Book Reviews

MIDDLE GROUND?

SAME SEX DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES. By Andrew Koppelman.[1] Yale University Press. 2006. Pp. xviii + 204. Hardback $35.00.

Patrick J. Borchers[2]

Andrew Koppelman, Professor of Law and Political Science at Northwestern University, is one of the most prolific and influential commentators on the same-sex marriage debate and the conflict-of-laws questions that it presents. His thoughtful and well-written book, entitled *Same, Sex, Different States: When Marriages Cross State Lines*,[3] is an important contribution to this literature.

The book draws on Koppelman's earlier writings on the same-sex marriage issue, the federal Defense of Marriage Act "DOMA",[4] and related topics. In it he attempts to stake a middle ground between the "pro-recognition" and the "anti-recognition" camps with regard to same-sex marriages solemnized in states or nations that allow such unions.

One of the most admirable features of the book is that it avoids overstating its case or embracing any of the easy solutions that, while appealing to one side or the other, do not hold up to scrutiny. Thus Koppelman quite rightly rejects the "Full Faith

1. Professor of Law, Northwestern University.
2. Vice President for Academic Affairs and Professor of Law, Creighton University.
3. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).
4. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in part at 28 U.S.C. § 1738C (2006)).

and Credit" solution advanced by the pro-recognition camp that dominated the popular press and some law review articles written shortly after the Hawaii Supreme Court's decision in *Baehr v. Lewin*.[5] That decision, which appeared likely to make the Aloha State the first to allow same-sex marriages, provoked the federal DOMA, which Koppelman quite rightly notes was aimed at a mostly imaginary target (pp. 116–18).

The far-fetched notion that led to the federal DOMA was that same-sex marriage would be a sort of card trick in which one card is flipped over and the whole rest of the deck follows.[6] As Koppelman quite rightly notes, this argument depended on a thorough confusion of what constitutes a "judgment" for full-faith-and-credit purposes (p. 118). For a marriage to have this "card trick" effect, it would have to involve the actual resolution of disputed issues. But, of course, the decision to enter into a marriage is not a disputed matter in the way that a divorce can be. It's simply not the case that Pat wants to get married to Fran, but Fran doesn't want to get married to Pat, and they have to go to a judge who will then decide whether they are to be married or not.

On the other end of the spectrum is the solution advanced by some in the anti-recognition camp. That camp proposes to amend the U.S. Constitution to ban same-sex marriages. Although opinion polls show that a large majority of Americans are opposed to same-sex marriage in principle,[7] it seems unlikely that the political will to amend the Constitution exists. Moreover, since opposition to same-sex marriage is much weaker among younger adults, the solution of amending the Constitution seems unlikely to gain momentum with the passage of time (p. 152).

With total victory for either side out of reach, the question to which Koppelman addresses himself is how best to mediate the *kulturkampf* between the small number of states who have institutionalized same-sex unions[8] and the 40 or so states who have by positive law expressed their opposition (p. 138).

---

5. 852 P.2d 44 (Haw. 1993).

6. *See* Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 152–54 (1998).

7. *Id.* at 150.

8. Prompted by their state high courts, currently Vermont and New Jersey have laws that confer essentially all the benefits of marriage on same-sex couples who go through a "civil union" ceremony. Massachusetts has by decree of the Supreme Judicial Court extended its marriage laws to include same-sex couples. The developments in

The engine driving the potential for policy disputes is the *lex loci celebrationis* (or "the law of the place of the celebration") rule in the conflict of laws. The general rule, from time immemorial, has been that a marriage that is valid under the law of the state in which it is celebrated is valid everywhere.[9] This raises the possibility that once a state recognizes same-sex marriage (and, unlike Massachusetts, does not have a "marriage evasion" statute[10]), couples barred from marrying in their home states will travel to states that allow their marriages and then return home and claim the status of a married couple. Now, as noted above and several times by Koppelman, this is not a rule of constitutional compulsion. The place-of-celebration rule has always been subject to a public policy exception which has allowed states to refuse to recognize out-of-state marriages against which the state has a deeply-felt policy.[11]

The same-sex marriage debate is not, of course, the first such policy conflict to present these quandaries. Before the U.S. Supreme Court in *Loving v. Virginia*[12] struck down state laws barring inter-racial marriages, states that barred such unions faced similar questions with inter-racial couples who had been validly married elsewhere. Koppelman carefully plumbs these cases for lessons they might teach but is, again, careful to not overstate his case by claiming that they present a perfect analogy (p. 49).

Koppelman usefully groups marriage questions into four different classes.[13] One is "Evasive Marriages" in which a couple

---

Vermont and Massachusetts are discussed extensively (pp. 8–11). The New Jersey Supreme Court decision is Lewis v. Harris, 908 A.2d 196 (N.J. 2006). In a divided decision, the high court of New York recently rejected the argument that its state constitution confers a right of same-sex marriage. *See* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

9. Borchers, *supra* note 6, at 154–58.

10. In Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (Mass. 2006), the Supreme Judicial Court upheld the Massachusetts marriage evasion statute in application to out-of-state same-sex couples domiciled in states that prohibit same-sex marriage.

11. Borchers, *supra* note 6, at 157–58.

12. 388 U.S. 1 (1967).

13. One quibble I have with Koppelman's taxonomy is that the willingness of courts to sustain attacks on marriages has always tended to depend on whether the marriage was being challenged by one of the parties to the marriage or by a third party whose rights depended upon the validity of the marriage, such as in questions of inheritance. *See* Borchers, *supra* note 6, at 157. Thus, for instance, in Chapter 2 Koppelman discusses at length the famous case of Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958), in which a wife who was underage under the law of her domicile was able to annul a marriage that was apparently valid where celebrated. Koppelman uses *Wilkins* as an example of the public policy doctrine invalidating what he would categorize as an "evasive" marriage. However, similarly "evasive" marriages have been upheld against attack on public policy grounds probably because the party attacking it was not one of the spouses. *See, e.g.*, In

domiciled in a state that does not allow for same-sex marriages travels to a state that allows them to get married and then returns home (pp. 102–06). A second is "Migratory Marriages" in which a couple is genuinely domiciled in a state that allows their union but then later re-domiciles in a state that prohibits their marriage (pp. 106–10). A third is "Visitor Marriages" in which a couple validly married under the law of their home state is visiting in a state that does not allow same-sex marriages but has need during the visit to take advantage of one of the incidents of the marriage, for instance, a right to make health care decisions for an incapacitated spouse (pp. 110–11). The fourth is "Extraterritorial Marriages" in which a legal relation in a state other than the couple's marital domicile turns on their marital status (pp. 112–13). An example here might be an intestate beneficiary living in a state that does not allow same-sex marriages whose right to inherit turns upon whether a same-sex couple living in a state that permits such marriages is treated as married.

At the risk of over-simplification, Koppelman proposes a reorientation of marriage law away from the place-of-celebration nexus to a domiciliary nexus. Thus he argues that states who prohibit same-sex marriages should be free to ignore evasive marriages but that they should recognize marriages in the visitor and extraterritorial cases. In the migratory case he proposes that states which prohibit same-sex marriages be allowed to refuse to recognize them as marriages subject to their recognizing some of the incidents of the marriage, particularly those that he terms "non-marital" rights, i.e., ones that could be created in the absence of a marriage (p. 110).

---

re May's Estate, 114 N.E.2d 4 (N.Y. 1953). Koppelman also at one point (pp. 23–24), stretches the traditional public policy doctrine beyond its bounds when he criticizes the New York Court of Appeals' decision in Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798 (N.Y. 1938). Although all can agree that the dreadful Nazi-era laws involved in that case violated every norm of natural justice, the public policy defense was always limited to preventing enforcement of foreign rights that violated the forum's public policy (such as those involving foreign marriages). It had never been understood to allow the rejection of a foreign defense to essentially create a right of action that would not have been known under foreign law. Thus, had *Holzer* involved the German company attempting to claim a breach of contract against the plaintiff Holzer, rather than the other way around, I have little doubt but that New York's high court would have dismissed the German company's suit on public policy grounds. Koppelman, however, has distinguished company in this view as the New York Court of Appeals so stretched the public policy doctrine in Kilberg v. Northeast Airlines, 172 N.E.2d 526 (N.Y. 1961) to reject the Massachusetts limitation on wrongful death recovery. This, however, was a short-lived innovation as two years later New York adopted a version of interest analysis for resolve conflicts and essentially recast *Kilberg* as an interest analysis case. *See* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). However, no part of Koppelman's central argument depends to any great degree on these points.

It is conceivable that such a reorientation, or at least a partial one, might take place. In my first writing on the same-sex marriage debate, I suggested, in what Koppelman would call the "migratory" case, that even non-recognizing states might well give some effect to such marriages.[14]

The real question, however, as Koppelman notes, is the collision between his proposed reorientation and many of the state statutes and constitutional amendments (often called "mini-DOMAs) (pp. 137–48) that were drafted not only to make clear that marriages must be of the opposite-sex variety but also addressed the conflict-of-laws issues that might be presented by same-sex marriages validly celebrated in other states. Many of these statutes appear to prohibit the reorientation that Koppelman proposes and would prevent recognition even in the visitor and extraterritorial cases (pp. 146–48).

The coming collision, Koppelman argues (correctly, in my view) is between some of these more expansive mini-DOMAs and the U.S. Supreme Court's line of cases beginning with *Romer v. Evans*.[15] *Romer* invalidated Colorado's "Amendment 2" which prohibited homosexuals from claiming any special status under state or local law. *Romer* is an extraordinarily slippery case that has led some lower courts to declare mini-DOMAs unconstitutional.[16] The Court's opinion is slippery because its holding that Colorado's amendment lacked any "rational basis" is difficult to cabin unless one is willing to accept the proposition that homosexuals are a suspect or quasi-suspect class for equal protection purposes, a view the *Romer* majority apparently disclaimed.[17]

In any event, however, *Romer*'s relationship to the same-sex marriage debate seemed attenuated as long as *Bowers v. Hardwick*,[18] the Supreme Court decision upholding Georgia's sodomy law, remained good law. For if states were allowed to criminalize same-sex sex without running afoul of the Constitution, it was difficult (to say the least) to imagine how the Constitution could

14. Borchers, *supra* note 6, at 185 ("I suspect that many states will give some effect to same-sex marriages even if they don't give them full effect, and the effect they give may depend on the circumstances of the marriage.").

15. 517 U.S. 620 (1996).

16. *See, e.g.*, Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd* 455 F.3d 859 (8th Cir. 2006).

17. *Romer*, 517 U.S. at 630–31.

18. 478 U.S. 186 (1986).

compel them to recognize same-sex marriages or even to give them partial effect.

But then came *Lawrence v. Texas*,[19] in which the Court struck down Texas's sodomy law and expressly overruled *Bowers*. The question of the effect of *Romer* and its progeny on same-sex marriages is now a much closer one. As Justice Scalia noted in his *Lawrence* dissent, the logic of the majority's opinion seems to cut away many of the constitutional obstacles to the institutional recognition of same-sex marriage,[20] to say nothing of Koppelman's more moderate proposal of partial recognition.

I will venture no prediction as to whether the Supreme Court will extend *Romer* far enough to pave the way for Koppelman's proposed reorientation. However, the same slippery slope that has worked to the advantage of the pro-recognition camp by bringing about *Lawrence* and setting up the arguments for the *Romer* line's extension may become its enemy. Some of the force of the argument in favor of same-sex marriage would seem to apply as well to other minority sexual unions.[21] Of course, there may well be principled ways in which to distinguish same-sex unions from other minority unions. But probably those distinctions will have to be made clear before we see widespread judicial acceptance of even Koppelman's middle ground.

However the future unfolds, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* is a significant and positive addition to the discussion.

---

19. 539 U.S. 558 (2003).

20. Id. at 600 (Scalia, J., dissenting) (referring to the equal protection argument against laws forbidding sodomy: "But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.").

21. Two obvious examples are sexual unions between adult siblings and polygamous unions. Although less common than same-sex unions, such unions are not rare. *See, e.g.*, *Blood Ties*, THE GUARDIAN, Feb. 28, 2007, p. 12 (detailing relationship between German brother and sister that resulted in the birth of four children and discussing their efforts to challenge the provision in the German civil code criminalizing their sexual relationship and noting that Sweden apparently allows marriages between half-siblings). Sexual attraction between adult siblings is apparently common if the siblings were raised apart. *See* Nigel Hawkes, *Taboo of Incest Explained by Relative Boredom*, THE TIMES, Apr. 3, 1995. In some states, polygamous unions are estimated to account for as much as 2% of the population. *See Utah Paying a High Price for Polygamy; Law: Child abuse and welfare fraud are part of plural marriage's toll*, L.A. TIMES, Sep. 9, 2001, p. A1. The possibility for a constitutional challenge to laws prohibiting polygamous marriages is more than theoretical. In State v. Holm, 137 P.3d 726 (Utah 2006), the Utah Supreme Court in a split decision upheld against a *Lawrence* challenge a bigamy prosecution of a man who after lawfully marrying his first wife entered into a marriage-like ceremony with another woman and then later the 16-year-old sister of his first wife.