AN ANALYSIS OF THE FEDERAL CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE

THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW. By Andrew Koppelman.[1] University of Chicago Press, 2002. Pp. 210. Cloth $48.00, Paper $17.00.

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Andrew Koppelman teaches both political science and law, and it is thus unsurprising that his book *The Gay Rights Question in Contemporary American Law* incorporates both political and constitutional theory in his analysis. This review will focus on the latter, although there is every reason to believe that his analysis is just as thought-provoking in his use of political theory.

The issues and analyses discussed in this book are hotly debated. The utter lack of consensus that exists can be explained, at least in part, by the Court's not having been sufficiently clear in what it has held and why, whether in cases involving lesbian, gay, bisexual and transgender (LGBT) rights in particular or constitutional law more generally. It thus should be unsurprising that even those who agree that same-sex marriage should be recognized may nonetheless disagree about the best constitutional analysis of the cases discussed in this book.

Romer v. Evans,[3] one of the first cases discussed by Koppelman, is a good illustration of a case which has been given numerous interpretations, both by commentators and by the Justices themselves. In *Romer*, the Court struck down Amendment 2, an amendment to the Colorado Constitution passed by referendum, which precluded localities from offering anti-

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3. 517 U.S. 620 (1996).

discrimination protection on the basis of orientation. Koppelman writes,

> *Romer*'s rule [ ]may [ ] 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. (p. 8)

Certainly, this is one possible reading of *Romer*, although the Court's subsequent actions have made this interpretation less plausible. For example, as Koppelman notes, (see p. 162 n.142) the electorate in Cincinnati, Ohio, passed a referendum that was quite similar in content to Amendment 2. The constitutionality of that referendum was upheld by the Sixth Circuit in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.[4] The Supreme Court vacated and remanded the Sixth Circuit opinion because the Court had decided *Romer* in the interim.[5] The Sixth Circuit upheld the constitutionality of the referendum on remand and, this time, the Court declined to grant certiorari.[6]

It is difficult to know what, if anything, to make of the Court's denial of certiorari after the Sixth Circuit's ruling on remand was appealed.[7] However, were Koppleman's reading of *Romer* correct, the Court presumably would have struck down the Cincinnati referendum as well. The language contained in the Cincinnati and Colorado referendum propositions was strikingly similar and it would be difficult if not impossible to distinguish the cases on the basis of the content of the propositions submitted to the voters. While *Romer* clearly stands for the proposition that a statute lacking any rational relationship to legitimate state interests will be struck down even on rational basis review,[8] that was uncontroversial even before the Court decided *Romer*. What is more controversial is Koppelman's claim about when the Court will infer that a statute is motivated by animus

4. 54 F.3d 261 (6th Cir. 1995) vacated and remanded, 518 U.S. 1001 (1996), reaffirmed on remand, 128 F.3d 289 (1997), cert. denied, 525 U.S. 943 (1998).

5. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).

6. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998).

7. See, for example, id. at 944 (Stevens, J., concurring) ("The Court's action today should not be interpreted either as an independent construction of the charter or as an expression of its views about the underlying issues that the parties have debated at length.")

8. See *Romer*, 517 U.S. at 632.

and, regrettably, *Equality Foundation* suggests that the Court is less willing to infer animus than Koppelman implies.

Koppelman suggests that *were* the Court to have recognized that discrimination on the basis of orientation was sex discrimination, then *Romer* would have been easily explainable by appealing to the *Hunter v. Erickson*[9] line of cases. (p. 24) Yet, notwithstanding the *Romer* Court's declining to adopt that tack expressly[10] and notwithstanding the Court's reluctance to recognize orientation discrimination as a form of sex discrimination, a *Hunter* analysis may nonetheless provide the best explanation of *Romer* and the failure to grant certiorari when *Equality Foundation* was again appealed.

First, the *Hunter* voting rights analysis does not only protect the rights of suspect or quasi-suspect classes and, for example, has been held by a state intermediate appellate court to protect the voting rights of individuals on the basis of sexual orientation and HIV status.[11] Second, and more relevant to why the *Romer* Court might have refused to grant certiorari in *Equality Foundation*, the Sixth Circuit distinguished *Romer* by appealing to considerations that might be thought important in a *Hunter* analysis, e.g., that the Cincinnati referendum was at the lowest political level.[12] While the Sixth Circuit's analysis in *Equality Foundation* is itself subject to criticism, e.g., because *Hunter* itself involved an invidious attempt to alter a minority's voting rights at the *lowest* political level,[13] the Sixth Circuit was clearly implying that *Romer* is best understood as a *Hunter* voting rights case and the Court permitted that analysis to stand.

Koppelman suggests that *Bowers v. Hardwick* may be a stumbling block to the recognition that orientation is a quasi-suspect classification. (p. 30) Certainly, the anti-gay tone of *Bowers* is hard to mistake,[14] and *Bowers* is open to a variety of

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9. 393 U.S. 385 (1969).

10. The Colorado Supreme Court had offered a *Hunter* analysis, and the *Romer* Court affirmed, although "on a rationale different from that adopted by the State Supreme Court." See *Romer*, 517 U.S. at 626.

11. See *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Ct. App. 1991).

12. See *Equality Foundation*, 128 F.3d at 296-97. See also *Equality Foundation*, 518 U.S. at 1001 (Scalia, J., dissenting) (suggesting that this case involves a decision by the lowest electoral subunit).

13. In *Hunter*, the citizens of Akron had adopted an amendment to the City Charter via referendum that required voter ratification of ordinances adopted by the City Council to preclude housing discrimination. 393 U.S. at 386.

14. See *Watkins v. United States Army*, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting), superseded by 847 F.2d 1329 (9th Cir. 1988), withdrawn on

interpretations. Yet, much of the analysis in *Bowers* established that sodomy was not protected by the right to privacy rather than that only same-sex sodomy was not protected. On a charitable interpretation of the *Bowers* opinion, the Court was addressing same-sex sodomy because that was the issue before the Court. It is for this very reason that, as Koppelman points out, states may be constitutionally permitted to prohibit sodomy generally but nonetheless be precluded by equal protection constraints from solely prohibiting same-sex sodomy. (p. 32)

The *Bowers* stumbling block seems more attitudinal than constitutional. Thus, if the right to privacy protected by the Federal Constitution does not include the right to engage in sodomy with a same-sex or different sex partner outside the confines of marriage,[15] *Bowers* does not provide the constitutional stumbling block to the recognition of orientation as a suspect or quasi-suspect classification that has sometimes been suggested.[16] A separate question is whether the case nonetheless symbolizes the reluctance of some members of the Court to permit the LGBT community to have more than second-class status,[17] but that will not be discussed here.

Koppelman writes, "Reasonable people disagree about whether hatred and stereotyping of gays is sufficiently pervasive in our society to warrant judicial suspicion of laws that discriminate on the basis of sexual orientation." (p. 28) Yet, he had previously made a convincing case that such hatred and stereotyping were pervasive. (pp. 21-22) What seems to be in dispute is not whether the hatred is pervasive but whether it is wrong. For example, in his *Romer* dissent, Justice Scalia did not attempt to deny but, rather, to justify the existence of animus on the basis of orientation.[18]

Koppelman believes that those seeking to advance the LGBT legal cause are likely to be unsuccessful if their legal focus is on the right to privacy protected by the Federal Constitution. Although suggesting that the right to privacy is pretty

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rehearing by 875 F.2d 699 (9th Cir. 1989) ("The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear.")

15. See, for example, *State v. Lopes*, 660 A.2d 707, 710 (R.I. 1995) (nonmarital sodomy not protected by Federal Constitution).

16. See, for example, *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting) (suggesting that *Bowers* somehow establishes the constitutionality of Amendment 2).

17. See, for example, id. at 636-53 (Scalia, J., dissenting). Justice Scalia's dissenting opinion was joined by both Justices Thomas and Rehnquist.

18. See id. at 644 (Scalia, J., dissenting).

firmly entrenched in American jurisprudence, (p. 39) he seems wary of relying on that right, in part because it is not expressly included in the constitutional text (p. 36) and in part because the Court has not offered clear guidelines to help the lower courts determine what it protects and what it does not. (p. 44) While the Court has sometimes suggested that a "liberty must be 'deeply rooted in this Nation's history and tradition'"[19] to qualify as protected by the right to privacy, (p. 43) Koppelman rightly suggests that this test is too indeterminate.

The difficulty with the history and tradition test, however, is not merely that it is too indeterminate but that it is unable to account for those interests that have been recognized as protected by the right to privacy. Contraception and abortion, for example, had been proscribed for at least 80 years when the Court struck down laws prohibiting them,[20] and it is difficult to see how practices proscribed for several decades could be described as deeply rooted within the nation's history and traditions. Thus, the history and tradition test is simply the wrong test to determine what is protected by the right to privacy and what is not. The point here of course is not that Koppleman made an error when referring to that test but, rather, that the Court cannot in good faith claim that such a test accounts for what the right to privacy protects, implicit or explicit claims to the contrary notwithstanding.

Koppelman rightly suggests that society can impose incest restrictions to protect the dynamics between parent and child (p. 48). He then suggests that it seems difficult to draw any abstract limit on government's power to regulate sexual behavior if, indeed, society has a legitimate interest in regulating incest. Yet, it is not at all clear why that is so. Certainly, there is no need to maintain an incest-like taboo on same-sex relations to preserve the monogamous family. There need be no poisoning of the parent-child relation when the parent has sexual relations with her same-sex or, for that matter, different-sex, adult partner, and the category of "monogamous families" should include same-sex parents who are raising their children just as it includes different-sex parents (whether or not married) who are raising their children.

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19. Quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

20. See *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (Massachusetts statute prohibiting contraception stemmed from statute passed in 1879); *Poe v. Ullman*, 367 U.S. 497, 501 (1961) (Connecticut contraception statute passed in 1879). See also *Roe v. Wade*, 410 U.S. 113, 116 (1973) (Texas statutes at issue prohibiting abortion were typical of those in effect for about a century).

Koppelman suggests that a close reading of the right to privacy cases makes clear that they "are less concerned with promoting sexual liberty than they are with promoting social cohesion and deference to traditional institutions." (p. 49) Yet, it is hardly as if one must choose between sexual liberty on the one hand and deference to traditional institutions on the other. Commentators can debate whether the Court was "concerned with social stability" (p. 50) when holding that the right to privacy protected access to contraception and abortion, but the right to privacy cases do not seem plausibly characterized as deferring to traditional institutions. Such a reading ignores some of the other cases handed down during the period under discussion—for example, *Stanley v. Illinois*[21] in which the Court struck down an Illinois statute under which "the children of unwed fathers become wards of the State upon the death of the mother."'[22] Holding such a statute unconstitutional hardly involved deference to traditional institutions such as marriage.

Koppelman implies that his interpretation of the right to privacy cases as representing deference to traditional institutions is supported by *Belle Terre v. Boraas*,[23] which he describes as "upholding an ordinance that prohibited persons unrelated by blood marriage, or adoption from living together." (p. 167 n.102) Yet, *Belle Terre* does not seem particularly supportive of marriage, and the ordinance itself is better described as *limiting* the number of unrelated persons who might live together. The *Belle Terre* Court specifically rejected the claim that the ordinance "reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge."[24] The Court considered the objection "that if two unmarried people can constitute a 'family,' there is no reason why three or four may not,"[25] but noted that "every line drawn by a legislature leaves some out that might well have been included."[26] While one might disagree with the Court about the reasonableness of precluding three of four unrelated persons from living together, one would be wrong to infer

21. 405 U.S. 645 (1972).
22. Id. at 646.
23. 416 U.S. 1 (1974).
24. Id. at 8.
25. Id.
26. Id.

that the *Belle Terre* Court was upholding an ordinance precluding non-marital couples from cohabiting.

It is important to be able to point to options in addition to sexual liberty on the one hand and traditional institutions on the other insofar as one wishes to capture some of the invidious aspects of the current same-sex marriage bans. At least one of the stereotypical views of individuals with a same-sex orientation is that they are always seeking sexual gratification,[27] and implying that *Bowers* simply involves a choice between tradition and licentiousness plays into the stereotyping that Koppelman rightly criticizes. (p. 24) While Koppelman criticizes *Hardwick* as a "disastrously bad piece of judicial craftsmanship," (p. 50) one might rightly be surprised by his claim that "one cannot say that the result in *Hardwick* is not consistent with the preceding privacy case law." (p. 50) Many not only can but do make such a claim, citing a variety of cases in support.

Koppelman is likely correct that the right to privacy protected by the Federal Constitution will not be construed as protecting the right to marry a same-sex partner. However, that is not because the right to privacy jurisprudence cannot or even should not be read to include such a right but because of the Court's cramped reading of its own jurisprudence in this area. State constitutions also protect the right to privacy, and pressing claims involving the right to privacy protections guaranteed by the state constitutions has been and may continue to be useful when seeking to secure protections for the LGBT community.[28]

Koppelman argues that much discrimination against gays and lesbians is sex discrimination because it is designed to promote particular gender roles. (p. 64) His argument is plausible—some of the discrimination against the LGBT community is likely motivated by the desire to discourage individuals from adopting nontraditional gender roles or attitudes, or engaging in "sex-inappropriate" behaviors. (See p. 64.) However, he does not adequately differentiate and discuss a different sex discrimination argument that has been accepted by some courts. Consider, for example, a statute that prohibits individuals of the same sex from marrying. One criticism of such a ban is that it in-

27. See Richard D. Mohr, *Gays and Justice: A Study of Ethics, Society, and Law* 25 (Columbia U. Press, 1988) (discussing "the stereotype of gays as sex-crazed maniacs").

28. See, for example, *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002) (sodomy statute violates right to privacy under state constitution); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (same); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (same); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (same).

volves an attempt to enforce particular gender stereotypes. The focus of such a criticism is on what the statute aims to achieve. Another criticism, however, is that a same-sex marriage ban expressly discriminates on the basis of sex because it precludes a man from marrying a man but not a woman and because it precludes a woman from marrying a woman but not a man.[29] Here, the focus is not on the goal but simply on the classification itself. A separate issue is whether an "exceedingly persuasive justification"[30] can be offered for this sex-based classification, but the focus is on whether such a classification was made and on whether the state can meet its burden for employing such a classification, and not solely on whether the classification is designed to reinforce stereotypical gender roles and attitudes.

One might contrast a same-sex marriage ban with a statute that classifies on the basis of orientation, e.g., an adoption statute that precludes lesbians or gays from adopting.[31] The former prohibits all individuals, regardless of orientation, from marrying someone of the same sex and permits them to marry someone of a different sex, assuming that other limitations like age or consanguinity are not a bar. The latter precludes anyone, regardless of sex, from adopting if he or she has a same-sex orientation.

The point here should not be misunderstood. Both marriage statutes precluding individuals of the same sex from marrying and adoption statutes precluding those with a same-sex orientation from adopting impose substantial burdens on the LGBT community. Such statutes obviously impose much greater burdens on individuals with a same-sex orientation than on individuals with a different-sex orientation and should be held unconstitutional. Thus, the claim here is not, for example, that same-sex marriage bans are constitutionally permissible because they permit LGBT individuals to marry, although not their life-partners.[32] Just as the interracial ban at issue in *Loving v. Virginia*[33] was unconstitutional notwithstanding its permitting indi-

29. See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) ("HRS § 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex.")

30. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citing Mississippi *Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

31. See Fla. Stat. Ann. §§ 63.042 (3) (West 1997) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.")

32. Depending upon the laws of the particular state, a post-operative transsexual may be able to marry his or her life-partner, even though anyone who saw them would say that they were of the same sex.

33. 388 U.S. 1 (1967).

viduals to marry others of their own race, same-sex marriage bans are impermissible notwithstanding their permitting LGBT individuals to marry someone of a different sex.

The point here is merely that statutes prohibiting same-sex marriage classify on the basis of sex rather than orientation. Those with a same-sex orientation are permitted to marry individuals of a different sex and individuals with a different-sex orientation are not permitted to marry someone of the same sex. As to how often those with a same-sex orientation would want to marry someone of a different sex or those with a different-sex orientation would want to marry someone of the same sex, e.g., to secure financial and emotional if not sexual benefits, that is a separate question which need not be addressed here.

Certainly, it is plausible to claim that the intention of same-sex marriage bans is to target those with a same-sex orientation, but that suggests that the sex-based classification is being used in a way that is both over-inclusive and under-inclusive. Thus, at least one answer to those who say that sex-discrimination and orientation-discrimination are different is not to suggest that all instances of the latter are instances of the former, (see pp. 60-61) but instead to say that they are different and that same-sex marriage bans are an example of an invidious sex-based rather than orientation-based classification.

Koppelman addresses the New Natural Law (NNL) theorists' attempts to justify same-sex marriage bans. He pays careful attention to their arguments and offers a variety of reasons to establish that their claims are not persuasive. One surprising element in his analysis, however, is his suggestion that "there are intuitions that most Americans share . . . that the NNL theorists have defended more thoughtfully and coherently than anyone else." (p. 80)

The NNL theorists try to justify the claim that "whatever goods a same-sex couple is capable of achieving together, marriage is simply impossible for them, because of the kind of thing that marriage is." (p. 80) Koppelman suggests that while most Americans "do not believe that sex is valuable only for purposes of procreation," since they "approve of heterosexual marriages of the elderly and infertile, for example," they nonetheless believe that "these cases [marriages involving the infertile or elderly] realize something uniquely valuable that is not realized by the same-sex couple." (p. 80) Koppelman concludes that the

"NNL's views, while they are often obscure, are not idiosyncratic." (p. 80)

Yet, it may be that NNL's views about same-sex marriage coincide with those of many Americans only in the conclusion reached and, further, that the common conclusion may be due to a mistake of fact. It may be, for example, that many believe that the function of marriage is to provide a setting in which children can thrive and also believe, even if mistakenly, either that the LGBT community is not having and raising children or that members of the LGBT community cannot be good parents. Precisely because same-sex couples have children to raise and are raising them well, the notion that marriage is important for the sake of children militates in favor of rather than against recognition of same-sex unions.

While the NNL theorists reach the same conclusion that many Americans draw, namely, that marriage is only for two individuals of different sexes, this does not mean that the NNL theory: (1) is internally consistent, (2) captures why many Americans believe that marriage should be reserved for different-sex couples, or (3) reflects other aspects of domestic relations law so that it can sensibly be incorporated within or provide a justification for current law. For purposes here, the relevant issue is (3).

Existing state laws specifying the conditions under which individuals might marry do not reflect the NNL theory's account of which types of relationships or acts count as marital. For example, individuals who do not wish to have children and who are only interested in assuring themselves of a consistent sexual partner would not be precluded from marrying on that account. So, too, individuals who always use contraception or, perhaps, who are sterilized so that they can have sexual relations without fear of conceiving also will be permitted to marry, and individuals who make use of advanced reproductive technologies so that they might have and raise children also are not viewed by the law as incapable of partaking of the goods of marriage, NNL view notwithstanding.

Just as state laws do not reflect the NNL view of marriage, the constitutional jurisprudence regarding the right to marry does not either. The Court has articulated numerous interests that are implicated in marriage—marriages are expressions of emotional support and public commitment, they may involve an expression of religious faith or personal dedication, and mar-

riages may be a pre-condition to the receipt of government benefits.[34] These are interests that are shared by both same-sex and different-sex couples and simply do not rely on the kind of view offered by the NNL theorists.

In *Zablocki v. Redhail*,[35] the Court suggested that it "is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships," because it "would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter [into] the relationship that is the foundation of the family in our society."[36] Same-sex couples not only are raising children but have legally recognized parent-child relationships protected by the right to privacy. Were the Supreme Court to take seriously its own explanations of why the right to marry is so important, the Court would recognize that the right to marry a same-sex partner is protected by the right to privacy guarantees provided by the Federal Constitution.

The NNL account of marriage neither represents existing law nor the constitutional interests implicated in marriage and thus can hardly rationalize or justify current state or constitutional law. Just as the history and tradition test does not adequately account for what is included within the right to privacy because it excludes too much, the NNL view cannot account for which marriages should be recognized as a matter of state or constitutional law because it excludes too much. The difficulty pointed to here is not Koppelman's rejection of the NNL view but rather his implicit or explicit suggestion that such a view either represents what most Americans believe or that it somehow captures the legal understanding of marriage either as a matter of state or constitutional law. Regardless of whether one is convinced by Koppelman's criticisms of that view, the NNL understanding of marriage simply does not capture the legal view of marriage and thus should not be used to "justify" state refusals to recognize same-sex marriages.

Currently, no state recognizes same-sex marriage, although Vermont recognizes civil unions. It seems plausible to believe, however, that same-sex marriage will someday be recognized in one or more states. When that happens, those states not permit-

34. See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987).
35. 434 U.S. 374 (1978).
36. Id. at 386.

ting such marriages to be celebrated will have to decide whether to recognize those same-sex marriages validly celebrated in a different state.

To understand the issues implicated in the interstate recognition of marriage, it is important to consider some of the different contexts in which this issue might arise. Consider three categories:

Category$_1$

A couple wishes to marry. However, their domicile treats their marriage as void and, perhaps, has a law prohibiting their evading local law by going to another state to marry. They nonetheless go to another state where their marriage is permitted, marry, and then return home. An issue arises in which the validity of their marriage is important to establish.

Category$_2$

A couple marries in accordance with the law of their domicile and lives there for several years. They then move to a new domicile, which would not have permitted the couple to marry had they been domiciled there at the time of their union's celebration. An issue arises in which the validity of their marriage is important to establish.

Category$_3$

A couple marries in their own domicile in accord with local law. They vacation in another state, which would not have permitted them to marry had they been domiciled in that state. An issue arises in which the validity of their marriage is important to establish.

The strongest case for non-recognition involves the type of marriage included in Category$_1$. Assuming that no constitutional guarantees are violated by the statute, the law of the domicile at the time of the marriage traditionally determines the validity of the marriage. This does not mean, however, that a marriage that could not have been celebrated in the domicile will not be recognized even if valid where celebrated. As Koppelman suggests, (p. 95) even marriages in this category are valid everywhere if valid where celebrated, as long as they do not violate a strong public policy of the domicile.

It might seem surprising that a state would not permit a marriage to be celebrated locally but would nonetheless recognize it if validly celebrated elsewhere. Yet, this is less surprising than first appears when one considers the state's interests in promoting marriage and in promoting the legitimacy of children. Nonetheless, in this kind of case, the couple seems least entitled to complain if their domicile refuses to recognize their union. They knew that local law prohibited their marriage and went elsewhere to evade that law. Of the couples in the three categories discussed here, this couple is least likely to be thought to have had a reasonable and justified expectation that their marriage would be recognized.

It is not surprising that most of the recorded cases involve some version of the marriage described in Category$_1$. This was a much less mobile country in the past and couples were less likely to move to a new state to start a new life. It was much easier to cross a border to celebrate a marriage where it was permitted, but then to return to one's domicile and to one's job, family, and friends.

For purposes here, the question is whether a state will recognize a marriage between same-sex partners that was validly celebrated in another state. Many states have already passed statutes that suggest that the state will not recognize a same-sex marriage regardless of when or where it was celebrated.[37] While these statutes will have to be construed by the courts, one possible reading of them is that they not only apply to marriages described in Category$_1$, but also apply to the marriages described in Category$_2$ and Category$_3$.

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37. Ga. Code Ann. § 19-3-3.1 (b) (Lexis 1999):

> No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

Ala. Code § 30-1-19 (e) (Lexis 1998) ("The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."); Va. Code Ann. § 20-45.2 (Lexis 2000) ("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.")

Koppelman wishes to defend the "modest claim" that were one of the states to recognize same-sex marriages, no state would be required by local law to refuse to recognize such marriages for all purposes. (p. 98) Yet, if state and federal constitutional guarantees are bracketed, Koppelman's modest claim may nonetheless be too bold. Many states have articulated strong public policy statements against recognizing same-sex marriage, and the question at hand is whether a state legislature could bind the state's courts in all cases to refuse to give any effect to such marriages.

Koppelman suggests that "a blanket rule of non-recognition would be a radical departure from pre-existing choice-of-law principles and should not be adopted." (p. 102) He is correct both that this would be a radical departure and that this would be unwise, but those points address the choice-of-law rules that states should adopt. A different issue is whether as a matter of existing law courts have the discretion that he believes that they should, and yet another issue is whether the laws that might be crafted in the future in different state legislatures would nonetheless give judges "a free hand to craft sensible conflicts rules." (p. 116) It is not at all clear that states do or must permit their courts to have discretion to recognize same-sex marriages for particular purposes or for any purpose, even if the states would be wise to do so.[38]

Koppelman discusses two important marriage cases that fall into Category$_2$. Each case involved an interracial couple who had validly celebrated their marriage in their domicile, and then had subsequently moved to a jurisdiction which would not have permitted them to marry had they been domiciled in the latter jurisdiction at the time of the marriage. Koppelman notes that the two state supreme courts reached different conclusions with respect to the validity of the interracial marriages before them, but he then uncharacteristically fails to offer the kind of deep analysis of the cases that he offers elsewhere. This is regrettable, because these cases cry out for examination.

In *State v. Bell*,[39] the Supreme Court of Tennessee refused to recognize an interracial marriage validly celebrated in Mississippi. The *Bell* court cited examples of cases where a state could

38. This is assuming for the sake of argument that no state or federal constitutional guarantees require recognition of same-sex marriages for certain purposes or under certain conditions.

39. 66 Tenn. 9 (1872).

refuse to recognize a marriage validly celebrated in another domicile—incest and polygamy[40]—and then said that because the marriage before the court was no less revolting or unnatural than those,[41] the state could refuse to recognize the interracial marriage as well.

The difficulty here was that the court was using the wrong test, which traditionally was not whether the marriage was viewed in the forum with great distaste but instead whether the marriage was either incestuous or polygamous. The distaste test would simply have been too easy to meet, since the marriage would not even have been challenged unless the state had articulated a strong public policy against such marriages. Basically, the *Bell* court implied that the same standard for non-recognition should be used for marriages in $Category_1$ and $Category_2$, and that a marriage violating an important public policy simply should not be recognized regardless of whether it was valid in the domicile at the time of its celebration. Yet, marriages in these two different categories were traditionally treated quite differently, at least in part, because the former was celebrated even though the couple was on notice that their domicile precluded the marriage, whereas the latter was celebrated when the couple might reasonably and justifiably have believed that their legally permitted marriage would continue to be recognized.

It may well be that the *Bell* court was sensitive to the difficulty posed by its treating marriages in $Category_1$ and $Category_2$ in the same way, for it did not even mention that the marriage at issue had been validly celebrated in a different *domicile*.[42] Indeed, the Tennessee Supreme Court does not make that point clear until it issues a different decision seventeen years later in which the court explains what was at issue in *Bell*.[43]

In *State v. Ross*[44] the North Carolina Supreme Court used the traditional test to determine whether a marriage validly

40. Id. at 11.

41. Id.

42. The court writes, "The question to be determined is, does a marriage in Mississippi protect persons who live together in this State in violation of the act of the General Assembly of the 27th of June, 1870?" Id. at 9. Here, the court does not even mention where the parties were domiciled at the time of the marriage.

43. One needs to consult *Pennegar & Haney v. State*, 10 S.W. 305 (Tenn. 1889) to find out that the parties in *Bell* were domiciled in Mississippi at the time of the marriage. See id. at 307 ("in *State v. Bell*, 7 Baxt. 9, this Court held that a marriage between a white person and a negro, valid in Mississippi where celebrated, was void here, in a case whether the parties were domiciled in Mississippi at the time of the marriage"). 87 Tenn. 244, 251.

44. 76 N.C. 242 (1877).

celebrated in another domicile would be recognized. The court held that because the marriage validly celebrated in the domicile was neither polygamous nor incestuous,[45] it would be recognized.[46] The North Carolina Supreme Court would not have recognized the interracial marriage validly celebrated in South Carolina had the degree of distaste been the relevant test, since the court made clear how offensive it found the marriage.[47] Indeed, when the State Attorney-General suggested that the state need not recognize the interracial marriage validly celebrated in a different domicile because "a marriage between persons of different races is as unnatural and revolting as an incestuous one,"[48] the court rejected that argument and instead pointed out that "[i]t is impossible to identify this case with that of an incestuous or polygamous marriage."[49] The court decided that the costs associated with not recognizing a non-polygamous, non-incestuous marriage validly celebrated in the domicile at the time of celebration were simply too great, and recognized the marriage.[50]

One would be wrong to infer from the *Ross* decision, however, that North Carolina did not believe that interracial marriages violated an important public policy. In the very same year in which *Ross* was decided, the North Carolina Supreme Court refused to recognize an interracial marriage celebrated in South Carolina by North Carolina domiciliaries.[51]

Koppelman correctly notes that a federal court in *Ex parte Kinney*[52] suggests that a state would not have to recognize an interracial marriage validly celebrated in another domicile were the couple to have subsequently emigrated to the state. Yet, Koppelman does not seem to appreciate how *Kinney* may undercut the ability of states to refuse to recognize same-sex marriages validly celebrated elsewhere in certain circumstances.

The *Kinney* court discussed three different scenarios, one from Category_1, one from Category_2, and one from Category_3. The actual case before the court fell into Category_1, since it involved an interracial marriage celebrated by Virginia domiciliaries who had attempted to evade local law by marrying in

45. See id. at 245-46.
46. See id. at 247 (the marriage would be recognized because neither polygamous nor incestuous).
47. See id. at 246 (discussing how "revolting" the marriage was to the court).
48. Id. at 245.
49. Id. at 247.
50. See id.
51. See *State v. Kennedy*, 76 N.C. 251 (1877).
52. 14 F. Cas. 602 (E.D. Va. 1879).

the District of Columbia. The court believed this an easy case and held the marriage void.

While recognizing that the case would have been more difficult had the couple validly celebrated their marriage in their own domicile before moving to Virginia,[53] the court ultimately concluded that the United States Constitution would not require Virginia to recognize such a marriage. Thus, the court believed that the United States Constitution would not preclude Virginia from refusing to recognize marriages in $Category_1$ and in $Category_2$. However, the court offered a different position when analyzing cases in $Category_3$, suggesting that if an interracial couple had celebrated their marriage in their domicile of the District of Columbia and then had merely traveled through Virginia, the state would have been constitutionally required to recognize the marriage, local policy notwithstanding.[54]

Koppelman suggests that *Kinney* held that "even conceding a state's right to outlaw interracial marriages, that state was obligated to make reasonable accommodation of those states that held different views on the miscegenation question." (p. 113) Yet, *Kinney* was not offering an accommodation theory but was instead offering an analysis of the Fourteenth Amendment and privileges and immunities protections afforded by the United States Constitution.

The *Kinney* court's conclusion that the Fourteenth Amendment offers no protection for interracial marriages[55] is simply no longer good law.[56] What is more interesting is the *Kinney* court's suggestion that privileges and immunities guarantees would protect the interracial marriage of individuals traveling through a particular state.[57] At least two points might be made about such a suggestion. First, this means that states refusing to recognize marriages in $Category_3$ may be violating privileges and immunities guarantees. Second, given *Saenz v. Roe*[58] in which the Court suggested that privileges and immunities guarantees are not only implicated when one visits a state but may also be implicated when one emigrates to a new state, states refusing to recognize marriages in $Category_2$ may also be violating privileges and immunities guarantees.

53. See id. at 606.
54. Id.
55. Id. at 605.
56. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967).
57. *Kinney*, 14 F. Cas. at 606.
58. 526 U.S. 489 (1999).

Any discussion of the interstate recognition of same-sex marriages must examine the Defense of Marriage Act. The Act has two sections, one defining marriage for federal purposes and the other discussing the full faith and credit that would be due to same-sex marriages in other states. Koppelman suggests that the former would seem difficult to challenge on constitutional grounds. (p. 128) Yet, Koppelman's pessimism may not be justified, given the unprecedented nature of Congress's refusal to defer to state definitions of marriage (p. 136) and the Court's having explained that Congress can only supplant state law in these kinds of matters where important federal interests would thereby be protected.[59]

Koppelman rightly suggests that *Romer* might helpfully be used to establish the unconstitutionality of DOMA. One might consult the *Congressional Record* to see the impermissible motivation of (some of) those supporting DOMA and, as Koppelman suggests, the statute on its face suggests invidious purpose. (p. 139) Thus, even were the Court to reject that invidious motivation could be inferred from the comments of particular members of Congress,[60] the unprecedented nature of DOMA and the breadth of the burden that it imposes on certain individuals should be enough to make DOMA's invidiousness clear.

In his epilogue, Koppelman criticizes Justice Johnson who suggests in her concurrence in *Baker v. State*[61] that Vermont should recognize same-sex marriage rather than permit a different status—civil unions—to be created. Koppelman writes, "If same-sex marriage really is required by high principle—and Amestoy and Johnson both agree that it is—then it is no light thing to act in a way that makes it less rather than more likely that such marriages will in fact be recognized and remain so." (p. 144) Basically, he believes that had the Vermont court found same-sex marriage protected by the Vermont Constitution, then the constitution would have been changed by the electorate. For support that such a result would occur, he points to what happened in both Alaska and Hawaii, namely, those state constitu-

59. See *Rose v. Rose*, 481 U.S. 619, 625 (1987) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)) ("Before a state law governing domestic relations will be overridden, it 'must do "major damage" to "clear and substantial" federal interests'").

60. Cf. *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.")

61. 744 A.2d 864 (Vt. 1999).

tions were changed to prevent the states from recognizing same-sex marriage. (p. 142)

Yet, Koppelman rightly suggests that the Hawaii Supreme Court deserves praise for having recognized the merit in the claim that the state's refusal to recognize same-sex marriage implicated equal protection guarantees on the basis of sex, (p. 152) even though the Hawaii decision led to both a state constitutional amendment in Hawaii and to Congress's passing the Defense of Marriage Act. The criticism made of Justice Johnson's concurrence and suggested remedy might also have been made of the Hawaii plurality opinion in *Baehr v. Lewin*,[62] namely, that the decision did not seem likely to lead to the continued recognition of same-sex marriage, and some of the praise given to the *Baehr* opinion might also have been offered for Justice Johnson's concurrence.

Koppelman's ambivalence about who deserves praise is unsurprising. Very important interests are implicated in marriage, and the LGBT community is severely burdened by current marriage laws. Civil union status, while less attractive than marital status, is nonetheless quite attractive—it offers emotional, financial, and symbolic benefits, which would not otherwise be available, both to same-sex partners and to any children that the couple might be raising. Courts are in the unenviable position of realizing what the law requires and also realizing the practical implications of issuing a decision which, although reflecting the law, is very unpopular. It is extremely regrettable that courts are put in such an untenable position, and the *Baehr* plurality and all members of the *Baker* court deserve praise for their implicit or explicit recognition that state refusals to recognize same-sex relationships involves invidious discrimination.

Koppelman addresses many of the legal issues that are implicated by current state same-sex marriage bans and that will be implicated when some states finally recognize such unions. His analyses are both controversial and thought-provoking. While same-sex marriage proponents and opponents might disagree with the particular tacks that Koppelman takes, they all must admit that he helps to put many of the issues sharply into focus, itself no mean feat.

62. 852 P.2d 44 (Haw. 1993), reconsideration granted in part, 875 P.2d 225 (Haw. 1993).