DEFINITION OR DISCRIMINATION? STATE MARRIAGE RECOGNITION STATUTES IN THE "SAME-SEX MARRIAGE" DEBATE

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I. INTRODUCTION

States are in motion. Legal scholars are trying to keep up with them. That is the shape of the public debate about "same-sex marriage" and the state of the scholarship that surrounds it.¹

This paper was developed for a conference on the interjurisdictional recognition of marriages, which featured a number of papers on the "same-sex marriage" debate.² Neither of us, however, claim to be scholars in the field of Conflict of Laws. We are both blessed to have mentors and close colleagues who teach Conflicts, but we are only mere lawyers. Our task was to describe and discuss thirty State statutes, passed in recent years, which require that a legally recognizable marriage include a man and a woman.³

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¹ The reader may notice that we repeatedly put the term "same-sex marriage" in quotation marks. This reflects our belief that same-sex unions are not marriages, a belief which we realize some readers will not share. Although offense may be taken, no offense is intended. For more, see David Orgon Coolidge, Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage, 38 S. TEX. L. REV. 1 (1997) (stating that a person's moral convictions regarding same-sex marriages is based upon "[t]he way in which one defines marriage... life, love, and sexuality"); David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 BYU J. PUB. L. 201 (1998) (questioning the accusation that proponents of existing marriage laws are merely "bigots" and arguing that Loving v. Virginia, 388 U.S. 1 (1967), can be read in more than one way).

² The papers reflected a diversity of views. It goes without saying, we hope — but it is always worth saying anyway — that whatever our differences of opinion on the question of marriage, we have much to learn from each other. In fact, where a question is deeply controverted, and many people have chosen sides, it is easy to develop blind spots. Good scholarly work, in our experience, helps one to overcome those blind spots. Then, if one happens to also be an advocate, as well as a scholar, one will hopefully have not only a greater respect for the complexity of what one is engaged in, but a deeper respect for those with whom one is engaged. The conference was a great aid to that end.

³ See infra notes 10-87 and accompanying text.
Although recent events in Hawaii, Vermont, and Alaska are fascinating and fast-moving, we will discuss them only insofar as they bear upon the subject at hand. We will not focus on the Defense of Marriage Act, because other papers at the conference addressed that subject and spurred one of the more lively debates at the conference. Finally, we will not focus on the other twenty States which have not yet passed these types of statutes, although the tales of their ups and downs would make for absorbing reading, whatever one’s view of the outcomes. If these States are forced to address questions of recogni-

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tion before passing a marriage recognition statute, presumably they will do so by means of choice of law doctrines, including the public policy exception. These topics were ably addressed in this symposium by Professors Hogue and Myers.7

We will begin with a relatively brief narrative about the passage of these thirty marriage recognition statutes.8 Then we will describe the main features of the statutes themselves in greater detail, with attention to the distinctive features of certain of the statutes.9 This will lead to a brief look at the resulting conflicts of interpretation and evaluation that these laws evoke.10

II. DESCRIPTION

A. PASSAGE

We can best understand these statutes as part of an ongoing drama, one which began in the early 1990s and which will stretch into the next century.

The marriage recognition statutes originated as a spiral of responses to a sequence of three events in Hawaii. The first event was the May 1993 Baehr v. Lewin11 decision of the Hawaii Supreme Court, in which a plurality of the Justices rejected the idea of a fundamental right to “same-sex marriage.”12 However, the court then held that under the Equal Protection Clause of the Hawaii Constitution, the existing marriage law was sex discrimination and therefore subject to strict scrutiny.13

The second event in Hawaii occurred in the Spring of 1996, when the initial attempt to place a State Constitutional Amendment on the ballot failed.14 That failure was widely reported.15


8. See infra notes 10-54 and accompanying text.
9. See infra notes 53-79 and accompanying text.
10. See infra notes 78-125 and accompanying text.
15. See Melissa Healy, GOP Lawmakers Offer Bill to Restrict Gay Marriages, L.A. TIMES, May 9, 1996, at 22 (stating that the Defense of Marriage Act was introduced in Congress less than two weeks later).
The third event occurred in December of 1996. In Baehr v. Miike, Judge Kevin Chang ruled that the State of Hawaii failed to offer a compelling State interest to justify the existing marriage law, and held the law unconstitutional. That ruling has been stayed, pending an appeal before the Hawaii Supreme Court. In the meantime, the Hawaii Legislature passed the Marriage Amendment in 1997 and has placed it on the ballot for November 3, 1998. If the Amendment passes and survives legal challenge, the controversy in Hawaii may subside. If the Amendment fails, many observers predict that the Hawaii Supreme Court will affirm Judge Chang's ruling and the State Department of Health will begin to issue marriage licenses to same-sex couples.

The first legislature to pass a marriage recognition bill was Hawaii. In response to the decision in Baehr, the 1994 Hawaii Legislature passed Act 217, which reaffirmed the State's marriage law by adding the words "man and woman." This understanding of marriage had always been implied, but explicit use of these words had not been needed until the issue of same-sex marriages arose in Baehr. As part of this process, Act 217 included a brief section amending HRS 572-3, entitled "Contracted without the State." It previously read: "Marriages legal in the country where contracted shall be held legal in the courts of the State." Act 217 amended this section to read as follows: "Marriages between a man and a woman legal in the country where contracted shall be held legal in the courts of this State."

Other State legislatures proceeded through their 1994 and 1995 legislative sessions largely oblivious to events in Hawaii. Bills ad-

22. Id.
dressing same-sex marriage were only introduced in three States: Alaska, South Dakota, and Utah.\textsuperscript{25} Utah succeeded in passing its statute. Although the bill was initially stalled by threats to pressure the International Olympic Committee to reject Utah's application to host the Winter Olympics, it was finally brought to the floor and passed by a wide margin in both chambers.\textsuperscript{26} To the existing list of void or prohibited marriages, the statute adds a new subsection with the phrase, "between persons of the same sex."\textsuperscript{27} It invokes the public policy exception for out-of-state marriages which would be void or prohibited within Utah, including those between persons of the same sex.\textsuperscript{28}

In early 1996, as Hawaii increasingly became the focus of national attention, bills were introduced in twenty-four of the forty-eight remaining States.\textsuperscript{29} Of these, fifteen became law — raising the total to seventeen.\textsuperscript{30} Although many faced various obstacles in committees, or from powerful lobbies and legislative opponents, all the legislative bills finally passed by margins of 70 percent or more in each chamber.\textsuperscript{31} Thirteen of the bills were signed by their respective Governors.

\begin{itemize}
\item \textsuperscript{25} H.B. 227 (Alaska 1995); H.B. 1184 (S.D. 1995); H.B. 366 (Utah 1995).
\item \textsuperscript{27} UTAH CODE ANN. § 30-1-2 (1995).
\item \textsuperscript{28} UTAH CODE ANN. § 30-1-4 (Supp. 1998).
\item \textsuperscript{31} The final first and second chamber votes on each of the statutes were as follows: H.B. 308 (Alaska 1996) (31-9 House, 16-3-1 Senate); H.B. 1038 (Ariz. 1996) (59-5 House, 21-9 Senate); H.B. 503 (Del. 1996) (39-0-2 House, 17-3 Senate); H.B. 1580 (Ga. 1996) (135-10 House, 47-0 Senate); H.B. 658 (Idaho 1996) (66-4 House, 24-6 Senate); S.B. 1773 (Ill. 1996) (87-17-4 House, 42-9 Senate); S.B. 515 (Kan. 1996) (87-38 House, 39-1 Senate); H.B. 5662 (Mich. 1996) (74-28 House, 31-2 Senate); S.B. 937 (Mich. 1996) (88-14 House, 30-2 Senate); S.B. 768 (Mo. 1996) (142-11 House, Senate concurred); H.B. 1302 (N.C. 1996) (98-10 House, Senate concurred); S.B. 73 (Okla. 1996) (99-0 House, 42-2 Senate); S.B. 434 (Pa. 1996) (177-16 House, 43-5 Senate); H.B. 4502 (S.C. 1996) (82-0 House, passed on voice vote Senate); H.B. 1143 (S.D. 1996) (49-18 House, 26-8 Senate); S.B. 2305 (Tenn. 1996) (90-1-3 House, Senate unanimous with one abstention). This
North Carolina’s bill did not require a signature and Governor Knowles of Alaska chose to let that State’s statute become law without his signature.\textsuperscript{32} In addition, the Colorado legislature passed a bill, but it was successfully vetoed by Governor Roy Romer.\textsuperscript{33}

By early 1997, \textit{Baehr v. Mike}\textsuperscript{34} had come in from the trial court in Honolulu. Bills were now introduced or pre-filed in thirty-one of the thirty-three remaining States.\textsuperscript{35} Of these, nine became law,\textsuperscript{36} raising the total to twenty-six. Again, each bill passed by margins of seventy percent or more in each chamber.\textsuperscript{37} This time, two Governors chose to let statutes become law without their signatures.\textsuperscript{38} There were also


\textit{Rob Chepak, \textit{Chiles Won't OK Same Sex Marriages, TAMPA TRIB., May 30, 1997, at 1 (reporting that the Governor of Florida declined to sign the legislation); John Hale, \textit{Same-Sex Marriage Ban is Law: King Withholds Signature, BANGOR DAILY NEWS, Apr. 1, 1997 (discussing the circumstances under which Governor Angus S. King of Maine allowed a law banning same-sex marriages to go into affect).}
two successful gubernatorial vetoes: Governor Romer, again, and the new Governor of Washington State, Gary Locke.  

This year has seen further action. Bills have been introduced in fifteen of the twenty-four remaining States. Of these, four have become law. Bills in Alabama, Iowa and Kentucky passed by overwhelming margins, and were signed by their Governors. The fourth bill passed in Washington State, but only after the legislature successfully overrode another veto by Governor Locke.

Thus, thirty statutes have passed. Of these, two have already been attacked in court in Alaska and Missouri (although the circumstances behind the two challenges are completely different). Missouri’s marriage recognition statute was passed as part of a larger bill that included social service regulations. In *St. Louis Health Care Network v. State,* the agencies subject to those regulations filed suit under the Missouri Constitution, arguing that the bill’s title was unconstitutionally vague. On May 26, 1998, the Missouri Supreme Court agreed, and struck the entire statute.

Regarding Alaska, in *Brause v. Bureau of Vital Statistics,* Anchorage Superior Court Judge Peter Michalski held that under Article I, section 22 of the Alaska Constitution, which expressly protects the right to privacy, “the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy.” Judge Michalski also held that both marriage statutes implicated “the Constitution’s prohibition of classifications based on sex or gender. . . .”

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41. H.B. 152 (Ala. 1998); H.F. 382 (Iowa 1998); H.B. 13 (Ky. 1998); H.B. 1130, 55th Leg. (Wash. 1997).
42. The final first and second chamber votes on each of the statutes were as follows: H.B. 152 (Ala. 1998) (71-12 House, 30-0 Senate); H.F. 382 (Iowa 1998) (89-10 House, 40-9 Senate); H.B. 13 (Ky. 1998) (84-9 House, 32-2-1 Senate). On the compilation and documentation of these votes, see supra note 30.
44. 968 S.W.2d 145 (Mo. 1998).
45. *St. Louis Health Care Network v. Missouri,* 968 S.W.2d 145, 146 (Mo. 1998).
46. *St. Louis Health Care,* 968 S.W.2d at 149 (referring to the provisions related to same-sex marriage, but only in passing).
concluded that both the marriage and marriage recognition statutes were subject to strict scrutiny. The Alaska Attorney General immediately filed an interlocutory, discretionary Petition for Review with the Alaska Supreme Court, which the Court declined to accept. In the interim, the Alaska Legislature responded by passing, with a two-third margin in both chambers, a proposed amendment to the Alaska Constitution which would effectively pre-empt the entire case. The Amendment was challenged in court, and the Alaska Supreme Court held that only the first sentence of the proposed Amendment would be allowed to appear on the ballot. The Alaska Marriage Amendment, which will appear on the general election ballot on November 3rd (the same day as the Marriage Amendment in Hawaii), reads as follows:

50. Id.
51. High Court Declines Same-Sex Case, ANCHORAGE DAILY NEWS, June 6, 1998, at D1, available in 1998 WL 13049707 ("The Alaska Supreme Court has declined to review a judge's decision in an ongoing case challenging the state ban on same-sex marriage. Theoretically, that clears the way for a superior court trial on the challenge, but voters may decide the matter before the courts can.").
52. As passed by the Legislature, the Marriage Amendment read as follows: "To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex." S.J.R. 42, 20 Leg. (Alaska 1998).
53. Conscious that the proposed Marriage Amendment is likely to pass, its opponents filed suit before November 3rd, arguing, among other claims, that under Romer v. Evans, 517 U.S. 620 (1996), the Amendment was patently unconstitutional and the people of Alaska should not even be allowed to vote on it. The Alaska Legislature responded with a suit of its own. See Bess v. Ulmer, No. 3AN-98-07776 CI; Dodd v. Ulmer, No. 3AN-98-7972 CI; Alaska Legislature v. Ulmer, No. 3AN-98-08114 CI. The three cases were consolidated and heard by Superior Court Judge Sen Tan on August 30, 1998. At that time, Judge Tan ruled orally from the bench that the Amendment should stay on the ballot and that the Romer claims were not ripe; his final judgement was entered on September 8, 1998. The Bess and Dodd plaintiffs filed an emergency appeal with the Alaska Supreme Court, and oral argument was held on September 18, 1998. On September 22, the Court allowed the Marriage Amendment to go forward, but removed the second sentence. It made no reference to Romer. See Bess, Dodd, and Legislature v. Ulmer, Nos. S-08811, S-08812, S-08821, Preliminary Opinion and Order, slip. op. at 5-7 (Haw. Sept. 22, 1998). Alaskans for Civil Rights, opposing the Amendment, could not be reached for comment. See Cheryl Wetzstein, Alaskans to Vote on Marriage Terms; Join Hawaiians in Determining Gays’ Rights to Nuptials, WASH. TIMES, Sept. 24, 1998, at A6. The Alaska Family Coalition, supporting the Amendment, declared victory: "The court's decision protects the right of Alaskans to determine the future of our society. Now we can get on to the important business of conducting a public debate on this issue that is spirited, but also civil." The Coalition was also critical of the Court for taking upon itself the right to edit the text. See Supreme Court Rejects Legal Challenges to Ballot Measure 2, Shortened Version of Marriage Amendment Cleared for Nov. 3 Ballot, Press Release of Alaska Family Coalition (Sept. 22, 1998).
To be valid or recognized in this State, a marriage may exist only between one man and one woman. 54

B. CONTENT

But what do these statutes actually say? Although all of the marriage recognition statutes, to a greater or lesser degree, share a number of general features, some of the statutes also use very specific language.

First, all thirty statutes clearly state that only marriages between a man and a woman may be validly performed in-state. Eight states use the language of "only a man and a woman," without any reference to same-sex couples. 55 Ten solely prohibit marriage between "persons of the same sex." 56 Twelve States do both. 57

Second, almost all of the statutes address the question of out-of-state recognition. South Dakota has the only statute that does not specifically refer to the out-of-state recognition question; rather, it speaks in general terms of marriage requiring a man and a woman. 58 The Hawaii statute speaks to the recognition question, but only in positive terms. 59 Missouri and North Dakota use the "only a man and a woman" phrase, without explicit reference to same-sex couples. 60 North Dakota's language, interestingly, applies only to residents of the State who leave the State in order to marry elsewhere and then return. 61 Four other States also have specific marriage evasion provi-

sions, but unlike North Dakota, they specifically refer to out-of-state recognition for both citizens and non-citizens.62

Twenty-six of the thirty statutes include explicit language that foreign marriages between persons of the same sex will not be recognized.63 Many of the statutes, such as Utah, are folded into more general provisions that list, or cross-reference a list, void and prohibited marriages.64 Others, such as Alaska, have specific new sections refusing to recognize “same-sex marriage.”65

Third, some statutes also refuse to recognize any of the incidents of marriage. This includes at least seven statutes from Alaska, Arkansas, Florida, Georgia, Kentucky, Minnesota and Virginia.66 The Minnesota statute is illustrative: after refusing recognition in general terms, it adds, “and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”67

Fourth, fifteen of the thirty statutes specifically invoke the magic words “public policy,” in addition to the provisions I have already mentioned.68

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65. ALASKA STAT. § 25.05.013 (Michie 1996).

66. Id.; ARK. CODE ANN. § 9-11-208(c) (Michie 1998); H.B. 147 (Fla. 1997); GA. CODE ANN. § 19-3-3.1(b) (West Supp. 1998); H.B. 13 (Ky. 1998); MINN. STAT. ANN. § 517.03(b) (West Supp. 1998); MONT. CODE. ANN. § 40-1-401(1)(d) & (4) (1997); S.B. 2053 (Miss.; 1997); Acts 354 (Va. 1997).

67. MINN. STAT. ANN. § 517.03(b) (West Supp. 1998).

Fifth, six of the statutes include specific policy statements. Only one, that of Alabama, refers to marriage as "a sacred covenant." The others, in Hawaii, Maine, Michigan, Tennessee and Washington State, speak generally about the uniqueness of marriage as a male-female community and its importance to the well-being of society as a whole, especially for our children.

Before moving on, there are some other interesting items to be observed in some of the statutes. Alaska, Hawaii and Oklahoma have retroactivity clauses. Several states have severability clauses. Kentucky's statute also prohibits polygamy. North Dakota made the effective date of its act the date when and if another State legalizes "same-sex marriages." Other statutes bear the mark of negotiation. Hawaii specifically states that nothing in its act prohibits the private celebration of same-sex commitment ceremonies. Arkansas states that nothing in its text shall prohibit any employer from offering domestic partnership benefits. And Iowa's, one of the most recent and hard-fought statutes, specifically directs the legislative council to also set up a domestic partnership task force, list its topics, and require the group to report back to the legislature by January 1, 1999. Last, but not least, recall that to pass the Marriage Amendment in Hawaii, the Hawaii legislature also adopted "reciprocal beneficiaries" legislation. Other States may yet pass statutes which include similar provisions.

III. CONTRASTING INTERPRETATIONS

Given these kinds of texts, one can imagine that many marriage statutes have been subject to contrasting interpretations as to their purpose and effect. There is even disagreement about what to call

71. I will return to these statements below, in discussing the question of purpose.
72. ALASKA STAT. § 25.05.013(3) (Michie 1996); HAW. REV. STAT. § 572-3-8 (1996); OKLA. STAT. tit. 43, § 3.1 (Supp. 1998) (discussing the retroactive application of the state's marriage statutes).
73. H.B. 1004(4) (Ark. 1997); S.B. 5(4) (Ark. 1997); Act 327 § 3 (S.C. 1996) (referring to the state same-sex marriage statutes which specifically contain severability clauses allowing the statute to be given effect despite the possibility of an invalid provision or application of the statute).
74. H.B. 13 (Ky. 1998).
75. S.B. 2230, 55th Leg. (N.D. 1997).
76. H.B. 2312 § 1 (Haw. 1994).
77. S.B. 5(2) (Ark. 1997).
them. Some call them “anti-recognition statutes” or “anti-gay initiatives” or “anti-marriage laws.”80 Others, including ourselves, simply call them “marriage recognition statutes.”81

One of the more thoughtful treatments of these statutes, although written when there were fifteen rather than thirty of them, is by Professor Barbara Cox from the California Western School of Law. In her article, which appeared in late 1996, Professor Cox surveys some of the statutes I have described, and comes to some broad conclusions about what they “really” mean.82

First, Professor Cox claims that because these statutes are specifically about “same-sex marriage,” they are targeted against gays and lesbians. As evidence of this bias, she points especially to the provisions refusing any form of recognition, even of incident-type contractual claims.83 Professor Cox then invokes Romer v. Evans and claims that all of these statutes are clearly unconstitutional, because their purpose is to discriminate against same-sex couples and their class is narrowly targeted.84 Finally, to this she adds the larger assumption that current marriage laws are heterosexist, so the only “reason” to support them is homophobia.85

There is not much room for dialogue when the issue is presented in this manner, but Professor Cox’s arguments do deserve attention. To the argument that these statutes “target” gays and lesbians, it can be responded that litigators advancing claims by gays and lesbians have targeted this issue on a nationwide basis. This is not a conspiracy theory; it is a statement of fact.86 Most legislatures have been reluctant to take on this issue. Once convinced they have no choice, however, legislators have addressed the definitional question with a

81. Rebecca S. Paige, Wagging the Dog — If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices, 47 AM. U. L. REV. 165 (1997); see Coolidge, 38 S. TEX. L. REV at 5-5, 90-94.
82. Cox, 2 NAT'L. J. SEXUAL ORIENTATION L. at 194.
83. Id. at 196.
85. Cox, NAT'L J. SEXUAL ORIENTATION L. at 201.
definitional answer: marriage is a male-female community; marriage is not anything else.

Similarly, the specific provisions in some of these statutes that prohibit any recognition of "same-sex marriage" are premised on the assumption that a union between persons of the same sex is simply not a marriage. This is why same sex unions are treated differently from recognition questions related to common-law marriage, degrees of consanguinity, and polygamy. The refusal of some States to even honor incidents of "same-sex marriage" can also be attributed to their desire to avoid the redefinition of marriage through the back door of litigation. In short, these statutes can be understood not as offensive measures by the legislature, but as primarily defensive measures.\(^8\) They may in fact represent an attempt by citizens and their elected representatives to actually participate in the great debate about marriage, rather than to have it decided for them somewhere else, by someone else. Whatever one thinks of these statutes, they, and their proposed constitutional amendment counterparts, have invigorated public debate. We consider that a plus.

IV. CONTRASTING EVALUATIONS

Different interpretations of these statutes consequently create differing evaluations. First, they produce different opinions about constitutionality. Second, these opinions reflect deeper differences about sexuality and marriage.

A. DIFFERENCES ABOUT CONSTITUTIONALITY

Many obvious lines of constitutional argument will be related to the issue of "same-sex marriage." Besides Full Faith and Credit, a variety of less-prominent constitutional theories are sure to come into play. For example: the various rights to travel, to political participation, or to a republican form of government. None of these theories are making big waves in the courts right now, but all are receiving increasing attention in the law review literature\(^9\) and among litigators looking for theories.\(^8\) There is sure to be an Establishment Clause


\(^9\) For citations to some of this rapidly growing literature, see Wardle, 32 Creigh-ton L. Rev. at 187 (listing numerous law review articles from January 1993 to June 1998 in Appendix I).

\(^8\) Lambda Legal Defense and Educational Fund, <www.lambdalegal.org>. In the words of the Lambda Legal Defense and Educational Fund:

Hearkening back to the not-so-long-ago ugly days of past discrimination against those who chose to marry the "wrong" kind of person (such as interra-
claim as well, however specious, despite the fact that only one of the thirty statutes uses language that could be considered religious.90

This leaves us with the two primary arguments one would expect: privacy (via Substantive Due Process) and equality (via Equal Protection). Among the professoriate, attempts continue to interpret the Due Process Clause in a manner that would confer a fundamental right to marry upon same-sex couples. Judges, however, have been less impressed by these arguments; indeed, almost all decisions have gone in the opposite direction. The lone exception, Judge Michalski's decision in Brause, may be overruled on November 3, 1998, by the people of Alaska. Recall also, that in Hawaii, both the plurality and the dissent rejected the privacy and due process claims advanced by the plaintiffs.91 In addition, the privacy claim was briefly energized by Judge Michalski's decision in Brause; however, the voters of Alaska may be about to overrule him. In addition, the attempt to establish a “fundamental right to intimate and expressive association,” as it is sometimes put, appears stalled for now.92


91. Baehr, 852 P.2d at 55-57 (discussing the plurality's position and conclusion); id. at 70 (Heen, J., dissenting). Without addressing the Due Process question explicitly, Judge Burns concurred “in the result.” Id. at 68-70 (Burns, J., concurring). As for other state supreme courts, especially in States with constitutional privacy clauses or privacy-supportive case law, the prospects of “innovation” are hard to estimate.

At the United States Supreme Court level, Washington v. Glucksberg suggests that we should not expect dramatic expansions of fundamental rights. If the Supreme Court relies upon decisions such as Glucksberg, it is unlikely to break new ground on a deeply controversial issue such as “same-sex marriage” by means of an open-ended reading of the Due Process Clause. As Professor Michael McConnell has recently written with reference to Glucksberg:

The Court announced a constitutional jurisprudence of unenumerated rights under the Due Process Clause based not on the normative judgments of courts, but on constitutional text supplemented by the tradition and experience of the nation. Roe v. Wade was not reversed on its facts; the abortion right itself remains secure. But the constitutional methodology under which Roe was decided has been repudiated. The era of judicial supremacy epitomized by Roe is over.

This seems especially likely where invalidating these statutes would virtually invalidate the existing marriage laws of all fifty States unless they agree to recognize “same-sex marriage.”

If anything, courts may uphold these statutes — and their constitutional cousins — as legitimate exercises of self-government, and, while doing so, reaffirm the traditional definition of marriage. There is, after all, a deep and lasting constitutional tradition that affirms the right to marry. Indeed, the swift movement of many states to reaffirm their basic definitions of marriage suggests not the notion of a developing tradition of a fundamental right to “same-sex marriage,” but quite the opposite: the achievement of a clear legal-political reaffirmation that marriage is a unique male-female community and so-

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cial institution.97 This would be bad news for litigators and academics whose deepest yearning is to judicially redefine marriage based on Loving v. Virginia,98 Zablocki v. Redhail,99 and Turner v. Safley.100 On the other hand, equality claims seem to have stronger currency. While “sexual orientation” has so far failed to take root as a suspect classification,101 claims based on “sex discrimination” have found a voice in the Hawaii Supreme Court.102 Furthermore, the United States Supreme Court decision in United States v. Virginia103 makes it clear that some laws, at least, can expect to receive “skeptical

97. In this respect, the reports of the death of Bowers v. Hardwick, 478 U.S. 186 (1986), may be greatly exaggerated. On this, see Professor Duncan’s contribution to this symposium, Duncan, 32 CREIGHTON L. REV. at 241.
98. 388 U.S. 1 (1967).
100. 482 U.S. 78 (1987). See, e.g., MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 49-74 (1997); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 123-52 (1996). Both Strasser and Eskridge are sharply critical of the Hawaii Supreme Court’s due process holding on more general “constitutional” grounds. In Strasser’s words, “[t]he Baehr plurality offered an interpretation of the relevant precedents that both ignores the case law and defies common sense.” STRASSER, supra note 98, at 52. Strasser criticizes the court for characterizing the right to same-sex marriage as a new right, rather than as an extension of an already-guaranteed right, and argues for a broad reading of Due Process based on Casey. Id. at 51-52, 64, 67-70. Strasser’s reading of Casey antedates the narrower reading of Due Process offered in the United States Supreme Court’s analyses in Glucksberg. Eskridge focuses his critique on what he considers the Court’s mistaken reading of Zablocki v. Rednail, 434 U.S. 374 (1978), and slams the Court for ignoring Turner v. Safley, 482 U.S. 78 (1987). Claiming that marriage is “a prepolitical form of interpersonal liberty,” Eskridge attempts to use Zablocki to claim that there are only two legitimate elements of a due process test: (1) “Is there a ‘direct legal obstacle in the path of persons desiring to get married?’,” and (2) “if so, is that restriction ‘supported by sufficiently important state interests and ... closely tailored to effectuate only those interests?’” ESKRIDGE, supra note 98, at 131-32. “The real problem with the Hawaii decision,” he continues, “is its addition of an unauthorized third step: Is the couple one that has traditionally been allowed to marry?” Id. at 131-32. According to this version of due process analysis, “the plaintiffs need not show their historical pedigree; all they have to show is their exclusion from a state-created fundamental right.” Id. at 134. Evidently, Eskridge believes the Court should have this power because “[m]arriage is an important social and legal construction, and it is what we make it to be.” Id. at 160.
102. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). As discussed above, this decision may shortly be overturned by the people of Hawaii.
scrutiny,"¹⁰⁴ and no doubt claims will be made that marriage and marriage recognition laws are “sex-based classifications.”

Perhaps most importantly, general equality claims have been strongly energized by the United States Supreme Court decision in Romer v. Evans.¹⁰⁵ There is much that could be said about Romer, and the law review literature is already exploding.¹⁰⁶ For purposes of this essay, we would make only three brief points.

First, to the extent that Romer can be said to offer a “method” that can be applied to other cases, that method involves three findings which generate an inference: (1) that a law narrowly targets a group, (2) that the law is so broadly sweeping as to render that group “strangers to the laws,” and (3) that the justifications offered for the “targeting” cannot be taken seriously, therefore generating the inference (4) that the law is based on nothing more than irrational “animus” toward that group. Note that the three findings are matters of law, rather than of fact. Note also that the conclusion that unconstitutional “animus” is at work is an inference from those findings, rather than an empirical assertion about who said the nastiest thing on which side


during the public debate preceding the passage of the law.\textsuperscript{107} The net yield of this "method" is the conclusion that a law is blatantly irrational. This does not depend upon the identity of the group.

Second, in order to hold that one of these marriage recognition statutes (or analogous State constitutional amendments) is unconstitutional "based on \textit{Romer}," a court will therefore be required to conclude that any State law which defines marriage to require a man and a woman (1) narrowly targets homosexuals, (2) sweeps so broadly as to render these individuals "strangers to the law," and (3) cannot be justified on any rational grounds, thus (4) generating the inference that there can be no purpose but "animus" at work, so that the laws are irrational and unconstitutional.

Third, to reach these conclusions, judges will have to engage in some fairly "bold" reasoning, even by current standards. They will have to conclude that (1) a statute that marriage requires a man and a woman has a "homophobic" purpose, (2) by limiting marriage according to this definition, government disables homosexuals in such a sweeping manner as to make them "strangers to the law," and (3) that none of the rationales offered in support of marriage have any reasonable connection to this definition, thus (4) generating the inference that a law that views marriage as a unique male-female sexual community is blatantly irrational, based only on bigoted "animus."\textsuperscript{108}

In short, to hold a marriage recognition statute unconstitutional "based on \textit{Romer}," a court will have to hold — however cleverly it

\textsuperscript{107} Indeed, even Professor Koppelman has acknowledged that the empirical evidence of "animus" surrounding Amendment 2 is "sparse." Andrew Koppelman, \textit{Romer v. Evans} and Invidious Intent, 6 WM. & MARY BILL RTS. J. 89, 135 (1997) ("The evidence of actual discriminatory animus is sparse. The offending, overbroad language of the Amendment did not even appear on the ballot, which contained only a summary of the law. Survey data does not turn up convincing evidence of impermissible animus in the Colorado electorate.") Koppelman, however, considers this lack of evidence "irrelevant," because he believes that courts should look to what he calls "objective, rather than subjective, purpose." \textit{Id.} For an attempt to place Amendment 2 in context by one who teaches law in Colorado, which comes to quite different conclusions than Koppelman, see Nagel, 6 WM. & MARY BILL RTS. J. at 167. In the end, it would appear that rather than being guided by any concrete analysis of the situation in Colorado, the Romer majority was persuaded by the more general "victim story" offered by the opponents of Amendment 2. See Richard F. Duncan, \textit{Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans}, 72 NOTRE DAME L. REV. 345, 366 (1997) (arguing that Justice Kennedy's "narrative blinded him to the social reality of Amendment 2, a reality that is much more complex and nuanced than the black and white dogmatism of Kennedy's insider narrative").

\textsuperscript{108} Duncan, for instance, offers the following list of legitimate governmental interests that would justify a law that marriage requires a man and a woman: (1) public morality; (2) encouraging childbirth within marriage; (3) the advantages of dual-gender parenting; (4) educative effects; and (5) avoiding the slippery slope. Richard F. Duncan, \textit{The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman}, 6 WM. & MARY BILL RTS. J. 147, 158-65 (1997).
packages it — that two-thirds of the American people and their representatives are Jim Crow racists in need of another Brown v. Board of Education. \textsuperscript{109} To accomplish this, these judges will have to substitute, for the view held by these people, their own (different) views of marriage, based on some mixture of individual autonomy or interpersonal intimacy. These judges may try to do this \textit{indirectly}, by stating, for instance, that “the law must be neutral between competing views of marriage,” thus enshrining their view in disguise. Or they may impose their views \textit{directly}, by openly stating that all adult consensual sexual relationships are of equal moral and legal value, and that any law assuming otherwise is immoral and illegal. A holding of this kind would be astonishing, but with some of today’s judges, anything is possible.\textsuperscript{110}

From our perspective, “animus” is very much in the eye of the beholder. It is not really obvious to us that “animus” is behind a state statute, such as Michigan’s, which says the following:

Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children.\textsuperscript{111}

Lawyers definitely have a long way to go to convince most judges that this is nothing but bigotry.

B. DIFFERENCES ABOUT SEXUALITY AND MARRIAGE

As one can see from this brief look at these marriage recognition statutes and their possible interpretations, each level of analysis leads into deeper questions about the meaning of marriage and its relationship to democracy, individual rights, and constitutional law. On these

\textsuperscript{109} 347 U.S. 483 (1954).

\textsuperscript{110} See generally Sunstein, 110 Harv. L. Rev. at 9 (stating that the decision in Romer “combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of the law’s expressive function”); Koppelman, 6 Wm. & Mary Bill Rts. J. at 89 (referring to Romer as a “hard case because the Court is presented with an unsolvable tangle of permissible and impermissible motives”); Nagel, 6 Wm. & Mary Bill Rts. J. at 167 (criticizing the Court in Romer for closing its eyes to the concerns of its citizens and arriving at a “harsh and sparse conclusion”); Coles, 48 Hastings L.J. at 1343 (referring to the decision in Romer as “neither useless, nor the start of very aggressive Supreme Court review of classifications which discriminate against lesbians and gay men”); Duncan, 6 Wm. & Mary Bill Rts. J. at 148 (stating that the Romer decision is narrow and shallow but is notable “for what it did not do [more so than] for what it did do”); Duncan, 12 BYU J. Pub. L. at 239.

\textsuperscript{111} S.B. 937 (Mich. 1995).
questions, both sides increasingly see that neutrality is impossible and that normative answers are inescapable.\textsuperscript{112}

For some, \textit{sexuality} is the starting point. Sexuality is essentially for pleasure and intimacy. Marriage is a state mechanism to encourage committed and stable relationships for those who might wish them. For persons who subscribe to this theory, the marriage recognition statutes we have been discussing are matters of simple \textit{discrimination}.\textsuperscript{113}

For others, \textit{marriage} is the starting point. We exist as male \textit{or} female, intended for community with one another. Marriage is primarily a shared, socially beneficial way of life as male \textit{and} female. Other forms of sexuality are understood in relationship to marriage, and marriage has something to do with the connection between the generations. For those with this point of view, the marriage recognition statutes are just a matter of simple \textit{definition}.\textsuperscript{114}

These are not new views. They are both deeply influential views, and by now, both of them are “traditions,” even if one calls itself “traditional,” and the other calls itself “nontraditional.”\textsuperscript{115} In our culture, our politics, and our legal struggles, the contest between them will continue.

V. THE ROLE OF MARRIAGE RECOGNITION STATUTES IN THE DEBATE ABOUT MARRIAGE

In the meantime, however, one must come to grips with the nature of this contestation, and it is precisely at this point that the divergence between the views becomes greatest. For some, the opposition to “same-sex marriage” is a reassertion of mob rule. To others, it is a quintessential example of self-government.


\textsuperscript{115} One of the great merits of John Witte’s recent work is to make it clear that the purely contractual view of marriage is itself a philosophical and theological tradition with longstanding roots. \textit{See} John Witte, \textit{From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition} (1997).
A. "POLITICAL RIOT?"

Tom Stoddard, the brilliant young litigator whose life was tragically cut short, had a suggestive phrase for these marriage recognition statutes. He called them a "political riot" against "same-sex marriage." 116

In a similar vein, Professor Cox argues in her article that these State statutes are the "new anti-gay agenda" of the "Religious Right." Having lost the effort to repeal anti-discrimination ordinances because of Romer, she claims, the Religious Right has turned to the next most convenient form of anti-gay legislation. 117

Professor Cox's argument makes several clear but questionable assumptions. First, it assumes that only the "Religious Right," meaning Pat Robertson perhaps, has been concerned about or involved in this issue. This, however, is false. For one thing, the Roman Catholic Church has been a prominent player in the debate over marriage, and few would describe (or accuse) Catholicism as part of the "Religious Right." 118 It is comparable to saying that only radical gay and lesbian activists support "same-sex marriage," when we know that other progressive political and religious groups also support it. 119

From the beginning of the debate in 1993, many religious communities and citizens groups have been involved in this debate. In Hawaii, three former Governors and a former Justice of the Hawaii Supreme Court have publicly condemned the Baehr decision and affirmed the people's right to resolve the question of marriage. 120

118. For examples of the Roman Catholic Church's statements in the debate in Hawaii, see The Diocese of Honolulu, In Defense of Marriage, <www.pono.net>.
119. See Lambda Legal Defense and Educational Fund, <www.lambdalegal.org> (listing a number of signatories to the Marriage Resolution proposed by the Marriage Project). Many "progressive" groups have signed on. Id.
120. Support included public statements by three former Governors (Waihee, Ariyoshi, and Quinn) (on file with author) and a statement by Frank D. Padgett, recently retired Justice of the Hawaii Supreme Court. Bishop, Ex-Supreme Court Judge Seek Vote on Same-Sex Union Ban, ADVERTISER, Mar. 30, 1997, at A5. In addition, a group of mainland legal scholars issued a statement in support of the constitutionality of the 1996 version of the proposed Marriage Amendment. The Professors argued that H.B. No. 2366 was constitutional, because under Crawford v. Los Angeles Board of Education, a state may amend its Constitution to bring it into line with the terms of the United States Constitution. Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535 (1982), See Statement of Eleven Law Professors on the Constitutionality of Adopting H.B. No. 2366 (April 25, 1996) (on file with author). These eleven law professors include: Eric G. Anderson, University of Iowa College of Law; Margaret Brinig, George Mason University School of Law; Richard F. Duncan, University of Nebraska College of Law; Douglas W. Kmiec, Notre Dame Law School; Donald P. Kommers, Notre Dame Law School; Raymond B. Marcin, The Catholic University of America, Columbus School of Law; Michael W. McConnell, University of Chicago Law School; Daniel D. Polsby,
Second, Professor Cox's argument assumes that the movement to pass these State statutes only took shape after *Romer* was decided. This is also false. Virtually all the players now involved have been active since 1993, and all were active before *Romer* was decided.¹²¹

Once we strip away these misconceptions, what is left of Professor Cox's argument? It appears to be based on the straightforward but eminently debatable sequence of claims that: (1) anyone who opposes "same-sex marriage" is homophobic and anti-gay; (2) thus, these homophobes are connected, she claims, with some extreme faction in American politics; and (3) thus, their actions are inexorably tainted with "animus." Ironically, it is a kind of conspiracy theory in reverse.

B. "Popular Reaffirmation?"

Instead, it might be argued that we are witnessing a widespread, nationwide reaffirmation of marriage as the union of one man and one woman. Thirty statutes and perhaps two state constitutional amendments in four years are nothing to sneeze at, and some of the remaining twenty states already have strong statutes and case law of their own. To be sure, since *Romer* was decided, every legislative committee that has considered a marriage recognition statute has probably been told, by opponents of the legislation, that the law will eventually be held unconstitutional under *Romer*. But it is hard to imagine the United States Supreme Court striking down many (if any) of these statutes, not to mention the existing marriage laws of all fifty states. These uses of *Romer* are merely transparent political attempts to persuade legislators not to act and to leave this question to the courts. And so the litigators and lobbyists make their power plays, the State officials make theirs, and we will see how it all shakes out in the end.

Meanwhile, despite the rhetoric of Armageddon that sometimes infects both sides, there are many practical legal options for Americans who wish to simultaneously reaffirm marriage and tolerate citizens living in nonmarital sexual relationships without endorsing their actions. Can one have a State legal regime which simultaneously affirms marriage, is silent on same-sex couples, forbids discrimination on the basis of sexual orientation, and maintains a sodomy law? Minnesota thinks so.¹²² Or, in contrast, can one decriminalize sodomy,

¹²¹ The groups in Hawaii, for instance, have been active since before *Romer* was decided. The efforts to pass State statutes and the Defense of Marriage Act have involved groups and organizations that preceded *Romer* by many years (or centuries).

reject antidiscrimination laws, and explicitly prohibit "same-sex marriage?" Maine thinks so; so does Pennsylvania. It is nothing but judicial, academic or litigative hubris that would steal this issue from the people and their elected representatives, and consign it exclusively to the domain of courtrooms, law classrooms, and litigators.

VI. CONCLUSION

As this essay heads to the publisher, the people and courts of Hawaii, Alaska and Vermont are about to make dramatic decisions that will shape the future of this debate. By the holidays, "same-sex marriage" could be legal in at least one State, and within months, lawsuits may be underway throughout the country challenging every one of these state marriage recognition statutes, as well as the federal Defense of Marriage Act. If so, pressure will increase on the remaining States to pass similar statutes, and fierce legislative battles will ensue.

On the other hand, Hawaii, Alaska and Vermont, each in their own way, may join in the popular reaffirmation of marriage represented by these thirty statutes. After various challenges, these reaffirmations may survive. In short, court-mandated "same-sex marriage" may be on the way in or on the way out. We have no crystal ball.

We do believe, however, that whatever happens, we should strive to understand one another as best we can, treat one another with respect (especially when we disagree), and give everyone a role in deciding a question of such fundamental importance to everyone's lives. We are clearly partisans of the view that marriage is a unique community that requires a man and a woman. We are also partisans of the view that if others disagree, they have as much of a right to participate in the political process as we do, and that all of us have a duty to

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124. Both Hawaii and Alaska vote on the proposed State constitutional arguments on November 3, 1998. In November, oral argument is also expected in Baker v. Vermont. As in Hawaii, the case in Vermont involves a challenge to Vermont's marriage law based on its State constitution. For contrasting overviews of the situation, see Peter Freiberg, Mormons Pour Funds into Alaska, WASHINGTON BLADE, Oct. 9, 1998, at 1, 26; Russell Shaw, Voters Asked to Decide if Gay "Marriage" is OK, OUR SUNDAY VISITOR, Sept. 27, 1998, at 3.
be good winners or losers. Marriage is a question for ordinary people to decide, whether they agree with us or not.

Put another way, the marriage debate is not a Manichean struggle between the judicial forces of light and the popular forces of darkness, but a genuine political conflict between citizens with different views of marriage. One side views it as a question of definition, the other as a question of discrimination. Our views are so different, yet as citizens we must deliberate together. If we cannot agree, and we cannot compromise, then we must vote either to remove the issue from the domain of the law entirely, or we must vote for or against specific proposals on marriage. To deliberate, to decide, and to do so with dignity; it is so simple to advocate but so difficult to implement. But what alternative do we have, if we take our fellow citizens seriously?

The role of marriage recognition statutes in the “same-sex marriage” debate is critical precisely because it has been one of the only ways that ordinary citizens can participate in this drama. In the debates over these statutes, the typical assortment of judges, assistant attorneys general and public interest litigators has been supplemented with a spirited and noisy collection of evangelicals, gay and lesbian activists, priests and rabbis (on both sides), civic groups, and many others for whom the question of marriage is preeminently about how we live our lives together. The process of standing in line together, having to sit and listen to each other testify, demonstrating across the street from one another — even the spectacle of publicly weeping at the same time, for entirely opposite reasons — these are the marks of American deliberation. It is not a classroom seminar, or symbolic jousting in the courtroom. It is our democratic process.

As we have seen, in some states these marriage recognition statutes have passed, with or without compromise. In other states, statutes have continued to fail. The balance of forces in different places yields different outcomes. But this is the process: organization, persuasion, decision. If one stays out, one has no one to blame but oneself. If one gets involved and wins, one has a duty to be gracious in victory. If one loses, at least one was involved; so one can be gracious in defeat. Meanwhile, both sides always live to fight another day.

What a contrast this is to the following scenario: a lawsuit is filed and argued in court. Along its way, numerous subterranean pressures are applied by various elite actors. At the end, a final edict is issued by a high court, supposedly based on the “constitution.” Ordinary citizens have only two choices: resignation or revolt. Neither is good for American public life.125

125. In the words of Professor Stephen Carter of Yale, “[f]or every time that we say . . . that only our own vision of constitutional meaning has any reality, a reality that
Which forum is more fair? Which forum leaves the losers feeling that they were really involved? Which forum allows ordinary citizens to have a say in the most crucial questions of our common life? To us the answers are obvious. If all these questions are decided by judges, then judges have become, in the words of Professor Mary Ann Glendon of Harvard, "a counterforce, not to democracy's excesses, but to popular government itself."

We believe that the marriage recognition statutes, and their companion constitutional amendments, are quintessential exercises of republican self-government. They reassert a popular role in the constitutional process, and they keep alive the hope that questions about marriage will finally be decided "of the people, by the people, and for the people." 126

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