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The Limits of Strategic Litigation

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What will the next wave of same-sex marriage litigation look like? What should it look like?

The model of marriage equality litigation that has dominated discussion to date is the carefully planned public interest lawsuit. In this model, gay rights organizations try to figure out which courts are most likely to be receptive to their claims, then recruit plaintiffs to challenge the laws on the books and file suit. We think, then we act. The whole undertaking is centrally planned in advance of any legal activity. The model for this kind of undertaking is the strategic litigation campaign undertaken by the NAACP Legal Defense and Education Fund in the 1940s and 1950s, culminating in *Brown v. Board of Education*.¹

There is, however, another model that will be increasingly relevant. That is the situation in which parties who had no interest whatsoever in being public interest plaintiffs find themselves unexpectedly trapped in an evil legal system that threatens to treat them in a viciously arbitrary and unfair way. The public interest organization necessarily comes into the litigation late, if at all. Instead of planning the litigation, the public interest organization is as surprised as the victim of the injustice. The classic model of this kind of litigation is the case of the Scottsboro boys.²

The title of this panel presupposes that the choice in the future will be between approaches to litigation that stress constitutional challenges versus approaches that raise procedural issues, such as the requirement that a ballot initiative deal with a single issue. But this overlooks a third possibility: that the next wave of litigation will involve neither

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1. 347 U.S. 483 (1954).

2. *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935).

constitutional nor procedural issues, but substantive issues of choice-of-law. Unlike either constitutional or procedural suits, the most powerful choice-of-law claims will be those involving unfair surprise; they cannot be planned for.

The lines of America's division over same-sex marriage have been getting steadily harder. In last November's elections, seven states passed constitutional amendments against same-sex marriage.³ But only two weeks before that, the New Jersey Supreme Court decided that the state must join California, Connecticut, Vermont, and Massachusetts⁴ in giving gay couples all the rights of married couples. Since then, similarly broad civil union laws have also been adopted in New Hampshire and Oregon. Together, the states that recognize same-sex couples comprise more than likely one fifth of the U.S. population.⁵ And the Republicans' loss of Congress means that the effort to amend the Constitution to ban same-sex marriage is dead.⁶

It is time to think about a problem that has gotten far too little attention in the debates about gay rights: what happens to people in legally recognized same-sex relationships when they cross state lines? Will those relationships ever be recognized in other states?

The answers are more complicated than almost anyone has noticed.

There are now forty-four states with laws banning same-sex marriage.⁷ These laws were passed mainly to guarantee that these states would be able to govern the marriages of their own citizens. But other situations will arise in which a same-sex marriage or civil union will be pertinent. And those will be the next important wave of gay rights issues in court.

Can someone who lives with a same-sex spouse in Massachusetts safely run away to Virginia with the family's assets? And what happens when someone from Massachusetts is hospitalized in Virginia and the

3. Jen Christensen, *Straight Talk Wins in Arizona*, THE ADVOCATE, Dec. 16, 2006, at 34 ("On November 7, South Dakota, Virginia, Idaho, Colorado, South Carolina, Tennessee, and Wisconsin joined 20 other states that have written antigay language into their state constitutions [by prohibiting same-sex marriage].").

4. *Lewis v. Harris*, 188 N.J. 415, 454 (2006) (citing Connecticut, Vermont, and Massachusetts as states granting same-sex couples the rights of married couples and California as granting some of those rights through domestic partnerships).

5. See U.S. Population Finder, <http://factfinder.census.gov> (last visited Oct. 1, 2007) (utilizing 2006 population numbers, those states make up 20% of the U.S. population).

6. See John M. Broder, *Jubilant Democrats Assume Control of Capitol Hill*, N.Y. TIMES, Jan. 5, 2007, at A1.

7. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Hand Book for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005) (compiling laws of forty-three states). Since that compilation, Wisconsin has amended its constitution to allow same-sex marriage. See Christensen, *supra* note 3, at 34.

hospital needs to know who is entitled to make the patient's medical decisions? Can a person with a same-sex spouse in Massachusetts come to Virginia and marry someone else of the opposite sex? If so, would the bigamous spouse be required even to tell the new spouse about the existing marriage?

This is not the first time that Americans have been divided about what kinds of marriages to recognize. Profound moral disagreements about marriage have involved differences in state laws concerning marriages between kin, marriages involving young teenagers, remarriages after divorce, and above all, interracial marriages.⁸

The most revealing of these disagreements concerned interracial marriages. The statutes prohibiting such marriages were worded at least as strongly as those of the recent laws against same-sex marriage.⁹ They usually declared them "void" and "prohibited."¹⁰ They went even further by sending interracial couples to jail.¹¹

Yet even in this charged context, the courts sometimes recognized interracial marriages, rejecting a blanket rule of nonrecognition. The outcomes almost always turned on a single question: where did the couple make its home? One case from 1948 is an illustration. Pearl Mitchell, who was black, died in Chicago without a will, leaving land that she had owned in Mississippi. A provision in the Mississippi Constitution declared interracial marriages "unlawful and void"; however, the state supreme court nonetheless allowed her white husband to inherit, because the couple had not lived in Mississippi.¹²

The Mississippi courts in 1948 were bulwarks of a pernicious system of racial subordination. But they understood something important about the problem of moral pluralism in a federal system: that each state must respect the legitimate operation of other states' laws. While that premise has constitutional implications, it is also relevant to ordinary issues of common law decisionmaking.

Given the sweeping language of individual state Defense of Marriage Amendments (mini-DOMAs) that are going to be governing law in most cases involving interstate recognition, the really important

8. The discussion that follows is elaborated in ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 28-50 (2006).

9. See 1870 Tenn. Acts 69 ("[T]he intermarriage of white persons with negroes . . . is hereby prohibited.").

10. See N.C. REV. CODE 68:7 (Little Brown 1855) ("All marriages . . . between a white person and a free negro, or free person of color . . . shall be void.").

11. See 1870 Tenn. Acts 69 ("[Persons guilty of interracial marriage] shall undergo imprisonment . . . not less than one nor more than five years.").

12. *Miller v. Lucks*, 36 So. 2d 140, 141 (Miss. 1948).

lawyering work is going to involve issues of statutory construction.¹³ The interracial marriage cases are relevant to those issues. Even the strongest public policy language used in these laws is constrained by history. It is a commonplace rule of statutory interpretation that when terminology has previously appeared in earlier statutes, and has been interpreted by courts to have a certain meaning, it should be understood to mean the same thing in a new statute.¹⁴ The language used by the mini-DOMAs was ubiquitous in the miscegenation statutes, which usually declared interracial marriages “void” and “prohibited.”¹⁵ Yet the Southern courts usually recognized nonevasive interracial marriages.¹⁶ If such language did not bar recognition in those cases, it should not do so now, either. In this context, “void” evidently means “void for residents of this state,” not “void for anyone in the world whose marriage is in any way pertinent to litigation in our courts.”¹⁷

It is only in the cases where the language of the mini-DOMAs is absolutely compelling that litigators will have to make arguments of unconstitutionality. There are four statutes that plainly adopt blanket non recognition regardless of what state the marriage was entered into.¹⁸

13. The following argument summarizes KOPPELMAN, *supra* note 8, at 137-48.

14. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, AND ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 283-85 (2000).

15. See 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 204-09 (1931) (compiling statutes). For earlier surveys to the same effect, see Note, *Intermarriage with Negroes—A Survey of State Statutes*, 36 YALE L.J. 858 (1927); 1 FREDERIC J. STIMSON, AMERICAN STATUTE LAW 667-69 (1886).

16. For inheritance cases that involved the legitimacy of an interracial marriage, see *Caballero v. Executor*, 24 LA. ANN. 573 (La. 1872) (recognizing out-of-state interracial marriage despite state statute declaring them void); *Whittington v. McCaskill*, 61 So. 236 (Fl. 1913) (allowing inheritance rights created by interracial marriage that was void under state law); *Lucks*, 36 So. 2d at 141 (recognizing inheritance rights despite state ban on interracial marriages); *State v. Ross*, 76 N.C. 224 (1877) (recognizing a marriage of an interracial couple who had migrated to North Carolina). *But see* *State v. Bell*, 66 Tenn. 4 (1872) (withholding recognition of interracial marriage that was valid in the authorizing state).

17. See *State v. Fenn*, 92 P. 417, 419 (Wash. 1907):

If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. . . . [A] statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.

18. FLA. STAT. ANN. § 741.212(1) (West 2005) (“Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign . . . are not recognized for any purpose in this state.”); KY. REV. STAT. ANN. § 402.045(2) (LexisNexis 1999) (“Any rights granted by virtue of [a same-sex] marriage, or its termination, shall be unenforceable in Kentucky courts.”); LA. CONST. art. XII, § 15 (“No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one

Against these, constitutional arguments will have to be made. But these laws are so sweeping, with a breadth so unrelated to any legitimate state interest, that a constitutional challenge is very likely to succeed.¹⁹

In order to avoid bizarrely unfair results that nobody has ever intended, such as a deadbeat father running away with all his family's assets and finding a safe haven in another state, states will have to recognize same-sex relationships sometimes, for some purposes. The hard work lies in figuring out how to map the boundaries of recognition in a way that allows each state to pursue its own deeply felt public policies. A complex task, but hardly an insurmountable one. If the Southern racist courts could do it, so can we. At a minimum, gay rights litigators can argue with considerable power, we should not respond to our disagreements in a *less* civilized and humane way than we managed to do in the shameful days of racial segregation.

The strongest cases for recognition will be those—I have already enumerated some typical situations—in which the litigants never planned to be in court, but were simply unfairly surprised by a distant state's laws. Those, and not cases in which people are trying to evade their home state's restrictions, are going to be the most sympathetic and powerful cases for recognition. It is in the nature of such cases that they cannot be planned for. One must simply wait for them to come along.

woman.”); OHIO REV. CODE ANN. § 3101.01(C)(2) (LexisNexis 2005) (“Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.”).

19. See KOPPELMAN, *supra* note 8, at 69-81.