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CONFLICTS AND THE SHIFTING LANDSCAPE AROUND SAME-SEX RELATIONSHIPS

HILLEL Y. LEVIN*

INTRODUCTION

Conflicts and choice of law questions arising from marriage recognition are more multidimensional today than ever before. Traditionally, these conflicts arose because one jurisdiction allowed marriage between two individuals while another prohibited such a marriage. This was the model in the consanguineous, polygamous, and interracial marriage contexts. It has also been the primary model for analyzing conflicts that arise in the context of same-sex relationships.

In a forthcoming article, *Resolving Interstate Conflicts Arising from Interstate Non-Marriage*,[1] I challenge this model, and suggest that the emergence of marriage-like[2] and marriage-lite[3] alternatives (i.e., civil unions, domestic partnerships, reciprocal benefits arrangements, etc.) for same-sex couples complicates and requires additional nuance in our conflicts analysis. The article also suggests that different jurisdictions with different recognition regimes for these kinds of non-marriage relationships ought to resolve such conflicts differently—even if they apply the very same conflicts methodology.

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1. Hillel Y. Levin, *Resolving Interstate Conflicts Arising from Interstate Non-Marriage*, 63 FLA. L. REV. 47 (2011) [hereinafter *Resolving Interstate Conflicts*]

2. As I use the term here and elsewhere, "marriage-like" relationships are those that the state grants all, or substantially all, of the rights and responsibilities traditionally associated with marriage to same-sex couples, but under a name other than marriage. In the United States, these marriage-like alternatives are typically called civil unions, though California's domestic partnership scheme also qualifies.

3. As I use the term here and elsewhere, "marriage-lite" relationships are those that the state grants only a subset (and usually a very small subset) of the rights and responsibilities traditionally associated with marriage to same-sex couples.

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This Essay intends to complement *Resolving Interstate Conflicts* in two ways. First, it further explores my claim that the introduction of marriage alternative schemes adds dimensions to the conflicts analysis. Second, much more broadly, and likely more controversially, it considers whether same-sex marriage advocates should pursue conflicts-based arguments as a basis for expanding marriage recognition in states that do not currently recognize same-sex marriage. I believe the answer may be no—despite, and in part, *because of*, my unhesitating support for same-sex marriage. In other words, I suggest that advocates for same-sex marriage should forgo some arguments that, if successful, could help them expand recognition of same-sex marriage.

I. A NEW CONFLICTS-BASED ARGUMENT FOR SAME-SEX MARRIAGE

Until recently, lawsuits advocating recognition of same-sex marriage were brought only in states that offered little or no recognition of same-sex couples—states like Hawaii, Vermont, New York, and Massachusetts. Lately, however, lawsuits demanding recognition of same-sex marriage have been brought in states that offer marriage-like alternatives such as civil unions and domestic partnerships. Although this difference seems slight, and in most ways *is* slight, it has important implications once we take conflicts into account.

These implications can be seen by examining two of the most recent cases seeking recognition of same-sex marriage in state courts. In 2007, the supreme courts of California and Connecticut were confronted with lawsuits seeking recognition of same-sex marriage.[4] At first glance, these cases appeared no different from earlier cases demanding recognition of same-sex marriage in states like Massachusetts and Vermont. And, indeed, the substantive arguments in the California and Connecticut cases were very much the same as those in the earlier cases—arguing for same-sex marriage on the basis of equality, due process, and/or fundamental rights. But, there was an

4. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48, 63-64 (Cal. 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

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important difference in the context: the legislatures in California and Connecticut—unlike those in states where marriage restrictions were challenged in earlier cases—adopted, by this time, marriage-like alternatives for same-sex couples. Specifically, California adopted domestic partnerships[5] and Connecticut adopted civil unions.[6] Thus, the issue before the courts in these states was whether these marriage-like alternatives were sufficient under the state constitutions.

In each case, a key question for the courts was whether the marriage-like alternatives were substantively equal to marriage under the law—that is, whether they carried all of the benefits of marriage, or whether there were meaningful differences beyond the normative ones resulting from the withholding of the title of marriage.[7] The lower courts in both states concluded that the marriage-like alternatives were identical to marriage in all ways except for name, and so they were equal enough, so to speak, under the law.[8] As a superior court judge opined, "civil union and marriage in Connecticut now share the same benefits, protections and responsibilities under law."[9]

Fundamentally, the claim that marriage-like and marriage relationships carry the same legal benefits is a factual one, of course. On review, the California Supreme Court considered this factual question to be so important that it requested further briefing from the parties on whether there were "differences in legal rights or benefits and legal obligations or duties . . . under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses."[10]

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5. CAL. FAM. CODE §§ 297-297.5 (West 2004 & Supp. 2010).

6. CONN. GEN. STAT. ANN. § 46b-38aa (West 2009) (repealed 2009).

7. *In re* Marriage Cases, 183 P.3d at 398-99; *Kerrigan*, 957 A.2d at 411-15.

8. *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 699-726 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 *as recognized in* Strauss v. Horton, 207 P.3d 48, 63-64 (Cal. 2009); Kerrigan v. State, 909 A.2d 89, 102 (Conn. Super. Ct. 2006), *rev'd*, 957 A.2d 407 (Conn. 2008).

9. *Kerrigan*, 909 A.2d at 102.

10. News Release, Judicial Council of California, Summary of Cases Accepted During the Week of June 18, 2007 (June 25, 2007) (on file with author), *available at* http://www.courtinfo.ca.gov/courts/supreme/summaries/WS061807.PDF.

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Further, this question consumed a good part of oral arguments in both the California and Connecticut cases. The reason for the California and Connecticut courts' keen interest in this question is probably that they were already prepared to hold, at least, that the states' constitutions required equality of treatment for same-sex couples. Indeed, it may well be that the courts were begging the petitioners to argue and demonstrate that their marriage-like alternatives were *not* functionally identical to marriage. Had the advocates succeeded in doing so, the courts may have grabbed the opportunity to declare that the state constitutions demanded full equality. After all, why pose the question of whether the marriage-like alternatives were practically equal to marriage if not to signal that inequalities would not be tolerated?

In each case, however, both sides essentially agreed on the substantive equivalence of marriage and the marriage-like alternatives. That is, even the attorneys for the petitioners seeking recognition of same-sex marriage conceded that marriage and marriage-like were functionally and legally equivalent, with only very slight and minor legal differences.[11] In neither case did the petitioners rest their arguments on, or even substantially pursue, the claim that the states' treatment of same-sex couples was substantively different from their treatment of opposite-sex couples.

However, each state's handling of the marriage/marriage-like conflict suggests that the advocates may have conceded too quickly. Indeed, there were meaningful differences between marriage and the marriage-like alternatives offered in those states. Specifically, under the prevailing law in both states, California and Connecticut refused to treat same-sex marriages performed in other states as having *any*

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11. *See* Brief of the Plaintiffs-Appellants with Separate Appendix at 10, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716) (conceding that the legislature "acknowledg[ed] that committed lesbian and gay couples are identically situated to and deserving of the same legal rights as married couples . . . ."); Oral Argument, *Strauss*, 207 P.3d 48 (No. S168047), *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm (follow "MP3 Audio of the March 5th oral argument" hyperlink) ("There are tangible rights and benefits at stake in today's debate, but you're right that more important, and what divides the parties is a symbol, and that symbol has deep meaning for people on both sides of the case . . . . More important[] than the tangible differences is the name 'marriage.' The name matters.").

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status under state law.[12] That is, same-sex couples were neither recognized as married under forum law nor as having entered into the local marriage-like alternative. This meant that same-sex couples lawfully married elsewhere (say, in Massachusetts), who subsequently moved to California or Connecticut were treated differently from similarly-situated opposite-sex couples. Indeed, opposite-sex couples who married in Massachusetts and relocated to California were, of course, treated as married; same-sex couples who did the same were nothing.

Consider the implications of this approach. A spouse in a same-sex relationship who married in Massachusetts and moved to California or Connecticut would have no hospital visitation, end-of-life decision-making, or inheritance rights. If the couple chose to dissolve the relationship, no court would have jurisdiction. And so forth. All of this *even though* California and Connecticut allowed and encouraged gay and lesbian couples to enter into marriage-like relationships in which these questions would seemingly be non-issues. This treatment of same-sex couples, in comparison to similarly-situated opposite-sex couples, is an obvious instance of true inequality between marriage and the marriage-like alternatives offered by these states. Rather than concede that marriage-like relationships were, at least from a legal perspective, identical to marriage relationships, advocates could have made something of this difference.

In other words, the existence of this new kind of conflict arising from the emergence of marriage alternatives and the way in which

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12. For Connecticut's decision, see Conn. Op. Att'y Gen. No. 2005-024 (2005), 2005 WL 2293060. For a discussion concerning California's approach, see Nancy L. Ober & Paul R. Lynd, *The Wedding Cake Falls: An Update on Same-Sex Marriage and Domestic Partner Issues After the San Francisco Marriage Decision*, ASAP (September 2004), http://www.littler.com (under "search," enter "wedding cake falls" and follow the hyperlink) ("Same-sex marriages from other jurisdictions . . . will not trigger any rights under California's domestic partnership law. Individuals in lawful marriages—even those not recognized in California—are excluded from California's domestic partnership law."). It is worth noting that the law in California subsequently changed, and California will now recognize foreign same-sex marriages as having the legal status of either marriage or domestic partnership, depending on when the marriage was performed. This change came about with the Marriage Recognition and Family Protection Act (now embodied in CAL. FAM. CODE § 308(a)-(c) (West 2004 & Supp. 2010)).

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these states resolved it—namely, by refusing to recognize married same-sex couples from other jurisdictions as having *any* status under forum law—offers an independent legal argument in favor of marriage equality. A court inclined towards requiring equal treatment of same-sex couples and opposite-sex couples might have leapt at the opportunity to strike down a marriage alternative in favor of marriage, given this unequal treatment.

Thus, the emergence of marriage alternatives for same-sex couples complicates and adds new dimensions to the battle over same-sex marriage—even beyond the conflicts context; and in this case, may provide a new equality-based argument for same-sex marriage in the context I have just described. That is, if a state adopts a marriage-like recognition scheme, but refuses to recognize same-sex couples married in another state for any purposes under forum law, then, purely as a factual matter, opposite-sex couples are treated differently than same-sex couples. A court inclined to demand full equality may see this inequality as a sufficient basis for requiring recognition of same-sex marriage.[13]

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13. It is interesting to consider why the advocates did not pursue this argument. With respect to the Connecticut case, according to the incomparable Mary Bonauto (who would know better than anyone, having carried much of the load in the case), marriage advocates were well aware of the Connecticut Attorney General's opinion that foreign same-sex marriages would be accorded no status under Connecticut law; but, nevertheless, the advocates declined to pursue this as a basis for demanding equality. According to Bonauto, the advocates for same-sex marriage understood the attorney general's opinion to be simply mistaken as a matter of conflicts law (a position I agree with), and thus nothing more than an opinion that would fall if ever tested in court. Thus, it was not worth pursuing in the marriage equality case. Where Bonauto and I diverge, however, is with respect to the significance of the attorney general's opinion—even if it was wrong as a matter of law and likely to be rejected by courts. In my view, this opinion was effectively the law of the state until it fell in court. State agencies were likely to follow it—indeed, state agencies requested that the attorney general file an opinion—and some same-sex couples may have borne its brunt. That such couples may have ultimately succeeded in having their foreign same-sex marriages recognized in Connecticut after drawn-out litigation is of little solace.

With respect to the California case, it is not altogether clear why the advocates did not pursue the argument that I have described. In California, the refusal to treat foreign same-sex marriages as having any status under local law was not due to a decision of the attorney general, but rather was apparently the creature of a statute. *See* CAL. FAM. CODE § 308.5 (West 2004 & Supp. 2010). Two

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II. WHY ADVOCATES SHOULD BE WARY OF USING CONFLICTS-BASED ARGUMENTS TO EXPAND MARRIAGE RECOGNITION

At this Symposium, some presenters have argued, as others have before, that marriage advocates may be able to expand marriage recognition by resorting to conflicts law. In particular, Sherman Rogers and Andrew Koppelman suggested that states might be required by the Full Faith and Credit Clause to recognize marriages from foreign states. In other words, they argue DOMA is unconstitutional in its entirety. Arguments along these lines have been

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possibilities come to mind. First, it is possible that advocates in California were simply unaware of the implications of California's scheme for foreign same-sex married couples. Although I hesitate to attribute this oversight to these able advocates, it does not seem all that farfetched to me. Conflict and choice of laws has always been a murky area of the law. Conflicts scholars are often perceived by the rest of the academy as wonkish, monkish, bookish sorts, consumed by their own private debates (often held in seemingly foreign languages). Second, although marriage advocates and legal scholars in this area have long taken conflicts seriously, the complications introduced by the advent of marriage-like and marriage-lite alternatives have been virtually off-the-radar. In researching for my own article on the subject, I found virtually nothing in the literature. Thus, advocates would be forgiven for not identifying and pursuing this argument.

But, there are alternative explanations. It could be that advocates for same-sex marriage were aware of this inequality and the argument it suggested, but feared that courts would have stopped short of requiring recognition of same-sex marriage on its account. Instead, courts might have simply required the states to treat same-sex couples married in Massachusetts as though they had entered into the local marriage-like alternative. This would have extended legally equivalent treatment to same-sex and opposite-sex couples, while continuing to withhold the term "marriage." Ultimately, of course, this is not what marriage advocates sought; they wanted full marriage equality, including the name. Thus, the petitioners may have downplayed the legal differences between marriage and the marriage-like alternatives as a gamble, hoping to push the courts to declare that even where marriage and the marriage-like alternatives are substantively identical, they still do not achieve full equality—a powerful precedent for future cases.

Relatedly, it is possible that the advocates wished to minimize the differences between marriage and the marriage-like alternative because they wished to make the point that if there really is *no* difference between a marriage and a domestic partnership or civil union, then there is no rational basis for giving them different names. If this was indeed their strategy, it proved successful: both courts ruled that the difference in name was unequal enough on its own to require the states to recognize marriage.

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kicking around for some time. I have little to say about the substantive merits of these arguments. Instead, I suggest that advocates should be exceedingly wary of pursuing them in court—even if they were convinced that these arguments would prevail.[14] Once again, I say this despite, and in part, *because of*, my support for same-sex marriage. What follows are three reasons to be wary, followed by a caveat that limits and clarifies my conclusion that conflicts law should not be the basis upon which same-sex marriage advocates litigate.

A. The Strategic Dangers of Pursuing Conflicts-Based Arguments

The first reason to be wary is simply a strategic one: even if a conflicts-based argument could win in court, winning such an argument could induce a backlash so extreme that it consumes any immediate victory achieved.

As we all know too well by now, convincing a court or even a legislature to require recognition of same-sex marriage does not guarantee that such a decision will stick. For instance, although the California Supreme Court required the state to recognize same-sex marriage, a ballot initiative overturned the court's ruling.[15] Similarly, in Maine, a ballot initiative overturned the legislature's passage of a law recognizing same-sex relationships.[16] Even more importantly, nearly every time a state court moves towards recognition of same-sex relationships, other states move to pass laws or amend their constitutions to prohibit any recognition of same-sex relationships.[17]

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14. I have my doubts as to whether such arguments could prevail. Speaking as a legal realist, a court disinclined to require marriage equality on the basis of equal protection, due process, or fundamental rights is not likely to be persuaded on full faith and credit or other conflicts grounds. Thus, it does not seem that such arguments add much value. Nevertheless, I concede that it is *possible* that a court could do so and, therefore, assume *arguendo* that someone might consider making this argument.

15. Proposition 8 overturned the California Supreme Court case. Subsequently, Proposition 8 was upheld in *Strauss v. Horton*, 207 P.3d 48, 119 (Cal. 2009).

16. Kevin Dwyer, *Maine Gay Marriage Law Repealed*, ABC NEWS (Nov. 4, 2009), http://abcnews.go.com/Politics/maine-gay-marriage-law-repealed/story?id=8992720.

17. *See, e.g.*, Jeffrey Rosen, *Immodest Proposal*, NEW REPUBLIC (December

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Sometimes, as in Michigan, these moves not only prevent forward momentum, they also roll back rights that same-sex couples had already secured in those states.[18] Most recently, and for these reasons, after high-powered attorneys Ted Olson and David Boies filed a lawsuit in federal court demanding recognition of same-sex marriage under the U.S. Constitution, some long-time advocates of same-sex marriage argued that this would do more harm than good.[19] Thus, same-sex marriage advocates can lose the war by winning the battle.

I suspect that an argument grounded in conflicts doctrine would be even more likely to spark staunch opposition than one grounded in equality, due process, or fundamental rights. It is one thing to identify a jurisdiction that is sympathetic to arguments for marriage equality; this stirs the pot, but the country obviously reconciled itself to the notion that some states will recognize same-sex marriage. It is another thing entirely, I think, to enter a hostile jurisdiction and demand marriage recognition on the grounds of full faith and credit. If a court in such a jurisdiction were to agree, there would likely be such an intense nationwide backlash that the marginal victory would at best be ephemeral.

Recall that in an earlier battle over the proposed Federal Marriage Amendment, which would have outlawed same-sex marriage throughout the country, several opponents of same-sex marriage declined to support the amendment on the grounds that it was unnecessary—because states *could* decline to recognize same-sex

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22, 2003, 12:00 AM), http://www.tnr.com/article/immodest-proposal (discussing the backlash from state court decisions requiring recognition of same-sex marriage).

18. *See* Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008). For more about this case, see Recent Case, *State Constitutional Law—Same-Sex Relations—Supreme Court of Michigan Holds that Public Employers May Not Provide Healthcare Benefits to Same-Sex Domestic Partners of Employees.*—National Pride at Work, Inc. v. Governor of Michigan, *748 N.W.2d 524 (Mich. 2008)*, 122 HARV. L. REV. 1263 (2009).

19. *See, e.g.*, William N. Eskridge Jr. & Darren Spedale, *Sit Down, Ted Olson and David Boies,* SLATE (May 29, 2009, 11:25 AM), http://www.slate.com/id/2219252. For background on the case, see, for example, Lisa Leff, *High-Stakes Gay Marriage Trial to Begin in Calif.*, ABC NEWS (Jan. 7, 2010), http://abcnews.go.com/US/wireStory?id=9504576 ("Gay marriage trial to begin in California, could set legal precedent for generations to come.").

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marriages from other states.[20] If a court held otherwise, the Federal Marriage Amendment could be on the table once again; and even if unlikely to be adopted (given the steady progress in public support for same-sex marriage), the debate itself could shape the political terrain in ways ultimately destructive to marriage equality. This view appears to be shared by the seasoned advocates who actually litigate these cases, as they seem to have made a conscious choice not to pursue conflicts-based arguments as a wedge for expanding same-sex marriage.

B. Conflicts is a Shield, and Not a Sword, for Advocates of Same-Sex Marriage

Assume for a moment that there would be no substantial backlash against a judicial opinion requiring recognition of same-sex marriage on conflicts grounds. In other words, assume that strategic considerations were swept aside. I still believe that marriage advocates ought to be very wary of pursuing conflicts-based arguments.

The battle for recognition of same-sex marriage has long been premised on a states' rights approach. Since *Baehr v. Lewin*,[21] marriage advocates have publicly argued that the people of, say, Georgia or Alabama need not worry if, say, Hawaii or Massachusetts adopts same-sex marriage. We have argued that this is a matter internal to the states.[22] Thus, to turn around and use conflicts as a wedge to achieve recognition in other states would be disingenuous. We ought to be wary of sacrificing our credibility and the principles we have articulated. We have used conflicts as a shield; to now use it as a sword would be a mistake.

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20. For example, John McCain opposed the Federal Marriage Amendment on federalism grounds, but indicated that his opinion could change if judges began to require states to recognize same-sex marriages performed in foreign states. *See McCain on Gay Marriage Amendment: Not Yet*, SWAMP (June 6, 2006, 4:11 PM), http://www.swamppolitics.com/news/politics/blog/2006/06/mccain_on_gay_marriage_amendme.html. For more about the Federal Marriage Amendment, see Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, CATO INSTITUTE (June 1, 2006), http://www.cato.org/pub_display.php?pub_id=6379.

21. 852 P.2d 44 (Haw. 1993).

22. *See, e.g.*, *supra* note 20 and accompanying text.

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I want to be clear that this objection is not legal in nature. Lawyers are permitted—and may even be required by their duty of zealous advocacy—to make mutually inconsistent arguments in different cases on behalf of different clients. Thus, arguing that states are protected from the marriage-based decisions of other states by conflicts doctrine does not preclude advocates from arguing that other states must recognize foreign same-sex marriages. Rather than a legal objection, my objection is based on a simple principle: we should not dupe people for the purpose of achieving the goal of same-sex marriage.

C. The Battle for Same-Sex Marriage Will be Achieved Through Persuasion Based on First Principles, Not Technicalities.

Finally, nationwide recognition of same-sex marriage will, should, and can only be achieved through public persuasion. Specifically, if marriage equality is to be achieved, it will be because people have become convinced that same-sex marriage is desirable for our country. I do not mean to suggest, as some have, that courts ought to stay out of the fight over same-sex marriage. Courts, countermajoritarian though they may be (at least in those states where there are no judicial elections), do have a role in the process of public persuasion. First, courts issue opinions that may, at least in an idealized sense, persuade. After all, courts give much more complete reasons for their decisions than legislatures ever do. Second, as more states adopt same-sex marriage, even if as a result of court rulings, people will likely see that the sky does not fall, children are not harmed, marriage continues to mean something, and families are strengthened.

But to the extent that courts do have a role, we would be better off if their opinions focused on core notions of equality, due process, or fundamental rights, rather than on the technicalities of conflicts law.

D. A Caveat

I do not mean to suggest that conflicts ought to have no role in litigation over same-sex relationships. But I hope that the role it plays will be limited and incremental in nature. As I have extensively argued elsewhere, under conflicts doctrine, states that recognize same-sex marriage should treat couples who have entered into foreign civil

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unions as married for the purposes of forum law, and vice versa.[23] Further, states that offer no recognition of same-sex couples, including those states that have their own mini-DOMAs, should nevertheless recognize some limited incidents of foreign marriages and civil unions. To the extent that such states refuse to do so, I have no principled objection to advocates pursuing this kind of limited recognition through litigation, though strategic concerns may continue to have force. What I object to in principle, even if not doctrinally, are the grander claims that all states must recognize all same-sex marriages from other states for all purposes.

CONCLUSION

I suspect that we are closer to the end of the battle over same-sex marriage than we are to the beginning. That is, it will not be long until same-sex marriage is adopted throughout the country. However, we are currently in an interstitial period in which American opinion concerning homosexuality is evolving. All of the conflicts of law that arose from the adoption of same-sex marriage and marriage-alternatives are a result of the frictions introduced by this evolutionary process. Short-circuiting this evolutionary process could, in the best case, achieve same-sex marriage immediately, or, in the worst case, set the movement back considerably. I believe the risk of substantial setback outweighs the possibility of immediate recognition of same-sex marriage. Setback is, in my judgment, more likely, and the results would be devastating.

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23. *See* Levin, *supra* note 1.

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