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Against Blanket Interstate Nonrecognition of Same-Sex Marriage

Andrew Koppelman[†]

In 1852, Jonathan Lemmon and his wife left Virginia for Texas. Evidently economic hardship was part of the reason. They were poor. Nearly all the property they had in the world was eight slaves.

Naturally, they brought the slaves along. Traveling over land was expensive and slow in those days, and the easiest way to go was by boat. But there was no direct steamship service between any port in Maryland and the Gulf coast. The usual route was to go first to New York, then change boats, and take a steamboat to New Orleans.

Ignoring warnings not to take their slaves ashore, the Lemmons went to a hotel, where they planned to wait the three days for the New Orleans boat. There they were discovered by a free black, who hurried to court and petitioned for a writ of habeas corpus. The trial court freed the slaves. Jonathan Lemmon took his case to the New York Court of Appeals, the highest court in the state, but there he lost again.¹

The Court of Appeals held that a slave from Virginia became free the instant he set foot on New York soil, because slavery could not exist in New York. New York statutory law so held, and that law was constitutional. "Every sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received. . . ."² The Constitution contained an exception for fugitive slaves, who had to be returned to their owners, but that was the only exception to the general rule.³ The state's interest in being free of slavery did not become less when the slave was merely transient. As a concurring opinion in the Court of Appeals put it, "[I]t is the *status*, the unjust

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1. This account is drawn from PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 296-310 (1981).

2. *Lemmon v. People*, 20 N.Y. 562, 602 (1860).

3. *Id.* at 603-606.

and unnatural relation, which the policy of the State aims to suppress, and her policy fails, at least in part, if the *status* be upheld at all.”⁴

Lemmon might be thought relevant to a contemporary controversy. Americans are profoundly divided over same-sex marriage. The regional divide was strikingly evident in the 2004 elections, where voters in twelve states approved referenda banning such unions, while in Vermont and Massachusetts, two states in which same-sex unions are recognized, the pro-recognition factions increased their numbers. (Same-sex unions that are legally equivalent to marriage are also recognized in California and Connecticut.)

Each side is now striving for total victory. Proponents of same-sex marriage want a judicial declaration, preferably by the United States Supreme Court, that same-sex marriage is constitutionally required. Opponents want a constitutional amendment banning any state from recognizing such marriage.

Neither side is going to get its way any time in the foreseeable future. As the recent election results show, Americans bring radically differing values to this question in different parts of the country. We are going to be divided on this issue for a long time. What we need is a way to live together.

The consequence of our moral divisions need not be hysteria or chaos. The largest concern arises from the fact that people move around. It's easy to say that Utah and Massachusetts can each have their own rules, but people from Massachusetts sometimes travel to Utah, and indeed have a constitutional right to go there. Can Utah residents get married on a weekend trip to Boston and then force Utah to recognize the marriage? And what happens if someone from Massachusetts is hospitalized in Utah, and the hospital needs to know who is legally authorized to make the patient's medical decisions?

Forty states have laws on the books declaring that they will not recognize foreign same-sex marriages, and that such marriages are contrary to their public policy.⁵ Some of them have very strong language, describing same-sex marriages as “void” or “prohibited.” The federal Defense of Marriage Act (DOMA) holds that no state need recognize same-sex marriages from other states. These provisions are widely understood as enacting a blanket rule of nonrecognition, under which states would “ignore marriage licenses granted to same-sex couples in other states.”⁶ Under the blanket nonrecognition rule, a

4. *Id.* at 630 (Wright, J., concurring).

5. These laws are collected in the appendix to Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. (forthcoming 2005) [hereinafter *Interstate Recognition*], which updates and supersedes the compilation in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

6. This formulation appears in two executive orders issued a few days apart by Governors Kirk Fordice of Mississippi and Fob James, Jr. of Alabama, declaring that they would not recognize same-sex marriages. See State of Mississippi, Office of the Governor, Executive Order No. 770 (Aug. 22, 1996) (same-sex marriage in another state “shall not be recognized as a valid marriage, shall produce no civil effects nor confer any of the benefits, burdens or obligations of marriage. . . .”); State of Alabama, Office of the Governor, Executive Order No. 24 (Aug. 29, 1996) (same).

state's courts would never recognize any same-sex union for any purpose whatsoever.

In earlier writings (and in a forthcoming book), I have offered a very different analysis, working through the question of interstate recognition of same-sex marriage as if it were an ordinary problem of choice of law, in which state and individual interests are to be balanced against each other in conventional, lawyerlike fashion.⁷ This analysis yields the conclusion that there is no simple, unitary answer to the question whether same-sex marriages from other states should be recognized.⁸

There are four different categories of situation in which the recognition question might arise.⁹ Each category, I have argued, presents different problems and requires a different analysis.

The first category, "evasive" marriages,¹⁰ includes cases in which parties have traveled out of their home state for the express purpose of evading that state's prohibition of their marriages, and thereafter immediately returned home. Such marriages will be invalid if they violate the strong public policy of the couple's home state. And such a public policy is clearly indicated by the 40 states that have enacted laws to that effect.¹¹

The second category, "migratory" marriages, includes cases in which the parties did not intend to evade the law of any state when they married, but contracted a marriage valid where they lived, and subsequently moved to a state where their marriage was prohibited. These will be complicated, even if there is a statute denying recognition to the marriage. Property claims arising out of a marriage cannot be simply annulled by the decision of one spouse to move to another state, and the marriage must be an impediment to the remarriage of either of the partners. Moreover, if the incident of marriage in

7. See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002) [hereinafter *GAY RIGHTS QUESTION*]; Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions after Lawrence v. Texas*, 65 OHIO ST. L. J. 1265 (2004); *Interstate Recognition*, *supra* note 5.

8. Actually, my view is that such marriages should always be recognized, because withholding recognition unconstitutionally discriminates on the basis of sex. See Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 U.C.L.A. L. REV. 519 (2001); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 220-234 (1994). But I understand that courts will not soon accept this argument, and that there are sound reasons for them to be cautious about intervening in this area too soon. See *GAY RIGHTS QUESTION*, *supra* note 7, at 141-54.

9. The following argument is elaborated in *Interstate Recognition*, *supra* note 5.

10. I borrow this useful nomenclature from Note, *Developments in the Law – The Law of Marriage and Family: Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2038 (2003) [hereinafter *Harvard Note*].

11. Three other states, Maryland, New Hampshire, and Wyoming, have laws against same-sex marriage that were enacted before interstate recognition became a live issue in the 1990s. They do not contemplate foreign same-sex marriages, and it is less clear whether they state a strong public policy against recognition.

question is one that could have been conferred by contract under the forum's law, such as the right to make medical decisions for one's partner, then the state's policy cannot be offended by the mere fact that the couple took advantage of a legal shortcut to that right created by another state's law.

The third category, and the one that most urgently demands clarity, is "visitor" marriages, in which a couple or a member of a couple is temporarily present in a state that does not recognize their marriage. Though there is little authority that addresses this precise question, such marriages should always be recognized, for all purposes. It is ridiculous for travelers' marriages to blink on and off like a strobe light as they cross state lines.

The fourth category is "extraterritorial" cases in which the parties have never lived within the state, but in which the marriage is relevant to litigation conducted there. For example, after the death intestate of one spouse, the other may seek to inherit property that was located within the forum state. In these cases, there is clear authority in favor of recognition.

Of course, this analysis invites the objection that I have understated the passions to which this issue gives rise. One may feel that what I have proposed here does not give enough weight to state interests against same-sex marriage recognition, since it would require recognition of those relationships in some circumstances. *Lemmon* shows that a different approach is possible.

A state might want to say that same-sex marriages are so abominable that they will not be recognized, ever, for any purpose. Just as slavery could not exist in New York, one might argue, a state can legitimately decide that same-sex marriage simply cannot exist within its borders. One might say, as some judges said of interracial marriages that crossed state lines, that the relation is "severed the instant they set foot upon our soil," and that "individuals who have formed relations which are obnoxious to our laws can find their comfort in staying away from us."¹² By this logic, any obligations created by a same-sex marriage would evaporate the instant the affected party set foot within the borders of such a state.

In this Article, I will explain why a blanket rule of nonrecognition, analogous to that proposed in *Lemmon*, is unworkable. There are four fatal difficulties. First, a blanket nonrecognition rule produces absurd and cruel results. Second, that rule is inconsistent with the rights of citizens within the federal system. Third, it would violate rights to equal protection established by the Fourteenth Amendment to the United States Constitution, because it would reflect a bare desire to harm a politically unpopular group. And fourth, the rule cannot be justified even in terms of the strongest and most attractive version of the conservative case against same-sex marriage.

12. *State v. Ross*, 76 N.C. 242, 250 (1877) (Reade, J., dissenting).

I. ABSURD RESULTS

Begin with the consequences of the rule.

Parties to marriages could dissolve them without any obligation to account for the marital assets, possibly leaving a dependent spouse deprived of assets that that spouse has spent years helping to amass.

A same-sex spouse could marry again in a second state without having to dissolve the earlier marriage or even having to disclose to the new spouse the existence of the previous marriage. That previous marriage would continue in existence in the place of celebration, effectively legalizing a form of polygamy.

More generally, blanket nonrecognition would mean that states following that rule would become havens for avoiding obligations of spousal property and child support that had been validly entered into pursuant to Massachusetts law.¹³

Travelers to a state whose marital rights and obligations unexpectedly became relevant would not be able to rely on those rights and obligations. Suppose Jane, who is married in Massachusetts to Sally, travels on business to Virginia and there is hurt in a car crash. Sally would not be permitted to make medical decisions for Jane. She might not even be permitted to visit her in the hospital.

If the children of such relationships were brought into the state, voluntarily or by force, their nonbiological parents would have no right to get them back. If Jane were the biological mother of Adam, and Adam were injured in the same crash, Sally could not make medical decisions for him, or visit him, either. Under the blanket nonrecognition rule, this is what she would be told: "You may not visit Jane or Adam, because only family members may visit patients here, and you are not a family member of either of these people in any respect which our state recognizes. You may not visit, or participate in medical decisions for, either of them. If Jane dies, you will not have any parental rights in Adam. When he recovers, the hospital cannot release him to you, and you cannot take him back to Massachusetts with you. If there is no surviving biological relative, we will regard Adam as an orphan, and place him in foster care."

The same thing would happen if, after Jane had died, Adam was kidnapped from his backyard by a stranger and carried across state lines. The kidnapper doubtless would be prosecuted, but Adam would still end up in foster care.

Advocates of the blanket rule of nonrecognition have never attempted to defend these results. That is probably because they have never thought about them.

13. See Joseph W. Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIB. (forthcoming 2004).

II. FEDERALISM

The second problem with a blanket nonrecognition rule is that it is probably unconstitutional. It violates states' obligations to one another within the federal system. *Lemmon* is a bad precedent. It makes us want to cheer, of course, but that is because we no longer believe in a federalist solution to the slavery question. Jonathan Lemmon was not entitled to own slaves anywhere. That, however, is not what the case says. Its actual reasoning, which effectively made interstate migration with their property impossible for many slaveholders, didn't make sense in a federal system. Slavery was sanctioned and protected in the original Constitution.¹⁴ Other obstacles to interstate commerce have been invalidated by the Supreme Court. For example, the Supreme Court once struck down an Illinois law that required trucks to use curved mudguards behind their tires.¹⁵ All of the neighboring states permitted straight mudguards, and one other state made curved mudguards illegal. The upshot was that trucks would either have to avoid Illinois or stop at the border to change their mudguards. Illinois had a legitimate interest in regulating trucks on its own roads, of course. But it couldn't enforce those regulations if the effect would be to impede the shipping of goods across state lines.

If differential mudflap rules are too great an obstacle to interstate commerce, certainly so is an absolute bar on passage through a state. And this is the basis on which the *Lemmon* case would likely have been resolved. Had the Civil War not intervened, *Lemmon* would probably have been overruled. At a minimum, New York might have been required to respect the slave property of transients.¹⁶ Unpublished notes in the papers of Chief Justice Roger B. Taney indicate that when the war broke out, he may already have been preparing to write an opinion vindicating the "obligation of all to respect the institution of slavery."¹⁷

A related federalism issue arises out of the constitutional right to travel. "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."¹⁸ On this basis, the Court invalidated a one dollar tax on persons who wanted to leave a state. If this is impermissible, then a fortiori the right to travel precludes the much heavier burden of dissolving one's closest family relations as the price of interstate travel.

14. See U.S. CONST., art. I, § 2, cl. 3 (counting slaves as three-fifths of a person for purposes of Congressional representation); art. I, § 9 (barring Congress from interfering with the slave trade until 1808); art. IV, § 2, cl. 3 (guaranteeing return of fugitive slaves); art. V (barring any amendment restricting the slave trade before 1808).

15. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

16. See FINKELMAN, *supra* note 1, at 313-38.

17. Quoted in *id.* at 338 n.76.

18. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868).

III. EQUAL PROTECTION

The third difficulty of the blanket recognition rule is that it is unconstitutional in yet another way. It violates equal protection.

The Fourteenth Amendment provides, in relevant part, that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁹ It was on this basis that the Supreme Court invalidated segregated schools and laws against interracial marriage. The Court’s two most recent gay rights decisions suggest that a blanket rule of nonrecognition, of the kind authorized by DOMA, would probably be unconstitutional for similar reasons.

*Romer v. Evans*²⁰ 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.”²¹ The amendment, Justice Kennedy’s opinion for the Court observed, “has the peculiar property of imposing a broad and undifferentiated disability on a single named group.”²² 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 settings.”²³ The Court concluded that “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”²⁴ 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.”²⁵ *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.²⁶

Seven years later, in *Lawrence v. Texas*,²⁷ the Supreme Court invalidated a law that criminalized homosexual sex. The Court held that the statute “furthers

19. U.S. CONST., amend. XIV, § 1.

20. 517 U.S. 620 (1996).

21. *Id.* at 624.

22. *Id.* at 632.

23. *Id.* at 630.

24. *Id.* at 635.

25. *Id.* at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), quotations omitted).

26. This reading of *Romer* is elaborated and defended in Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

27. 539 U.S. 558 (2003).

no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”²⁸ The Court relied on *Romer* to hold that the precedent of *Bowers v. Hardwick*, which held sodomy unprotected by the right to privacy, had “sustained serious erosion.”²⁹ The Court did not explain just how *Romer* eroded *Hardwick*. A fuller explanation appeared in Justice O’Connor’s concurrence. 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.”³⁰ Quoting *Romer*, she concluded that the Texas statute “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”³¹ The majority did not expressly embrace O’Connor’s equal protection theory, but it does declare it to be “a tenable argument.”³²

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 arising in the 1970s.³³ Similarly in *Romer*, the Court was troubled that the challenged disqualification “is unprecedented in our jurisprudence,” and it declared that “[i]t is not within our constitutional tradition to enact laws of this sort.”³⁴ 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.³⁵ In both cases, the statute in question singled out gays for extraordinarily harsh treatment. That is what blanket nonrecognition would do, too. Every single way in which it changes existing law is unprecedented, and is so bizarre as to be indefensible.

This argument invites the following response. Not all antigay legislation, not even legislation that severely disadvantages gays, is the result of hostility and a bare desire to harm an unpopular group. Justice Scalia thought that, so far from manifesting a bare desire to harm gays, the law struck down in *Romer* was “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”³⁶

28. *Id.* at 578.

29. *Id.* at 576.

30. *Id.* at 583 (O’Connor, J., concurring).

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

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

33. *See id.* at 570.

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

35. This interpretation of *Lawrence* is elaborated and defended in Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171 (2004).

36. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible – murder, for example, or polygamy, or cruelty to animals – and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct³⁷

The inference of impermissible motive, he thought, was therefore uncalled for. The Court’s opinion “disparaging as bigotry adherence to traditional attitudes,” Scalia concluded, was “nothing short of insulting.”³⁸

Scalia is half right. The problem is that laws that discriminate against gays often both express moral disapproval *and* reflect a desire to harm an unpopular group. Opposition to gay rights is a complex combination of serious moral disagreement and vicious prejudice.

Many Americans oppose same-sex marriage because they are Christians or Jews who interpret the Bible as forbidding homosexual conduct. Motivation of this kind does not necessarily deny anyone equal concern and respect. The equal dignity of all human beings is a foundational belief in both Judaism and Christianity; as an historical matter, these faiths are where contemporary secular liberals got the idea from.

But there is a lot of antigay animus in the United States that religion cannot explain. Throughout the United States, gay people are subjected to random violence, often of a remarkable viciousness. This kind of behavior is not required, but rather is forbidden, by mainstream Christianity.

Many traditionalists have even recognized the existence of prejudices against gay status and have understood that they need to dissociate themselves from it.³⁹ The Catholic Church, for example, has condemned antigay prejudice while maintaining its condemnation of homosexual activity. The Church’s doctrine does not entail that a person is morally defective and unclean merely because of homosexual desire. Quite the contrary; “the particular inclination of the homosexual person is not a sin.”⁴⁰ Ralph Reed, the former executive director of the Christian Coalition, writes that “the Bible makes it clear that homosexuality is a deviation from normative sexual conduct and God’s laws,” but also finds “disturbing” declarations by religious conservatives “that AIDS is ‘God’s judgment’ on the gay community,” and declares that “the deeply-held moral beliefs of Christians regarding this practice do not justify hateful or spite-

37. *Id.* at 644.

38. *Id.* at 652.

39. A notable and troubling exception is the Boy Scouts of America. See Andrew Kopelman, *Are the Boy Scouts Being as Bad as Racists? Judging the Scouts’ Antigay Policy*, 18 PUB. AFF. Q. 363 (2004).

40. Congregation for the Doctrine of the Faith, *Letter to Bishops on the Pastoral Care of Homosexual Persons*, 32 THE POPE SPEAKS 62 (1987).

filled intolerance of homosexuality."⁴¹ These conservatives understand that the moral objections to homosexual conduct that they want to defend can become rationalizations for vicious and hateful abuse.

Romer and *Lawrence* together establish that the more unusual the burden a law imposes on gays, the more likely it is that the law will be held unconstitutional. Traditional moralists will object that this presumption is unfair. If one thinks one's moral views correct, changing circumstances may require that one pursue those moral views through novel means. The novelty of the means, one might reasonably argue, should not automatically entail a presumption of bad motive. Some contemporary antigay rules are unprecedented, but the emergence of an active, widespread gay rights movement is also unprecedented. A prohibition such as the Texas law that singled out homosexual sex, invalidated in *Lawrence*, is one possible response to that movement. The Texas law could be, and was, supported by people of good will who do not question the equal dignity of gay people.⁴²

The answer is that every legal presumption that protects some interest against the state has costs. It will surely impair some legitimate government interest. A rule that the state may not discriminate on the basis of race will sometimes prevent the state from pursuing legitimate ends.⁴³ A strong First Amendment will protect some worthless and harmful speech.⁴⁴ If those rules are not unfair, neither is this one. But the concern about unfairness to conservative views takes us to the final argument against blanket nonrecognition of same-sex marriages.

IV. THE BEST ARGUMENT AGAINST SAME-SEX MARRIAGE

There is a fourth, and perhaps it is the deepest, reason why *Lemmon* is a poor precedent to rely on in the same-sex marriage controversy. The conservative argument against same-sex marriage, in its most thoughtful and humane form, does not entail a blanket rule of nonrecognition.

The conservative position has changed over time. Not long ago, courts were routinely willing to void, on grounds of undue influence, wills in which gay people attempted to leave their estates to their partners.⁴⁵ Almost no

41. RALPH REED, *ACTIVE FAITH: HOW CHRISTIANS ARE CHANGING THE SOUL OF AMERICAN POLITICS* 264-66 (1996).

42. See, e.g., Patrick Lee and Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135 (1997).

43. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986).

44. "[I]f the state needs no stronger justification for dealing with speech than it needs for dealing with other forms of conduct, then the principle of freedom of speech is only an illusion." FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 8 (1982). See also George Kateb, *The Freedom of Worthless and Harmful Speech*, in *LIBERALISM WITHOUT ILLUSIONS* 220 (Bernard Yack ed., 1996).

45. See Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

conservatives are willing today to support that result. Slavery did not have a right to exist. Same-sex relationships do. Few conservatives want to use the law to stamp them out. They simply do not want such relationships to be given the special treatment that is given to heterosexual marriages.

It may help clarify the controversy to note that the debate over same-sex marriage is really two different debates. The first is a normative debate about what relationships to value or even to sanctify. The second is a debate about administration – about which relationships ought to have legal consequences.

The normative debate, which has religious dimensions for many, concerns what relationships are intrinsically valuable. The key question is one about objective moral reality: Are same-sex relationships morally equal to heterosexual relationships, or do heterosexual relationships partake of a good that homosexual relationships cannot possibly share?

On this issue, Americans are divided, with different groups adhering to two very different moral visions. According to the anti-same-sex marriage vision, sex can be morally worthy precisely and only because of its place in procreation. Even the marriages of infertile heterosexual couples take their meaning from the fact that they form a union of the procreative kind, and their bodily union therefore has procreative significance. From this perspective, the movement for same-sex marriage is a misguided attempt to deny fundamental moral distinctions.

According to the other moral vision, sex is valuable, either in itself, or because it draws us toward friendship of a singular degree and kind. This bringing together of persons has intrinsic worth, whether or not it leads to childbearing or child-rearing. On this account, sexuality is linked to the flourishing of the next generation only to the extent that it is one of a number of factors that can bond adults together into stable familial units in which children are likely to thrive. It is not necessary or even important that the children be the biological product of the adults' sex acts. From this perspective, it is the devaluation of same-sex intimacy that is immoral, because it reflects arbitrary and irrational discrimination.

The administrative debate concerns what relationships between persons ought to be given legal recognition. Here the issue is the more mundane one of how resources should be allocated and unfair disruption of people's lives prevented. Like it or not, relationships of dependency exist in a wide range of households. From those relationships, one can reasonably infer what the members of those households would want and need if some unprovided-for contingency arises, such as the illness or death of one of its members. Financial issues such as inheritance and employer benefits for dependents of employees also come into play.

From the administrative perspective, law ought to do its best to reflect people's preferences and provide the default options that they would probably

have chosen if they had thought about it. The task of constructing the law of marriage is analogous to the task of constructing the law of business corporations: How can the state maximize efficiency and satisfy people's preferences about their relationships by constructing sensible "one size fits all" default rules, while protecting the interests of third parties, notably children? Here it all turns on what we know about the effects of various practices and policies. Religious notions of sanctification are very far from our minds.

One can address the administrative question without taking any position on the moral one. That is how many jurisdictions have approached the issue, granting same-sex couples some or all of the rights of married couples without the honorific of "marriage." In the United States, Vermont and California have adopted such a policy. Denmark, Sweden, Norway, Finland, and Iceland have partnerships that are nearly identical to marriage, while a more limited set of rights and responsibilities are available to same-sex couples in France, Germany, Austria, Hungary, South Africa, Portugal, and parts of Australia, New Zealand, Spain, and Switzerland.⁴⁶ The American constitutional amendment failed in part because it was so broadly worded that it prohibited civil unions as well as same-sex marriages.

Conservatives care far more about the normative issue than they do about the administrative one. Those who oppose civil unions do so because such unions give state recognition to homosexual relationships as such. They do not object to the use of neutral legal instruments to accommodate such relationships. They typically argue that many of the same legal results can be accomplished by wills, contracts, powers of attorney, and other generally available legal instruments. Thus, for example, President George W. Bush has suggested that gay couples can secure many of the benefits of marriage, such as the right to hospital visitation, through civil contracts.⁴⁷ They implicitly reject the result in the undue influence cases, mentioned earlier, which held, in effect, that such instruments would not be given effect if gay people used them.

The conservative position on the normative question deserves respect, even from those who disagree with it. Questions of ultimate value are notoriously resistant to rational resolution.⁴⁸ Decent people conscientiously come to different views about whether same-sex relationships can be morally equivalent

46. See Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569 (2004); LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes, eds., 2001).

47. Jennifer 8. Lee, *Congressman Says Bush Spoke About Options on Gay Rights*, N.Y. TIMES, February 9, 2004, at A15.

48. Attempts to rationalize the conservative position have not been successful. See GAY RIGHTS QUESTION, *supra* note 7, at 80-93 (2002); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, ST. THOMAS L. REV. (forthcoming 2005); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. OF JURIS. 51 (1997). But this may simply reflect the intractability of all such value judgments.

to opposite-sex relationships. And in a federal system, different views will be reflected in different states' laws.

The most charitable interpretation of the federal DOMA and the state mini-DOMAs is that they are defensive, and seek only to prevent those states from having to recognize continuing same-sex marriages within their borders. Their authors were worried primarily about the evasion case, and generally gave no thought at all to other cases. They wanted their own states' laws to maintain the normative position that heterosexual marriages partake of a good that same-sex marriages cannot possibly share.

But if the situation is one of self-defense, then there are some rules from the law of self-defense that are relevant. In criminal law, if you are attacked, you have a right to defend yourself. But your defense needs to be necessary and proportional to the scale of the attack.⁴⁹ No matter how badly your attacker behaved, your self-defense plea won't fly if he has been shot more than once, especially if some of the wounds are in his back.⁵⁰

Some of the antigay laws that are now being passed go far beyond the protection of an ideal of marriage. They inflict serious harm in order to make a purely symbolic point. For instance, Florida expresses its disapproval of homosexual conduct with a statute that forbids gays from adopting children. Defenders of the statute claim that they believe children are best raised by parents of different sexes, but they ignore the actual consequence of the law, which is that large numbers of gay foster parents are barred from adopting the children who have grown up in their households.⁵¹ These children are in fact dependent on the relationships that the law refuses to recognize. Whatever this law is concerned with, it is not the welfare of these children.

The state mini-DOMAs have sometimes gone overboard in just the same way. For example, Virginia's legislature, dissatisfied with the mini-DOMA already on the books, enacted over the governor's veto a broad law making "void and unenforceable" any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage."⁵² The governor worried about "the rights of people to enter into legal relationships,"⁵³ but the legislation was enacted without amendment over his veto. The consequence is that some same-sex couples have begun to leave Virginia, fearful that their wills, powers

49. See PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)-(d) (1984).

50. I know this sounds like something I made up, but see *People v. Seiber*, 394 N.E. 2d 1044 (Ill. App. Ct. 1979); *People v. Glenn*, 417 N.Y.S.2d 934 (N.Y. App. Div. 1979), *rev'd on other grounds*, 418 N.E.2d 1316 (N.Y. 1981); *State v. Collins*, 306 So.2d 662 (La. 1975).

51. See Lynn Waddell, *Gays in Florida Seek Adoption Alternatives*, N.Y. TIMES, Jan. 21, 2005, at A20.

52. VA. CODE ANN. § 20-45.3 (2004).

53. Laura L. Hutchison, *Couple Feels Forced to Leave*, FREDRICKSBURG FREE LANCE-STAR, Jan. 9, 2005, available at <http://www.fredericksburg.com/News/FLS/2005/012005/01092005/1627908> (last visited Apr. 12, 2005).

of attorney, and medical directives would be unenforceable. One Fredericksburg couple felt pressured to move away after living there for 40 years. The state attorney general, defending the law's constitutionality, denied that the law would have that 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."⁵⁴ But what he is offering is a narrowing construction of the law, that makes its reach less sweeping than its plain language suggests. One Virginia court has now claimed that the state's laws mean that no parental status arising out of Vermont's civil union laws can be recognized in Virginia.⁵⁵

Jonathan Lemmon was not treated this harshly. New York would not let him keep his slaves, but a private fund-raising effort collected \$5000 to compensate him for the loss of his only property, and the judge who freed his slaves contributed to the fund.⁵⁶ Even with respect to slavery, the country understood that there were human beings on the other side of the issue, and that if possible, their lives should not be destroyed.

It is possible to construe the mini-DOMA laws narrowly, and therefore avoid the danger that they be found unconstitutional. It appears that a lot of use will have to be made of this kind of narrowing device, since laws that lash out wildly at gay people keep getting passed.

More nuanced conflicts rules will not make everyone happy. They may not make *anyone* happy. Neither side gets the total victory it seeks. But the approach advocated here does accommodate the most pressing interests on both sides. It is the least bad answer to the problem.

So why would anyone support it?

Same-sex marriage is not likely to spread very widely in the United States in the near future. Public opinion is too strongly against it. But there are signs that this will change. Polls reflect a generational divide on the issue: while most Americans oppose it, most 18-to-29-year-olds are in favor.⁵⁷ The long-

54. *Id.*

55. See Christina Nuckols, *Two Women, Two States, One Child*, VIRGINIAN-PILOT, Dec. 13, 2004, available at <http://home.hamptonroads.com/stories/story.cfm?story=79273&ran=16653> (last visited Apr. 12, 2005); Jonathan Finer, *Judge Claims Control of Same-Sex Custody Fight*, WASH. POST, Sept. 9, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A6946-2004Sep8.html> (last visited Apr. 12, 2005).

56. See FINKELMAN, *supra* note 1, at 297.

57. "Younger people are much more likely than older Americans to support gay marriage." CBSNews.com, *Gay Marriage Battle Lines Drawn*, July 31, 2003, at <http://www.cbsnews.com/stories/2003/08/03/politics/main566402.shtml> (last visited Apr. 28, 2005) (comparing 61% support for gay marriage among 18 to 29 year olds with 18% support among people 65 years and older). See also Press Release, The Pew Forum on Religion & Public Life, *Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality*, Nov. 18, 2003, at <http://pewforum.org/publications/surveys/religion-homosexuality.pdf> (last visited Apr. 28, 2005) (citing statistics showing correlation between support for gay marriage and age of respondent); Ruy Teixeira, Center for American Progress, *Gay Marriage: Not Such a Big Deal After*

term hopes of the same-sex marriage movement are perhaps the most powerful reason why opponents are so eager to cement their position into the law now, while political forces still favor them.

If those who oppose same-sex marriage are going to have any chance to prevail, they will have to work harder to dissociate themselves from the charge of bigotry and hysteria. In particular, they need to be more discriminating about which legal rules they will advocate. They should oppose same-sex marriage, of course, but they should also oppose the kind of broad antigay legislation that we have just seen in Florida and Virginia. What we need is competition of a benign sort. Each side should intensely compete to show that it is more reasonable than the other.

