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The Difference the Mini-DOMAs Make

*Andrew Koppelman**

I. INTRODUCTION

Forty-four states now have statutes barring same-sex marriage. These laws were enacted in three waves, in response to the progress of the movement toward same-sex marriage. In the early 1970s, reacting to a few lawsuits filed by same-sex couples who sought to marry, a number of states enacted laws declaring that marriage would only be recognized between a man and a woman. A larger wave of statutes was enacted after a 1993 Hawaii Supreme Court decision made it seem likely that Hawaii would shortly recognize same-sex marriage.¹ Finally, the most recent wave of laws and constitutional amendments followed decisions in which state supreme courts in Vermont and Massachusetts construed their states' constitutions as mandating the recognition of same-sex relationships.² In this essay, I will discuss how these laws affect cases involving choice of law issues. Some of the consequences of these laws are surprising. Some are so harsh and irrational as to make the laws unconstitutional.

At the time of this essay's writing, in June 2006, there were forty states with post-1993 mini-Defense of Marriage Acts ("mini-DOMAs"), so called because they mimic the effort of the federal Defense of Marriage Act of 1996³ to contain the interstate effect of one state's

* Professor of Law and Political Science, Northwestern University. Thanks to Marcia Lehr for assistance, and to Joseph Singer for insisting that I do this research. This essay is adapted from ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

1. *See* *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that statute restricting marriage to a man and a woman is subject to strict scrutiny). Hawaii never did recognize same-sex marriage. While the case was still being appealed, a state constitutional amendment was adopted, giving the legislature the right to reserve marriage to opposite-sex couples. *See* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

2. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

3. Defense of Marriage Act of 1996, Pub. L. No. 104-199 (codified in scattered sections of 28 U.S.C.A. and 1 U.S.C.A.).

recognition of same-sex marriage.⁴ Three states have pre-1993 statutes barring same-sex marriage: Maryland (1973), New Hampshire (1987), and Wyoming (1977).⁵ Connecticut does not directly address the issue, but its adoption law declares that the state's public policy limits marriage to a man and a woman.⁶ Same-sex marriages are recognized, and licenses continue to be issued, in Massachusetts. There is no statutory authority on the question in five states: New Jersey, New Mexico, New York,⁷ Rhode Island, and Wisconsin.

Each wave of statutes was enacted in response to a specific problem that seemed likely to materialize:

- (1) an application for a marriage license by same-sex couples, who might argue that there was nothing in the statutes restricting marriage to opposite-sex couples;
- (2) an evasive foreign marriage by residents of the state, who would immediately return home and demand that their marriage be recognized; and
- (3) a decision by the state supreme court mandating recognition of same-sex relationships.

Most of these provisions efficiently eliminated the threat that provoked them. Oddly, though, some of the mini-DOMAs are so clumsily worded that they do not even clearly reach the evasion issue.

There are, however, other scenarios that are sure to materialize sooner or later, and which evidently received no attention at all, such as:

- (4) persons migrating to the state;
- (5) persons temporarily passing through the state;

4. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. The mini-DOMAs in California and Vermont have not stopped those states from recognizing domestic partnerships and civil unions, because those statutes do not use the name "marriage."

5. Many other states had pre-1993 statutes, but reworded them after the Hawaii decision to address the interstate recognition issue.

6. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005) (compiling mini-DOMAs). Since that article was published, Texas has supplemented its statute with an amendment to the state constitution, discussed *infra* note 66.

7. See *Hernandes v. Robles*, No. 05239, 2006 WL 1835429, at *9 (N.Y. July 6, 2006) (construing the state's laws to bar same-sex marriage, but not addressing the question of interstate recognition, thus leaving New York in the same category as the three states with pre-1993 statutes).

- (6) marriages of persons who never set foot in the state as a married couple, but whose status is relevant to litigation in the state;
- (7) children of same-sex couples who enter the state, temporarily or permanently, and whose status may need to be determined;
- (8) individual same-sex spouses entering the state who seek to avoid obligations of marital property and child support;
- (9) persons entering the state trying to avoid money judgments rendered after trial in another state;
- (10) same-sex spouses entering the state who seek declarations of nullity from the state's courts; and
- (11) persons entering the state who wish to contract new marriages without having to dissolve, or perhaps even to disclose, the previous ones.

Some of the new statutes are so broadly worded that they reach all of these scenarios.

Most of the statutes do not necessarily reach any further than the evasion cases illustrated by situation (2) above, which present the strongest cases for nonrecognition. If a state has a right to ban same-sex marriage, then it can reasonably refuse to recognize such marriages by its residents who fly to Boston for a day to get married. This is the type of case that almost all of these laws were intended to address. Some of these laws' provisions state that marriage licenses may not be issued to persons of the same sex, which says nothing about the effect of marriages celebrated elsewhere.⁸ Statements that such marriages are "void" or "prohibited" or both⁹ are ambiguous, and do not clearly reach beyond evasion cases.¹⁰ Some specify that such marriages are invalid

8. See, e.g., N.H. REV. STAT. ANN. § 457:1 (LexisNexis 1992 & Supp. 2006) ("No man shall marry . . . any other man."); N.H. REV. STAT. ANN. § 457:2 (LexisNexis 1992 & Supp. 2006) ("No woman shall marry . . . any other woman.").

9. See, e.g., ARIZ. REV. STAT. ANN. § 25-101 (2000 & Supp. 2006) ("Marriage between persons of the same sex is void and prohibited."); DEL. CODE ANN. sec. 13-101(a) (1999) ("A marriage is prohibited and void between . . . persons of the same gender."); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999 & Supp. 2006) ("The following marriages are prohibited . . . a marriage between 2 individuals of the same sex.").

10. What the reporter for the Restatement (Second) of Conflict of Laws wrote in another context is relevant here:

The fact that the statute contains no [choice of law] provision is persuasive evidence that the Legislature never gave thought to the question whether the statute should, or should not, be applied to foreign facts. At the least, there is no legislative command on the point and the court therefore enjoys some freedom of choice. It should be free, and indeed obliged, to inquire whether the value of applying the local statute and thus

within the jurisdiction, which leaves open the status of couples living outside the state.¹¹ Other states deem such marriages contrary to the state's public policy, but it is not made clear whether that public policy is so strong that the state will attempt to apply it to transactions, in or out of the state, involving nondomiciliaries.¹²

Evasion of one's home state laws is only one of the possible scenarios in which the validity of a same-sex marriage might come into issue in a court. A law that is designed to respond to the evasion issue does not necessarily control situations (4) through (11) above.

Even the strongest public policy language used in these laws is constrained by history. It is a commonplace rule of statutory interpretation that when terminology previously appeared in earlier statutes, and was interpreted by courts to have a certain meaning, it should be understood to mean the same thing in a new statute.¹³ The language used by these mini-DOMAs was ubiquitous in the antimiscegenation statutes, which many states had before the Supreme Court declared them unconstitutional in 1967,¹⁴ and which usually declared interracial marriages "void" and "prohibited."¹⁵ In a series of cases involving statutes using one or more of these terms, the Southern courts usually recognized non-evasive interracial marriages.¹⁶ If such language did not bar recognition

implementing the statutory policy is not outweighed by other choice-of-law considerations.

Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 960 (1977).

11. See, e.g., ALASKA STAT. § 25.05.013 (2004) ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state."); ARIZ. REV. STAT. ANN. § 25-112 (2000 & Supp. 2006) ("Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by [the statute against same-sex marriage].").

12. See, e.g., IDAHO CODE ANN. § 32-209 (2006) ("All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state."); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999 & Supp. 2006) ("A marriage between 2 individuals of the same sex is contrary to the public policy of this State.").

13. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, AND ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 283-85 (2000).

14. See *Loving v. Virginia*, 388 U.S. 1 (1967).

15. See 1 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* 206-09 (1931); Note, *Intermarriage With Negroes—A Survey of State Statutes*, 36 YALE L.J. 858 (1927); 1 FREDERIC. J. STIMSON, *AMERICAN STATUTE LAW* 667-69 (1886).

16. See *Whittington v. McCaskill*, 61 So. 236, 236 (Fla. 1913) (stating that the state constitution declared interracial marriages "forever prohibited" and statute deemed them "utterly null and void"); *Caballero v. Executor*, 24 La. Ann. 573 (1872) (Wyly, J., dissenting) (noting that

in those cases, it should not do so now. In this context, “void” evidently means “void for residents of this state,” not “void for anyone in the world whose marriage is in any way pertinent to litigation in our courts.”¹⁷

Maine’s statute declares that: “Persons of the same sex may not contract marriage” and further provides that such marriages are “considered void if the parties take up residence in this State.”¹⁸ This appears to mean that nonrecognition is the rule in migratory cases, but not in visitor cases. This draws the lines more intelligently than blanket nonrecognition, but it is nonetheless cruder than its authors probably intended. Does Maine really mean to say that a same-sex marriage in nearby Massachusetts is no impediment to a subsequent marriage in Maine, by someone who permanently takes up residence in Maine? Or that a person moving to Maine could be thereby relieved of spousal property claims and child support obligations?

Most of these laws apply only to same-sex *marriages* from other states, but those of Arkansas, Georgia, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Texas, Utah, and Virginia also bar recognition of same-sex relationships that resemble marriage, evidently referring to statutes such as California domestic partnerships and Connecticut and Vermont civil unions.¹⁹ These statutes also generally do not make clear whether they apply to any but evasive unions.²⁰ As usual, the more complex conflict scenarios were never thought of.

LA. CIV. CODE ANN. art. 95 (1838) declared interracial marriage “void”; *Miller v. Lucks*, 36 So. 2d 140, 141 (Miss. 1948) (noting that the state constitution declared such marriages “unlawful and void”). The leading cases in which the courts split on migratory marriages involved statutes with virtually identical language. *State v. Ross*, 76 N.C. 242 (1877) (recognizing a migratory marriage despite a statute that declared that “[a]ll marriages . . . between a white person and a free negro . . . shall be void.”). N.C. REV. CODE 68:7 (Little, Brown 1855). The law in *State v. Bell*, 66 Tenn. 9 (1872), which withheld recognition, was not materially different: “the intermarriage of white persons with negroes . . . is hereby prohibited.” Tenn. Acts. 1869–70 at 69 (1870).

17. See *State v. Fenn*, 92 P. 417, 419 (Wash. 1907):

If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. . . . [A] statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.

18. ME. REV. STAT. ANN. tit. 19-A, § 701 (2005).

19. The texts of all of these statutes appear in *Interstate Recognition*, *supra* note 6.

20. See, e.g., KY. CONST. § 233A (“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); NEB. CONST. art. I, § 29 (“The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”).

II. THE VARIETIES OF MINI-DOMAS

Some of the statutes, particularly the most recent ones, are so broad that they approach blanket nonrecognition.²¹ These harsher statutes can be grouped into three categories. The first category focuses, oddly, on refusing to enforce any “contractual rights” created by same-sex marriages.²² The meaning of these laws is obscure. The second category declares that the state will not enforce judgments of other states’ courts if those judgments are based on recognition of same-sex marriages.²³ And the third category imposes a broad blanket rule of nonrecognition.²⁴ Laws in the last two categories are probably unconstitutional, because they impose broad and sweeping disabilities on a single group: same-sex couples.

A. “Contractual” Rights

Statutes in Alaska, Arkansas, Minnesota, and Virginia focus on denying “contractual rights” arising out of same-sex marriage. Here, for example, is the language of the Alaska statute, the first of these laws to be enacted, which the other statutes evidently emulated: “A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.”²⁵ Nearly identical language appears in the laws of Minnesota and Virginia.²⁶

The clause referring to “contractual rights” makes little sense. Rights that arise by virtue of a marriage, such as rights of intestate succession or hospital visitation, are not contractual rights.²⁷ Rights that arise by

21. See, e.g., FLA. STAT. ANN. § 741.212(1) (West 2005); KY. REV. STAT. ANN. § 402.045(2) (LexisNexis 1999).

22. See *infra* Part II.A.

23. See *infra* Part II.B.

24. See *infra* Part II.C.

25. ALASKA STAT. § 25.05.013 (2004).

26. See MINN. STAT. ANN. § 517.03 (West 2006) (“A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”); VA. CODE. ANN. § 20-45.2 (West 2005) (“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”).

27. Minnesota’s statute declares that marriage “is a civil contract between a man and a woman,” MINN. STAT. ANN. § 517.01 (West 2006), but this is a metaphor, not a statement of the law.

virtue of marriage do not arise out of a contract, but by operation of law. It makes even less sense to refer to contractual rights granted by virtue of the termination of a marriage. Rights that arise out of a marriage's termination are the consequence of a court's orders, not a contract. The language rests on a category-related misnomer. It is like referring to marriage rights that are blue, or that are in the key of B flat.²⁸

Under the most plausible interpretation of the "contractual rights" language, it precludes courts from construing marital rights as contract rights. In states that do not allow same-sex marriage, the marriages of couples who migrate to the state should be treated as though they were ordinary contracts, and given the same legal effect as the marital rights that the parties could have expressly created by contract. This would spare the parties the expensive task of drawing up legal documents that would confer those rights. This solution, however, now seems to be unavailable in Alaska, Arkansas, Minnesota, and Virginia.²⁹ It is precluded by the plain language of these states' statutes, although it is doubtful that any of the drafters had this tactic in mind. Any married same-sex couple migrating to those states should try to replicate their marital rights by contract. Any rights that arise from that contract will not be granted by virtue of the marriage license, and so will be enforceable.

Another possible reading is that the reference to contract rights is sloppy surplusage, and that these statutes mandate a blanket rule of nonrecognition. In that case, for reasons that will be explained shortly, these laws would be unconstitutional.³⁰ Three states, Virginia, Montana, and Michigan, go even further, and apparently bar same-sex couples from even conferring marriage-like rights upon one another by contract.³¹ These laws are almost certainly unconstitutional.

28. Arkansas has a modified version of the language that is a bit clearer, referring to "contractual or other rights" granted by virtue of the marriage license, but it remains obscure what the reference to contract is intended to accomplish. ARK. CODE ANN. § 9-11-208(c) (2006) ("Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts."). *But see* ARK. CODE ANN. § 9-11-208(d) (2006) ("[N]othing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.").

29. *See* Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2212 (2005).

30. *See infra* text accompanying notes 41–57.

31. Contrast Ohio, which specifically provides that its mini-DOMA should not be construed to "[a]ffect the validity of private agreements that are otherwise valid under the laws of this state." OHIO. REV. CODE ANN. § 3101.01(C)(3)(b) (West 2005).

Virginia has two statutes that refer to “contractual rights.” One of them, already cited, adopts the confused formulation of Alaska.³² The other—adopted later, over the governor’s veto—is clearer, but astonishingly broad:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.³³

This provision is so broad that it appears to bar enforcement of any “arrangement,” which apparently means any legal document of any kind, between members of a same-sex couple that gives them any of the rights that the law gives to a married couple. A will, a medical power of attorney, a deed transferring an interest in a piece of real estate, even a form authorizing another to pick up a child from a school, would all be void to the extent that it tries to create any right that exists by law between the members of a married couple.

The governor of Virginia worried about the provision’s effect on “the right of people to enter into legal relationships,” but the legislation was enacted without amendment.³⁴ The consequence is that some same-sex couples have begun to leave Virginia, fearful that all the legal documents they have relied on for years will now be unenforceable. One Fredericksburg couple felt pressured to move away after living there for forty years.³⁵ The state attorney general, defending the law’s constitutionality, denied that the law would have this effect. “The purpose of this legislation is not to prohibit business partnership agreements, medical directives, joint bank accounts, or any other rights or privileges not exclusive to the institution of marriage.”³⁶ But what he is offering is a very bold, narrowing construction of the law—one that makes its reach less sweeping than its plain language indicates.

A similar statute in Montana is only slightly narrower, prohibiting “a marriage between persons of the same sex” and declaring that a “contractual relationship entered into for the purpose of achieving a

32. See *supra* note 26.

33. VA. CODE ANN. § 20-45.3 (West 2006).

34. Michael Hardy, *Warner: Same-Sex Union Ban Too Strict*, RICHMOND TIMES-DISPATCH, Apr. 17, 2004, at A1.

35. L. Hutchison, *Couple Feels Forced to Leave*, FREDERICKSBURG FREE LANCE-STAR, Jan. 9, 2005, <http://www.fredericksburg.com/News/FLS/2005/012005/01092005/1627908>.

36. *Id.*

civil relationship that is prohibited . . . is void as against public policy.”³⁷ This only reaches contracts, not other arrangements, between same-sex couples, but it still makes them void. Like Virginia’s law, it declares that members of same-sex couples are forbidden to do what everyone else is permitted to do.

Michigan’s constitutional amendment similarly provides that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”³⁸ The last six words of this provision are so broad that they would arguably preclude any two adults, including but not limited to a same-sex couple, from trying to make an agreement that is “similar . . . for any purpose” to a marriage. The meaning of this statute is *really* obscure. It is not clear how similar to a marriage an agreement has to be in order to be prohibited—the law probably does not bar ordinary business partnerships—but the most natural reading, in context, is that it precludes contracts entered into by same-sex couples, and only by those couples, which confer rights that married couples would be entitled to.

These laws are almost certainly unconstitutional. The Fourteenth Amendment provides, in relevant part, that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”³⁹ It was on this basis that the Supreme Court invalidated segregated schools and laws against interracial marriage.⁴⁰ The Court’s two most recent gay rights decisions suggest that laws singling out gay people for unique and unprecedented burdens are unconstitutional for similar reasons.

*Romer v. Evans*⁴¹ struck down an amendment to the Colorado constitution—referred to on the ballot as “Amendment 2”—which provided that neither the state nor any of its subdivisions could prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”⁴² As Justice Kennedy’s opinion for the Court observed, the amendment “has the peculiar property of imposing a broad and undifferentiated disability on a single named group.”⁴³ The amendment seemed to “deprive[] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private

37. MONT. CODE ANN. § 40-1-401 (2005).

38. MICH. CONST. art. I, § 25.

39. U.S. CONST. amend. XIV, § 1.

40. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

41. *Romer v. Evans*, 517 U.S. 620 (1996).

42. *Id.* at 624.

43. *Id.* at 632.

settings.”⁴⁴ The Court concluded that “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”⁴⁵ The broad disability imposed on a targeted group “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. [I]f the constitutional concept of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁴⁶ *Romer*’s holding may thus be summarized: If a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law’s purpose is simply to harm that group, and so will invalidate the law.⁴⁷

Seven years later, in *Lawrence v. Texas*,⁴⁸ the Supreme Court invalidated a law that criminalized homosexual sex. The Court held that the statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁴⁹ The Court relied on *Romer* to hold that the precedent of *Bowers v. Hardwick*, which had held sodomy unprotected by the right to privacy, had “sustained serious erosion.”⁵⁰ The Court did not explain just how *Romer* eroded *Hardwick*. A fuller explanation appeared in Justice O’Connor’s concurrence. Justice O’Connor would have invalidated the Texas law under the Equal Protection Clause, arguing that it, like the law in *Romer*, exhibits “a desire to harm a politically unpopular group.”⁵¹ Quoting *Romer*, Justice O’Connor concluded that the Texas statute “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”⁵² The majority did not expressly embrace Justice O’Connor’s equal protection theory, but it did declare it to be “a tenable argument.”⁵³

Part of what troubled the Court in *Lawrence* was the fact that sodomy laws singling out gays are a fairly recent development in the law, only

44. *Id.* at 630.

45. *Id.* at 635.

46. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

47. See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997) (elaborating upon and defending this reading of *Romer*).

48. *Lawrence v. Texas*, 539 U.S. 558 (2003).

49. *Id.* at 578.

50. *Id.* at 576.

51. *Id.* at 580 (O’Connor, J., concurring).

52. *Id.* at 583 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

53. *Lawrence*, 539 U.S. at 574.

arising in the 1970s.⁵⁴ Similarly, in *Romer*, the Court was troubled that the challenged disqualification “is unprecedented in our jurisprudence,” and declared that “[i]t is not within our constitutional tradition to enact laws of this sort.”⁵⁵ Extraordinary burdens, it appears, arouse suspicion, and the more unusual the burden, the more likely it is that the law will be held unconstitutional. Together, *Lawrence* and *Romer* establish a fairly clear rule: If a law singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.⁵⁶

That rule is probably sufficient to invalidate these laws, under which same-sex couples are prohibited from making contracts that everyone else is allowed to make. It is not constitutionally permissible to say that gay people are denied legal protections that are available to all other citizens. “A State cannot so deem a class of persons a stranger to its laws.”⁵⁷

B. *Nonenforcement of Judgments*

A second category of statutes indicates that judgments of courts will not be enforced if a same-sex marriage was at issue in the underlying lawsuit. Florida, Georgia, Ohio, Texas, and West Virginia indicate that they will not even recognize “judicial proceedings” arising from same-sex marriage.⁵⁸ This is unconstitutional. States have to enforce foreign judgments, whether or not they agree with what the court did in the other state. That is the minimum content of the Full Faith and Credit Clause of Article IV.⁵⁹

The Supreme Court has enforced the Full Faith and Credit Clause only weakly with respect to laws, but it has enforced it quite strictly with respect to judgments. It has been settled for nearly a century that no state may refuse to enforce a final judgment issued by the courts of another state.⁶⁰ The basic idea is that litigation has to come to an end. The losing party cannot just be allowed to go to another court and try to

54. *See id.* at 570 (“It was not until the 1970s that any state singled out same-sex relations for criminal prosecution, and only nine states have done so.”).

55. *Romer*, 517 U.S. at 633.

56. *See* Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171 (2004) (further elaborating upon and defending this interpretation of the *Lawrence* and *Romer* cases). *See also* *Kansas v. Limon*, 122 P.3d 22, 25–26 (Kan. 2005) (adopting a similar reading of *Lawrence*).

57. *Romer*, 517 U.S. at 635.

58. GA. CONST. art. 1, § 4, cl. 1(b); FLA. STAT. ANN. § 741.212(2) (West 2006); OHIO. REV. CODE ANN. § 3101.01(C)(4) (West 2006); TEX. FAM. CODE ANN. § 6.204(c)(1) (Vernon 2006); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2006).

59. U.S. CONST. art. IV, § 1.

60. *See* *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

reopen the matter. That would be unfair to the parties; it would also make courts look ridiculous if they constantly contradicted each other.⁶¹ That is why divorces are entitled to full faith and credit, and why Nevada was therefore able, for a long time, to set itself up as a divorce haven for residents of states where divorces were hard to get: a divorce is an adversarial proceeding between the spouses, and the divorce decree is a judicial judgment, no less than an award of money in a suit for a debt. And all judgments are final. At some point, litigation has to come to an end.

These statutes' declaration that no effect will be given to a "judicial proceeding" respecting a same-sex marriage implies that *all* judgments in which the prevailing party pleaded the existence of a same-sex marriage will be ignored. If, for example, a drunk driver runs down and kills a pedestrian on a Boston street, the victim happens to have been married to a person of the same sex, and the surviving spouse wins a wrongful death suit, could the driver avoid the consequences by fleeing with his money to Florida or Texas? Like the bars on contracts by same-sex couples, these provisions hurt gay couples in such a broad and undifferentiated way that they, too, are unconstitutional.

C. *Blanket Nonrecognition*

Finally, six laws plainly adopt blanket nonrecognition.⁶² These laws impose a broad and undifferentiated disability on gay people alone, and for that reason are unconstitutional. As in *Romer* and *Lawrence*, they single out gays for extraordinarily harsh treatment. There has never been a blanket nonrecognition rule for any disfavored type of foreign marriage—not even interracial marriage. It follows that a blanket nonrecognition rule would be unconstitutional here as well.

Two of these laws are especially egregious. One is that of Louisiana, the only state in which the legislature appears to have even thought about the choice of law issue outside the evasion scenario. Louisiana's Civil Code has a choice of law provision, which provides that "[t]he

61. See LEA BRILMAYER, *CONFLICTS OF LAWS* 298–99 (2d ed. 1995).

62. See LA. CONST. art. XII, § 15 ("No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman."); FLA. STAT. ANN. § 741.212(1) (West 2006) ("Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign . . . are not recognized for any purpose in this state."); KY. REV. STAT. ANN. § 402.045(2) (LexisNexis 2006) ("Any rights granted by virtue of [a same-sex] marriage, or its termination, shall be unenforceable in Kentucky courts."); OHIO REV. CODE ANN. § 3101.01(C)(2) (West 2006) ("Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.").

status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue,” and that state is determined by considering, *inter alia*, “the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue,” and “the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability.”⁶³ Public policy can invalidate a marriage, but only if it is the public policy of the most interested state.⁶⁴ This is just a summary of one version of the most sophisticated contemporary choice of law theory.

Louisiana very recently had an entirely sensible choice of law regime in place. Under this law, evasive marriages would rarely have been recognized, while a more complex analysis would be required for other cases. The state has now deliberately scrapped this nuanced approach in favor of a blanket rule of nonrecognition, which applies in this and no other context.⁶⁵ Once more this is unconstitutional because it singles out same-sex couples for burdens that are imposed on no one else. Everyone on the planet gets the benefit of Louisiana’s ordinary choice of law rule except same-sex couples. They alone are subject to the blanket nonrecognition rule. Their marital and child support obligations are unenforceable in Louisiana courts. They alone may be unable to get their children back if those children are kidnapped and taken into Louisiana.

Texas recently amended its constitution to provide that the state and its subdivisions “may not create or recognize any legal status identical or similar to marriage.”⁶⁶ This evidently was intended to forestall

63. LA. CIV. CODE ANN. art. 3519 (2006).

64. *See id.* art. 3520(A) (“A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519.”).

65. *See id.* art. 3520(B) (“A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.”).

66. TEX. CONST. art. I, § 32 (amended 2005). The bill proposing the amendment also contained the following language, which suggested that the drafters did have some sober moments:

This state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the

recognition of civil unions or domestic partnerships, but the provision is so clumsily drafted that, taken literally, it abolishes all marriages in Texas. Standard model heterosexual marriage is, of course, a “legal status identical or similar to marriage.” Did Texas conclude that it had to destroy marriage in order to save it? Obviously, this wasn’t the intention. The Texas example should make us cautious about interpreting these laws literally.

These overbroad laws are particularly ill considered, because their unconstitutionality means that they cannot be given effect even to do what the state would clearly be permitted to do, such as ban evasive same-sex marriages. Michael Dorf observes that if a statute has an “impermissible purpose, courts cannot save it by severing its unconstitutional applications. The invalid legislative purpose pervades all of the provision’s applications.”⁶⁷ The impermissible animus revealed by the broad reach of these statutes, the bare desire to harm a politically unpopular group, means that they are void in their entirety, unlike other, more moderate statutes that pursue the same end.

III. CONCLUSION

Let it be clear that I am *not* claiming that the Constitution requires states to adopt any specific conflicts rules. A state can have a strong public policy against same-sex marriage. It can decline to recognize evasive marriages. It can permissibly decline to treat a same-sex marriage as a contract. It also need not give travelers the right to exercise marital rights, such as the right to file a wrongful death suit. There is room for argument about the details of a conflicts regime in this area.⁶⁸ However, what states may not do is what too many of them have done: flail wildly at the problem, like a man in a crowded room singlemindedly trying to kill a mosquito with a baseball bat.

entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage.

H.R. 6, 78th Leg., (Tx. 2005); Tx. Acts 2003, 78th Leg., ch. 124.

67. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 279 (1994).

68. See KOPPELMAN, *supra* note *, at 82–113.