller, 629 P.2d 156 (Kan. 1981); Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958); *In re* Miller's Est., 214 N.W. 428 (Mich. 1927); Garcia v. Garcia, 127 N.W. 586 (S.D. 1910); Toth v. Toth, 212 N.W.2d 812 (Mich. Ct. App. 1973); Mason v. Mason, 775 N.E.2d 706 (Ind. Ct. App. 2002). The federal Board of Immigration Appeals has decided in favor of first cousins as well. *See, e.g.*, *In re* Balodis, 17 I. & N. Dec. 428 (B.I.A. 1980) (granting entry to a noncitizen based on fiancée classification when the individual openly planned to enter the country, marry a first cousin in a state where cousin marriage is permitted, and then reside as spouses in a state where it is barred).

licensed abroad than in enforcing the cousin bans,[279] given their weak justifications.[280] Accordingly, in *Leefeld v. Leefeld*, the Supreme Court of Oregon remarked with exasperation that the only contribution of the state's cousin ban was to make criminal an activity that is in essence harmless.[281] Rather than demonstrating contempt for states' traditional regulatory hand in marriage,[282] dismantling the bans would pragmatically settle cross-border mayhem arising from the unnecessarily inconsistent approach to first cousins.[283]

2. The Slippery Slope

The fear of the slippery slope emerges as a reflexive rejoinder to challenges of a marriage-related statutory scheme.[284] It insists that the moral imperative to avoid marching down a "parade of horribles" requires we arm the barricades much earlier[285]—for instance, at first cousins. Yet, the majority decisions in *Lawrence*[286] and *Obergefell*[287]

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279 Storke, *supra* note 55, at 493–97; *Loughmiller*, 629 P.2d at 158 ("The general rule with regard to the recognition of marriages solemnized elsewhere is that if the marriage is valid where contracted, it is valid everywhere.").

280 *See supra* Section II.B; *see also In re* May's Est., 114 N.E.2d 4 (N.Y. 1953) (validating a legally solemnized marriage between an uncle and his half-niece). An uncle and half-niece share the same amount of genetic material as first cousins. *How to Use Shared DNA to Determine Relationships*, FAM. TREE MAG., https://www.familytreemagazine.com/dna/how-to-use-shared-dna-to-determine-relationships [https://perma.cc/ZSJ7-9W7J].

281 166 P. 953, 954 (Or. 1917) ("It would be strange, indeed, if a marriage could have any validity, and yet the parties by continuing the marriage relation would be guilty of a felony, and constantly liable to be convicted and sentenced to the penitentiary." (quoting McIlvain v. Scheibley, 59 S.W. 498, 500 (Ky. 1900))).

282 *See supra* Section I.C.4.

283 *See Garcia*, 127 N.W. 586 (lamenting the disastrous results an uneven approach to first-cousin marriage causes for inheritance rights and legitimization of children); *accord Leefeld*, 166 P. at 954; *see also* Storke, *supra* note 55, at 473–74.

284 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of . . . validation of laws based on moral choices."); *see generally* Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543 (2005) (critiquing social disgust as an illegitimate basis upon which to legislate persons' private affairs of romance and sex).

285 Cahill, *supra* note 284, at 1550–55.

286 539 U.S. at 571–79 (majority opinion) ("Our obligation is to define the liberty of all, not to mandate our own moral code. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." (internal citations omitted)).

287 Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the

suggest that changeable social mores are not viable justifications for discriminatory behavior in the context of a fundamental right.[288] After all, if moral norms were a sufficient basis upon which to infringe on marriage, anti-miscegenation laws might still be part of statutory schemes.[289] A slippery slope constructed of bare social disgust cannot support the abrogation of a fundamental right.[290]

Additionally, first-cousin marriage cannot seriously be said to wait at the bottom of the slippery slope of cascading immorality when the practice already enjoys near-universal legality and acceptance.[291] Though international custom by no means binds our jurisprudence, the Supreme Court has indicated global consensus is a relevant factor in evaluating the constitutionality of marriage regulation.[292] National accord with the international consensus in the not-too-distant past further strongly indicates first-cousin marriage does not wait at the bottom of the slippery slope.[293]

State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

288 *Id*. at 671 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."); *see also* Cahill, *supra* note 284, at 1548–50; McDonnell, *supra* note 17, at 357–59; Zhou, *supra* note 17, at 227–30.

289 Bratt, *supra* note 17, at 289.

290 *Lawrence*, 539 U.S. at 562 (insisting the state has no place in criminalizing sodomy as "[l]iberty presumes an autonomy of self" free from the regulation of general society); *see generally* Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will* Lawrence *Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 32 HAMLINE L. REV. 95 (2009). Turnipseed argues for non-incestuous treatment of romantic partners who adopt one another for inheritance purposes, a separate and distinct legal issue than the one discussed here, but persuasive as both scenarios present flawed genetic, familial, or social justifications—leaving only the "'ick' factor." *Id*. at 129.

291 In this way, first-cousin marriage, a traditionally accepted form of marriage, *supra* Section I.A, is insulated from criticisms lobbed at *Obergefell* as having rejected without explanation the historical relevance of gender to marriage. *See, e.g.*, Anderson, *supra* note 236 (arguing that *Obergefell* incorrectly redefines marriage as a genderless institution).

292 *See, e.g.*, United States v. Windsor, 570 U.S. 744, 808 (2013) (Alito, J., dissenting) ("Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000."); *Obergefell*, 576 U.S. at 718–19 (Scalia, J., dissenting) (criticizing the majority's redefinition of "an institution as old as government itself, and accepted by *every nation in history* until 15 years ago" (emphasis added)).

293 *See* Cahill, *supra* note 284, at 1562–69 (arguing incest cannot wait at the bottom of the slippery slope where no uniform "incest" definition exists).

CONCLUSION

States enjoy broad authority in regulating marriage.[294] However, that power runs concurrently with a fundamental right to marry based in the Fourteenth Amendment, which imposes on states a heavy burden in justifying infringements upon the freedom to marry the partner of one's choice.[295] The cousin bans create a classification scheme targeting a particular group for special impairment to their exercise of this essential right because of an identity characteristic.[296] Such proscriptions raise the utmost suspicion of the Court, and the states must show the characteristic itself presents a strong reason for the discriminatory treatment.[297]

The interests the state can claim for banning cousin marriage prove to be insufficient for the task.[298] The biogenetic concern wrongly confines the marriage right solely to its procreative function,[299] while empirical research demands first cousins ought to be treated like any other couple for family planning purposes.[300] The nuclear family's asexual safety net remains intact,[301] and society as a whole does not regress as a result of first-cousin marriage.[302]

Under the microscope of the high degree of scrutiny applied in marriage cases, the bans emerge as unjustifiable denials to an arbitrary class from exercising first cousins' right to marry. Overturning the cousin bans is constitutionally required and would have positive consequences for this nation's first-cousin couples and their families.[303] It is time the nation returns to its roots, corrects a lingering discriminatory misstep of the post-Civil War era,[304] and strikes down these perverse prohibitions.

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294 *Supra* Section I.C.4.

295 *Supra* Sections I.C.2–I.C.3.

296 *Supra* Section II.A.

297 *Supra* Section I.C.5.

298 *Supra* Sections II.B–II.C.

299 *Supra* Section II.C.1.

300 *Supra* Section II.B.1.

301 *Supra* Section II.B.2.

302 *Supra* Section II.B.3.

303 *See* Bennett et al., *supra* note 13, at 115–16; BITTLES, CONSANGUINITY IN CONTEXT, *supra* note 25, at 231 ("Enforced legislation . . . could in time lead us all back along . . . eugenic pathways that are best left in the past . . . .").

304 *Supra* Section I.A.2.