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# The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination

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**THE UNCONSTITUTIONALITY OF THE MINNESOTA  
DEFENSE OF MARRIAGE ACT: IGNORING JUDGMENTS,  
RESTRICTING TRAVEL AND PURPOSEFUL  
DISCRIMINATION**

Bradley J. Betlach<sup>†</sup>

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## I. INTRODUCTION

In December of 1990, three same-sex couples applied for marriage licenses with Hawaii's Department of Health. Not surprisingly, the Department of Health denied the applications because the couples were of the same sex, even though, in all other respects, they were fully qualified to obtain the licenses. Rather than simply walking away, disappointed that the state would not formally and legally recognize their commitments to each other, Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Logan and Joseph Melillo went to court. The state of marriage in this country, at least as it has traditionally been known, may never be the same.<sup>1</sup>

The simple fact that these three same-sex couples applied for and were denied marriage licenses was not in itself newsworthy. It had happened before, and it would undoubtedly happen again. Neither was their institution of a lawsuit challenging the constitutionality of the state's marriage laws groundbreaking. That ground had been broken twenty years earlier, in Minnesota, by Richard John Baker and James Michael McConnell,<sup>2</sup> and repeated by other couples in other states over the years.<sup>3</sup> Unlike their predecessors, however, the Hawaii same-sex marriage applicants would succeed in convincing their state supreme court that Hawaii's marriage laws, as applied to same-sex couples, were presumptively unconstitutional under Hawaii's rather unique Equal Protection Clause, requiring the application of strict scrutiny.<sup>4</sup> For the first time, the nation truly sat up and took notice.

Three years later, following a trial on the merits, the First Circuit Court of Hawaii, the Honorable Kevin C. Chang presiding, concluded that the state had failed to show that its prohibition of same-sex marriage was justified by a compelling state interest and narrowly drawn to avoid unnecessary abridgments of constitutional rights.<sup>5</sup> This time, the nation panicked. Congress and a vast major-

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1. For a discussion of the history, purpose and benefits of marriage, see Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991).

2. See *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

3. See, e.g., *Dean v. District of Columbia*, No. Civ. A. 90-13892, 1992 WL 685364 (D.C. Super. June 2, 1992), *aff'd per curiam*, 653 A.2d 307 (D.C. 1995); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973).

4. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

5. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct.

ity of the states' legislatures rushed to enact special, unprecedented legislation, specifically defining marriage as a union between persons of the opposite sex, specifically prohibiting marriage between persons of the same sex, and voiding recognition of same-sex marriages lawfully performed elsewhere.<sup>6</sup> Minnesota was one of those states.<sup>7</sup>

To many persons, the concept of same-sex marriage is an oxymoron because marriage is, by its very definition, a relationship between persons of different sexes—one man and one woman.<sup>8</sup> Many persons who might otherwise favor equal contractual rights for same-sex domestic partners nevertheless object to the concept of same-sex "marriage."<sup>9</sup> The debate surrounding same-sex marriage is also emotionally charged because marriage in our culture is, for many, inextricably tied to religion.<sup>10</sup> Nevertheless, it must be recognized that marriage, wholly apart from its religious aspects, is also a civil institution, carrying with it a plethora of rights and duties emanating from state and nation. That said, the subject of this article is limited to "civil marriage" because it is "civil marriage" which is at stake in Hawaii and which is the subject of both the federal and state Defense of Marriage Acts, not the substantial equivalent of marriage or marriage in the religious sense.

The purpose of this article is to examine the constitutionality, or unconstitutionality as the case may be, of Minnesota's version of the Defense of Marriage Act. Although the topic would seem to be a fairly narrow one, it necessarily entails a general discussion of the United States Supreme Court's treatment of marriage throughout the years, the Hawaii courts' decisions in *Baehr*, the questionable constitutionality of the Federal Defense of Marriage Act,<sup>11</sup> Minnesota's choice of law rules as traditionally applied to marriage and divorce, and the Minnesota Supreme Court's decision in *Baker v. Nelson*.<sup>12</sup> The constitutionality of Minnesota's Defense of Marriage

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Dec. 3, 1996).

6. By September 1, 1997, approximately 40 states had amended their laws, in one way or another, to prohibit same-sex marriage.

7. See MINN. STAT. § 517.03 (Supp. 1998).

8. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1421 (1993).

9. See ANDREW SULLIVAN, SAME SEX MARRIAGE: PRO AND CON 190-92 (1997) (citing William Safire, *Same-Sex Marriage Nears*, N.Y. TIMES, April 29, 1996, at A27).

10. See Eskridge, *supra* note 8, at 1497-1502 (discussing the history of marriage under a Judeo-Christian social construction).

11. 1 U.S.C.A. § 7 (Supp. 1997) and 28 U.S.C.A. § 1738C (Supp. 1997).

12. 291 Minn. 310, 191 N.W.2d 185 (1971).

legislation will be examined under the Full Faith and Credit Clause of the United States Constitution, in relation to the fundamental right of interstate travel as guaranteed by the United States Constitution, and under the Equal Protection clauses of the United States and Minnesota Constitutions, particularly in light of the United States Supreme Court's decision in *Romer v. Evans*.<sup>13</sup>

The article concludes that the federal Defense of Marriage Act violates the Full Faith and Credit Clause of the United States Constitution. In addition, the Minnesota Defense of Marriage Act violates the fundamental right to travel guaranteed by the federal constitution and, most likely, the Equal Protection Clauses of the United States and Minnesota constitutions. If the Minnesota Defense of Marriage legislation is interpreted to prohibit the recognition of same-sex divorce decrees entered in other states, it also violates the Full Faith and Credit Clause. Finally, if the Minnesota Defense of Marriage legislation is struck down as unconstitutional, Minnesota's choice of law rules pertaining to marriage will require the state to recognize same-sex marriages validly entered into elsewhere if the spouses resided in a state permitting same-sex marriage at the time of their marriage.

## II. MARRIAGE: A FUNDAMENTAL RIGHT FOR SOME BUT NOT FOR OTHERS

### A. *The United States Supreme Court On Marriage*

Over a century ago, the United States Supreme Court described marriage as "the most important relation in life,"<sup>14</sup> and the "foundation of the family and of society, without which there would be neither civilization nor progress."<sup>15</sup> Personal decisions with respect to marriage are ones which an individual may make without unjustified governmental interference.<sup>16</sup> Indeed, the freedom to marry whom one chooses has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.<sup>17</sup>

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13. 116 S. Ct. 1620 (1996).

14. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

15. *Id.* at 211.

16. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (stating that the Supreme Court has long recognized the freedom of personal choice in matters of marriage and family).

17. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

In *Griswold v. Connecticut*,<sup>18</sup> the Supreme Court held that the right to marry was a part of the fundamental “right of privacy” implicit in the Fourteenth Amendment,<sup>19</sup> and stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>20</sup>

Despite the Supreme Court’s unqualified proclamations, marriage has historically been a fundamental right for some citizens, but not others.<sup>21</sup> Generally, marriage is only a fundamental right if you seek to marry a single adult, of the opposite sex, to whom you are not closely related.<sup>22</sup> Less than fifty years ago, thirty of the forty-eight states banned interracial marriages by statute,<sup>23</sup> and it was not until 1967 that the Supreme Court, in *Loving v. Virginia*,<sup>24</sup> held that anti-miscegenation statutes violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>25</sup> Thus, it was not until relatively recently that there was determined to be a fundamental right to marry regardless of race.<sup>26</sup>

The anti-miscegenation statutes provide an apt analogy to the proliferation of legislation designed to prohibit persons of the same sex from marrying.<sup>27</sup> Indeed, the justifications put forth by

18. 381 U.S. 479 (1965).

19. See *id.* at 486; see also *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

20. *Griswold*, 381 U.S. at 486.

21. This is true despite the fact that “[i]n determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions.” *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring). Rather, courts must consider the traditions of our society and determine whether a principle is so ingrained in the collective conscience to deem it a fundamental right. See *id.* The question is whether the right “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’ . . .” *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

22. See, e.g., MINN. STAT. §§ 517.02 & 517.03, subd. 1 (1996 & Supp. 1998).

23. See *Baehr v. Lewin*, 852 P.2d 44, 62 n.24 (Haw. 1993).

24. 388 U.S. 1 (1967).

25. See *id.* at 2.

26. It does not appear that Minnesota ever prohibited interracial marriage.

27. Surprisingly, America may be more ready to accept same-sex marriage today than it was ready in 1968 to accept interracial marriage. In 1968, the year

the trial judge who found the Lovings to have violated Virginia's ban on interracial marriage, harkens the arguments often made by those opposed to same-sex marriage: that homosexual relationships are unnatural, immoral and contrary to religious teachings. The trial judge in *Loving*, discussing the basis for Virginia's ban on interracial marriage, stated in his order,

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>28</sup>

Equally shocking by today's standards was the Virginia Supreme Court's rationale for upholding the constitutionality of the anti-miscegenation statute. The court found legitimate the state's purposes of preserving the racial integrity of its citizens, preventing the corruption of blood, and the obliteration of racial pride, and endorsing the doctrine of white supremacy.<sup>29</sup>

#### B. *Baker v. Nelson: The Minnesota Supreme Court On Same-Sex Marriage*

In 1971, the Minnesota Supreme Court rejected the anti-miscegenation analogy and held that there is no fundamental right to same-sex marriage. In *Baker v. Nelson*,<sup>30</sup> the court concluded that Minnesota's marriage laws, codified in chapter 517 of the Minnesota Statutes, do not authorize marriage between persons of the same sex and, consequently, that such marriages are prohibited.<sup>31</sup> The result the court reached is hardly earth-shattering, considering the state of civil rights for homosexuals and the public's limited understanding and acceptance of sexual orientation issues. While challenging the prohibition of same-sex marriage may have seemed ripe coming just four years on the heels of *Loving*, *Baker* was clearly a case before its time.

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*Loving* was decided, a Gallop poll found that some 72 percent of Americans still disapproved of interracial marriages even if they were prepared to accept it. See SULLIVAN, *supra* note 9, at XXI. By comparison, a Newsweek poll conducted in 1996, found that 58 percent of Americans oppose legalizing same-sex marriage. See *id.* at XXII.

28. *Loving*, 388 U.S. at 3.

29. *Id.* at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749 (1955)).

30. 291 Minn. 310, 191 N.W.2d 185 (1971).

31. See *id.* at 312, 191 N.W.2d at 186.

In *Baker*, the court rejected the plaintiffs' argument that the absence of an express statutory prohibition against same-sex marriage indicated a legislative intent to authorize such marriages.<sup>32</sup> The statute at issue provided in relevant part:

Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.<sup>33</sup>

The court relied on the common usage of the word "marriage" and the marriage laws themselves, which were "replete with words of heterosexual import such as 'husband and wife' and 'bride and groom.'"<sup>34</sup> The court's comment that it would be unrealistic to think that the original draftsmen of the marriage statutes would have used these terms in any different sense is undeniably true.<sup>35</sup>

The *Baker* court then rejected the plaintiffs' contention that the statute, so interpreted, violated the First, Eighth, Ninth or Fourteenth Amendments of the United States Constitution.<sup>36</sup> The court's analysis here is unconvincing and cryptic.<sup>37</sup> Although the court, relying on *Loving*, obviously believed marriage to be one of the "basic civil rights of *man*," it nevertheless held that marriage was not a fundamental right for *men*.<sup>38</sup> The court soundly rejected the plaintiffs' argument that confining marriage to heterosexuals was irrational and invidiously discriminatory, but failed to analyze whether there was a rational basis for prohibiting same-sex marriage.<sup>39</sup>

Rather than justifying the prohibition, as constitutional analysis requires, the court simply reiterated the obvious—that marriage

32. *See id.* at 311-12, 191 N.W.2d at 185-86.

33. MINN. STAT. § 517.01 (1971).

34. *Baker*, 291 Minn. at 311-12, 191 N.W.2d at 185-86.

35. *See id.* at 311, 191 N.W.2d at 186.

36. *See id.* at 315, 191 N.W.2d at 187.

37. *See id.* at 312-15, 191 N.W.2d at 186-87. The court dismissed without discussion the plaintiffs' contentions that the marriage statute violated the First and Eighth Amendments of the United States Constitution. *See id.* at 312 n.2, 191 N.W.2d at 186 n.2.

38. *Id.* at 314, 191 N.W.2d at 187 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)) (emphasis added).

39. *See id.* at 313, 191 N.W.2d at 187.



has been traditionally a heterosexual institution:

The institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within a family is as old as the book of Genesis. Marriage and procreation are fundamental to the very existence and survival of the race. This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.<sup>40</sup>

The court dismissed the plaintiffs' reliance on *Griswold* by characterizing the Supreme Court's holding in *Griswold* as nothing more than a basic prohibition on a state's ability to intrude upon the right of privacy inherent in the marital relationship—the state having authorized the marriage in the first place.<sup>41</sup> The court found that *Griswold* does not apply where the state has prohibited the marriage itself, and again culled language from the opinion harkening back to our traditional notions of marriage.<sup>42</sup>

The court's scarcely adequate equal protection analysis is even more frustrating:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.<sup>43</sup>

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40. *Id.* at 312-13, 191 N.W.2d at 186 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

41. *See id.* at 313, 191 N.W.2d at 186.

42. *See id.* at 313, 191 N.W.2d at 187 (discussing "the traditional relation of the family—a relation as old and as fundamental as our entire civilization" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965))).

43. *Id.* at 313-14, 191 N.W.2d at 187 (citations omitted).

Dismissing plaintiffs' analogy to the anti-miscegenation laws struck down in *Loving*, the court simply concluded that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."<sup>44</sup> What this "clear distinction" is, however, is anything but clear, particularly in light of the court's steadfast refusal to address head-on the plaintiffs' arguments regarding procreation.<sup>45</sup>

Although marriage in the United States has historically been defined as a relationship between persons of different sexes,<sup>46</sup> in the past it had also been reserved solely for persons of the same race. In fact, interracial marriage was lawfully prohibited in a majority of the states until just 30 years ago.<sup>47</sup> "Just as interracial marriage was portrayed in such a way as to isolate African Americans from mainstream society, so prohibitions against same-sex marriage help to preserve the subordination of gays, lesbians, and bisexuals within society."<sup>48</sup>

At least the *Loving* Court, in upholding Virginia's anti-miscegenation law, engaged in a constitutional analysis by setting forth the state's "legitimate" purposes for justifying its prohibition on interracial marriages (as misguided as those "legitimate" purposes were).<sup>49</sup> The fact that the Minnesota Supreme Court disposed of the plaintiffs' constitutional challenges in two vague pages ably demonstrates that, despite human rights advances that followed the Stonewall riots,<sup>50</sup> neither society nor the courts were

44. *Id.* at 315, 191 N.W.2d at 187.

45. *See id.* at 313-14, 191 N.W.2d at 187.

46. Actually, same-sex marriage is far from unprecedented. *See Eskridge, supra* note 8, at 1435-84 (providing an exhaustive discussion of same-sex marriage throughout history and in other cultures); *see also SULLIVAN, supra* note 9, at 3-45.

47. *See supra* notes 23-29 and accompanying text.

48. Eskridge, *supra* note 8, at 1423.

49. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

50. *See Eskridge, supra* note 8, at 1420 n.5. The Stonewall Riots of June 27 and 28, 1969, in which gay and lesbian patrons of the Stonewall Bar in New York City fought back against a routine police raid, are widely considered to be the single most significant defining moment in the battle for human rights of gays and lesbians in the United States. *See id.* Stonewall:

did for gay and lesbian liberation what the lunch counter sit-ins did for the African-American civil rights movement: the riots provided martyrs, demonstrated open resistance to oppressive social practices, and created a focal point for future struggle. Although the gay and lesbian rights movement in the United States started as early as the 1950s, it made dramatic progress only after 1969.

*Id.* at 1483.

ready to seriously accept as radical a concept as same-sex marriage.<sup>51</sup> Thus, while the gay community might applaud the *Baker* plaintiffs for fighting for the basic, fundamental right of gay marriage, the community is left with controlling case law, which places another obstacle in the way of legally recognized same-sex marriages.<sup>52</sup> Had the plaintiffs waited a few years to bring suit, however, the result would likely have been the same; every state and federal court which considered same-sex marriage after 1971 reached the same result.<sup>53</sup> That is, until Hawaii.

### III. UNDERSTANDING *BAEHR*: IT'S NOT A GAY THING

The same-sex applicants in *Baehr* filed their complaint for injunctive and declaratory relief on May 1, 1991, seeking a judicial declaration that the construction and application of Hawaii Revised Statutes Section 572-1<sup>54</sup> to deny an application for a license to marry because an applicant couple of the same sex was unconstitutional.<sup>55</sup> On October 1, 1991, the trial court granted the state's motion for judgment on the pleadings and dismissed the lawsuit.<sup>56</sup> The applicants appealed the judgment to the Hawaii Supreme Court, challenging both the constitutionality of the statute and the

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51. See *Baker v. Nelson*, 291 Minn. 310, 312-15, 191 N.W.2d 185, 186-87 (1971).

52. See *id.*

53. See, e.g., *Dean v. District of Columbia*, No. Civ. A. 90-13892, 1992 WL 685364, at \*2-3 (D.C. Super. Ct. June 2, 1992), *aff'd per curiam*, 653 A.2d 307 (D.C. 1995) (holding that the legislature's refusal to authorize same-sex marriages does not violate either due process or the Equal Protection clause); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that right to same-sex marriages is not protected by the Constitution); *Singer v. Hara*, 522 P.2d 1187, 1195-97 (Wash. Ct. App. 1974) (holding state's prohibition against same-sex marriages does not violate the Equal Protection clause). See also *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (ruling that same-sex marriage between American and Australian was invalid for immigration purposes); *Burkett v. Zablocki*, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (dismissing action to compel issuance of marriage license to same-sex couple who failed to properly submit a brief); *De Santo v. Barnsley*, 476 A.2d 952, 953-56 (Pa. Super. Ct. 1984) (holding that common law same-sex marriage does not exist in Pennsylvania).

54. HAW. REV. STAT. § 572-1 (1984) did not specifically provide that persons of the same sex could not marry. It did, however, repeatedly refer to the parties of the marriage as being a "man" and a "woman," and also referred to the married persons as being "husband" and "wife." See *id.*

55. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*1 (Haw. Cir. Ct. Dec. 3, 1996).

56. See *id.* at \*2.

trial court's dismissal of the lawsuit on the pleadings.<sup>57</sup> The supreme court ruled in favor of the applicants on both accounts, and remanded the case for a trial to determine whether Hawaii's prohibition of same-sex marriage could survive strict scrutiny, i.e., whether the prohibition was justified by compelling state interests and narrowly drawn to avoid unnecessary abridgments of constitutional rights.<sup>58</sup>

The Hawaii Supreme Court's decision in *Baehr* was widely considered to be a civil rights victory for gays and lesbians and, at least in its application and practical effect, it was such a significant milestone.<sup>59</sup> What many people find surprising, however, is that the *Baehr* result had nothing to do with sexual orientation per se. Indeed, like all of the courts before it, the Hawaii Supreme Court refused to find a fundamental right to same-sex marriage in Hawaii's constitution,<sup>60</sup> even though Hawaii's constitution guarantees a right of privacy.<sup>61</sup> This right of privacy includes, at a minimum, all of the fundamental rights expressly recognized as being subsumed in the United States Constitution, including the fundamental right to marry first recognized in *Skinner v. Oklahoma*<sup>62</sup> and more recently affirmed in *Zablocki v. Redhail*.<sup>63</sup>

57. See *Baehr v. Lewin*, 852 P.2d 44, 52-68 (Haw. 1993).

58. See *id.* at 68.

59. Evan Wolfson, one of the attorneys representing the plaintiffs in *Baehr*, summed up the import and contradictions in *Baehr* as follows:

The *Baehr* decision, then, although imperfect, is remarkable. Inclusion at the level of marriage is uniquely revolutionary, conservatively subversive, singularly faithful to true American and family values in a way that few, if any, other gay and lesbian victories would be. This is true not only because of marriage's central symbolic importance in our society and culture, but also because of what the court called the "encyclopedic" multiplicity of rights and benefits that are contingent upon that status.

Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580 (1994-95). It is for these same reasons that others are so adamantly opposed to same-sex marriage.

60. See *Baehr v. Miike*, 1996 WL 694235, at \*19.

61. HAW. CONST. art. I, § 6 (stating "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

62. 316 U.S. 535, 541 (1942). In *Skinner*, the right to marry appears to have been inextricably linked to procreation. At issue was a statute which allowed Oklahoma to sterilize habitual criminals against their will. *Id.* at 537. In striking down the law, the *Skinner* Court stated that the legislation involved "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

63. 434 U.S. 374, 374 (1978). In *Zablocki*, the Supreme Court considered a

Specifically, the Hawaii Supreme Court refused the applicants' invitation to recognize a fundamental right to same-sex marriage.<sup>64</sup> Applying the criteria set forth by Justice Goldberg in his concurring opinion in *Griswold*, the Supreme Court held that the right to same-sex marriage is not so rooted in the "traditions and [collective] conscience of our people" that the failure to recognize it would violate the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>65</sup> Nor did the Court "believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."<sup>66</sup> Given these conclusions alone, *Baehr* could hardly be trumpeted as a civil rights victory for gays and lesbians.

The Hawaii Supreme Court, however, also considered whether Hawaii's marriage laws were unconstitutional under the equal protection clause of its constitution, which provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.<sup>67</sup>

Because sex is a suspect category under Hawaii's equal protection clause, and section 572-1 of the Hawaii Statutes regulates marital status and its concomitant rights and benefits on the basis of sex, the Hawaii Supreme Court concluded that strict scrutiny applied.<sup>68</sup> Consequently, the court held that the marriage statute was presumptively unconstitutional and remanded the case to the trial court to determine whether the state could "show that the statute's sex-based classification is justified by compelling state interests" and "narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."<sup>69</sup>

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Wisconsin statute prohibiting a Wisconsin resident with minor, noncustodial children from marrying until the resident demonstrated to a court that he was in compliance with his child support obligations, if any. *Id.* at 375. The *Zablocki* Court, applying strict scrutiny, struck down the statute, concluding that it burdened the fundamental right to marriage. *Id.* at 390-91.

64. See *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

65. *Id.* at 57 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring)).

66. *Id.*

67. HAW. CONST. art. I, § 5.

68. *Baehr*, 852 P.2d at 67.

69. *Id.*

In the majority's view,<sup>70</sup> homosexuality, and whether it constituted an immutable trait, were immaterial to its equal protection analysis, the touchstone being sex, not sexual orientation.<sup>71</sup> Explaining itself, the court noted that Hawaii's marriage laws do not prohibit homosexuals from marrying because they may in fact marry persons of the opposite sex and, conversely, homosexuals and heterosexuals alike may not marry someone of the same sex.<sup>72</sup> In sum, the Hawaii Supreme Court held that Hawaii's marriage laws were presumptively unconstitutional because they classified persons on the basis of sex. The state may not deny a man or a woman a marriage license based solely upon the sex of the person who they seek to marry unless of course there is a compelling reason for doing so.<sup>73</sup>

On remand, the state argued that the following interests were compelling and therefore justified its denial of same-sex marriage: (1) protecting the health and welfare of children and other persons, (2) fostering procreation within a marital setting, (3) securing or assuring recognition of Hawaii's marriages in other jurisdictions, (4) protecting the state's public fisc from the reasonably foreseeable effects of state approval of same-sex marriage, and (5) protecting civil liberties, including the reasonably foreseeable effects of state approval of same-sex marriages, on its citizens.<sup>74</sup> The trial primarily focused on the state's claim that it had a compelling interest to promote optimal development of children and its position that it is best for a child to be raised in a single home by its parents, or at least by a married male and female.<sup>75</sup> In this regard,

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70. One justice of the Hawaii Supreme Court filed a separate concurrence, agreeing that the case should be remanded, but for a determination of whether sexual orientation was biologically fated so that "sex" as used in Hawaii's Equal Protection Clause included differences in sexual orientation. *See id.* at 68-70 (Burns, J., concurring in the result).

71. *Id.* at 53 n.14.

72. *Id.* at 51 n.11.

73. *See id.* at 68. One justice dissented, concluding that section 572-1 does not establish a suspect classification based on gender because it treats all males and females alike, and a rational basis exists for prohibiting same-sex marriage since marriage exists primarily for the propagation of the human race. *Id.* at 71-74 (Heen, J., dissenting).

74. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*1, 3 (Haw. Cir. Ct. Dec. 3, 1996).

75. *Id.* at \*20. The trial court dismissed, with minimal discussion, the state's claims that same-sex marriage would create an adverse impact on the public fisc. *Id.* It also dismissed the state's claim that there would be an adverse impact to Hawaii based upon other jurisdictions' refusals to recognize Hawaii same-sex mar-

the state and the applicants each presented testimony from four expert witnesses.<sup>76</sup> The battle of the experts was not even close, as the state's experts routinely conceded major points on cross-examination thereby undermining the state's case at every turn.<sup>77</sup>

Although the trial court found that an intact family environment consisting of a child and his or her mother and father presents a less-burdened environment for the development of a happy, healthy and well-adjusted child, it concluded that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child, which is not dependent upon sexual orientation.<sup>78</sup> The court recognized the wide diversity in the structure and configuration of families, specifically found that gay and lesbian parents can be and are as fit and loving as heterosexual parents, and that gay and lesbian parents and same-sex couples can and do provide children with a nurturing relationship and an environment in which they can thrive.<sup>79</sup> Not only did the court find that the state failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children, it found that "children being raised by . . . same-sex couples may be assisted by the recognition of same-sex marriage because they may [then] obtain certain protections and benefits that come with or become available as a result of marriage."<sup>80</sup>

Finally, the court, addressing the institution of marriage itself, concluded that in Hawaii and elsewhere, people marry for a variety of reasons, including "(1) having and raising children, (2) stability and commitment, (3) emotional closeness, (4) intimacy and monogamy, (5) the establishment of a framework for a long-term relationship, (6) personal significance, (7) recognition by society, and (8) certain legal and economic protections, benefits and obligations;" reasons which the trial court found were shared in Hawaii and elsewhere by gay men and lesbians who want to marry.<sup>81</sup> The

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riages, citing the federal constitution's full faith and credit clause. *Id.* Finally, the trial court summarily dismissed the state's claim that it needed to protect traditional marriage as a fundamental structure in society, stating that the evidentiary record in the case was inadequate to examine and decide this issues. *Id.*

76. *Id.* at \*4-16.

77. *Id.* at \*4-9.

78. *Id.* at \*16.

79. *Id.*

80. *Id.* at \*18.

81. *Id.*

court specifically rejected the state's argument that legalized prostitution, incest and polygamy will occur if same-sex marriage is allowed, noting that there are compelling reasons and established precedent to prevent and prohibit these activities.<sup>82</sup>

Having rejected the state's arguments, the trial court enjoined the state from denying an application for marriage solely because the applicants are of the same sex.<sup>83</sup> The judgment, however, was stayed pending review by the supreme court. As of the date of this article, the Hawaii Supreme Court has not yet issued a decision. It did not hear oral arguments in the case, and a decision could come down at any time. Based upon its earlier decision, the weakness of the state's case, and the deference paid to a trial court's findings of fact, the court will likely affirm the trial court's findings, thereby entitling same-sex couples in Hawaii to legally marry.<sup>84</sup> It is widely believed that same-sex couples from across the nation will flock to Hawaii to get married and then return to their home states and demand recognition for their marriages. Be assured that litigation will ensue as the federal government, the states, employers and

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82. *Id.* at \*20-21.

83. *Id.* at \*22.

84. See LESBIAN AND GAY LAW ASS'N. OF GREATER N.Y., *Who Will be the First with Same-Sex Marriage: Hawaii or the Netherlands?* LESBIAN/GAY LAW NOTES, Nov. 1997, at 163.

Also pending in Hawaii, however, is a ballot measure approved by the state legislature, scheduled for a vote in November of 1998, when the state's voters will be asked whether the state constitution should be amended to authorize the legislature to determine whether marriage should be restricted to opposite-sex couples.

*Id.* In addition, the Ninth Circuit Court of Appeals will decide in 1998 whether a referendum on holding a state constitutional convention must be rerun. In 1996, a plurality voted in favor of holding a constitutional convention, but the Hawaii Supreme Court ruled that an absolute majority of all voters was necessary to authorize the convention. *Id.* Opponents of same-sex marriage had hoped to use the convention to accomplish the objective of the scheduled 1998 ballot measure. *Id.* Thus, although Hawaii may be the first state to recognize same-sex marriage, the permanence of that recognition is questionable. *Id.*

Even if the Hawaii Supreme Court reverses the trial court's decision in *Baehr*, or its legislature or general population eventually prohibits same-sex marriage through a constitutional amendment, the debate over same-sex marriage and DOMA will likely continue, both in the United States and in foreign jurisdictions. A challenge to Vermont's marriage laws, for example, appears poised for success. See *id.* Vermont has an equal protection clause similar to Hawaii's, a gay rights law, and domestic partnership benefits provided by the state. Even more significantly, DOMA legislation has twice failed in Vermont's legislature. See *id.* Finally, the Netherlands is on the verge of becoming the first modern jurisdiction to extend the full right to marry to same-sex couples. See *id.*



others refuse to recognize these marriages.

#### IV. THE FEDERAL REACTION

##### A. *The Defense Of Marriage Act*

As a result of the *Baehr* decision, Congress easily passed the Defense of Marriage Act (DOMA), which was signed into law by President Clinton on September 21, 1996.<sup>85</sup> DOMA presumably resulted from a fear that a significant number of same-sex couples would travel to Hawaii, get married, and return home expecting their home state to recognize their marriage under the Full Faith and Credit Clause of the United States Constitution.<sup>86</sup> Others saw DOMA as nothing more than a political ploy—an attempt by Republicans to force liberal Democrats to take an unpopular position in an election year, jeopardizing their chances of reelection—and argued that DOMA was superfluous because full faith and credit would not require the states to recognize same-sex marriage if such marriages were contrary to the states' public policy.<sup>87</sup>

There are two separate aspects to DOMA. The first purpose is to confer a right on the states, irrespective of the Full Faith and Credit Clause of the Constitution, to legally ignore same-sex marriages performed lawfully under another state's laws. The Act states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession,

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85. 1 U.S.C.A. § 7 (Supp. 1997) and 28 U.S.C.A. § 1738C (Supp. 1997). The House approved DOMA by a vote of 342 to 67, and the Senate passed DOMA by a vote of 85 to 14. See Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUSTON L. REV. 425, 443 (1997).

86. *Id.* at 442. This fear is probably not unfounded. In a 1994 survey of gay men by THE ADVOCATE, a national gay and lesbian news magazine, nearly two-thirds of the respondents stated that they would marry if they were legally able to, and only 15% stated that they would not marry. See Wolfson, *supra* note 59, at 583.

87. See, e.g., Representative Barney Frank's comments during the Hearings of the House Judiciary Committee on DOMA, May 15, 1996, quoted in SULLIVAN, *supra* note 9, at 213-17.

or tribe, or a right or claim arising from such a relationship.<sup>88</sup>

The second aspect of DOMA, which will not be treated here, is to define the term "marriage" for purposes of federal laws.<sup>89</sup> "Marriage" is defined as "only a legal union between one man and one woman as husband and wife," and the word "spouse" is defined as "a person of the opposite sex who is a husband or a wife."<sup>90</sup>

### B. *DOMA Violates Full Faith And Credit*

It is ironic that Congress passed DOMA so that the states would not have to give full faith and credit to same-sex marriages performed in Hawaii. In doing so, Congress itself passed a law which is most likely an unconstitutional restriction on full faith and credit. What makes this truly ironic, however, is that full faith and credit would not likely have forced states to recognize same-sex marriages performed outside their borders because the Constitution's Full Faith and Credit Clause contains a judicially recognized public policy exception.<sup>91</sup> Instead, whether states will be required to recognize same-sex marriages depends upon each state's choice of law rules.

The Full Faith and Credit clause of the United States Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>92</sup>

Whether DOMA is found to be unconstitutional under the Full Faith and Credit Clause will likely depend upon the interpreta-

88. 28 U.S.C.A. § 1738C (Supp. 1997).

89. For a discussion of the constitutionality, or more appropriately, the unconstitutionality of this second aspect of DOMA, see Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 313 (1997) (arguing that Section 3 of DOMA is an unconstitutional intrusion into an area traditionally and properly reserved for the states); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467 (1997) (same); but see Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 172-73 (1996) (arguing that Congress may use federal law to regulate federal benefits).

90. 1 U.S.C.A. § 7 (Supp. 1997).

91. See *infra* Part VI.A.

92. U.S. CONST. art. 4, § 1.

tion given the second sentence of the clause.<sup>93</sup> Congress has enacted three pieces of legislation pursuant to this provision: The Parental Kidnapping Prevention Act (PKPA) Of 1980,<sup>94</sup> the Full Faith and Credit for Child Support Orders Act of 1994,<sup>95</sup> and the Safe Homes for Women Act of 1994.<sup>96</sup> Significantly, all three of these laws further the application of full faith and credit and are consistent with the principle of federalism.<sup>97</sup> Congress has never passed legislation like DOMA, which limits or nullifies the Full Faith and Credit Clause.<sup>98</sup>

DOMA is antithetical to the Full Faith and Credit Clause because it restricts rather than fosters federalism.<sup>99</sup> The Supreme Court has stated:

The very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created

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93. There is some conflict as to whether marriage falls into any of the categories included within the Full Faith and Credit Clause, i.e., public acts, records or judicial proceedings. This is not a particularly compelling issue. The U.S. Supreme Court has never ruled on whether a state must provide full faith and credit to marriages from another state, *see* Ruskay-Kidd, *supra* note 89, at 1439, marriage, it seems, is the epitome of a public act, at least in Minnesota, where a state license is necessary and common law marriage is disallowed. *See* Gerber v. Gerber, 241 Minn. 346, 347-48, 64 N.W.2d 779, 781 (1954) (stating marriage is a contract between three parties: the husband, the wife and the state); *see also* Thomas M. Keane, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 506 (1995) (stating marriage might also qualify as a judicial proceeding if performed by a judge). *See id.* Finally, although a divorce decree, an all too common consequence of marriage, is a judgment, DOMA purportedly would allow a state to refuse to give effect to it.

94. 28 U.S.C. § 1738A (1994).

95. 28 U.S.C.A. § 1738B (Supp. 1997).

96. 18 U.S.C.A. § 2265 (Supp. 1997).

97. *But see* Brown, *supra* note 89, at 166 (arguing that the PKPA negatively affects full faith and credit because it limits states to three jurisdictional bases upon which they may afford full faith and credit to custody decrees of another state). It is unclear how the federal DOMA will be interpreted in light of the Parental Kidnapping and Parentage Act and the Full Faith and Credit for Child Support Orders Act. *See* Strasser, *supra* note 89, at 321-22. There is a conflict between the last-in-time rule and the presumption that the courts should not presume that Congress enacted a law which allows avoidance of the moral and legal obligations of child and spousal maintenance.

98. *See* Ruskay-Kidd, *supra* note 89, at 1460.

99. Professor Lawrence Tribe, professor of constitutional law at Harvard Law School, believes that DOMA, as an exception to the Full Faith and Credit Clause, is "plainly unconstitutional." 142 Cong. Rec. S5931-33 (daily ed. June 6, 1996) (statement of Lawrence H. Tribe, as read into the Record by Senator Ted Kennedy) *quoted in* Brown, *supra* note 89, at 165. Professor Tribe specifically takes issue with DOMA's "negative" rather than "unifying" effect on federalism. *Id.*

under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.<sup>100</sup>

Yet DOMA expressly gives each state the right to disregard the public acts, records and judicial proceedings of another state; allowing each state to act as an independent sovereignty when it comes to marriage and divorce.

Proponents of DOMA argue that DOMA is not an intrusion by the federal government into an area reserved for the states, but is necessary to protect the autonomy of the states so that they are not forced to recognize another state's acts which are contrary to their own public policies.<sup>101</sup> This argument misses the point because the Full Faith and Credit Clause already has a public policy exception. DOMA was unnecessary legislation that did nothing more than discourage federalism.<sup>102</sup> DOMA is unconstitutional because Congress does not have the power to restrict, abrogate or dilute full faith and credit.

## V. THE STATE REACTION

In response to the developments in Hawaii, the Minnesota legislature amended Minnesota Statutes section 517.01 to read in relevant part:

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted *only between persons of the opposite sex* and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do.<sup>103</sup>

Additionally, Minnesota Statutes section 517.03, subd. 1(a)(4) was amended to specifically prohibit "a marriage between persons

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100. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935).

101. See *Brown*, *supra* note 89, at 168-69.

102. See *Strasser*, *supra* note 89, at 300-01.

103. MINN. STAT. § 517.01 (Supp. 1998) (emphasis added noting the legislative amendment).

of the same sex.”<sup>104</sup> Finally, the legislature provided that: “A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”<sup>105</sup>

The history of this legislation bears mentioning because it demonstrates that the legislature was not motivated by any clear understanding of relevant law, but by other reasons, be they political, hateful, rooted in fear or simply uninformed.<sup>106</sup> From January until March of 1997, the proposed amendments sponsored by Senator Tom Neville, R-Northfield,<sup>107</sup> prohibiting same-sex marriage did not get out of committees controlled by key democrats.<sup>108</sup> Republicans countered by inserting the DOMA amendments into any available bill.<sup>109</sup> In March, 35 senators wrote a letter requesting that the bill be given a hearing, and Senator Neville moved, unsuccessfully, for a hearing pursuant to Senate Rule 40.<sup>110</sup> In sup-

104. MINN. STAT. § 517.03 subd. 1(b) (Supp. 1998). Prior to this change, the statute prohibited marriages between persons already married and certain family members and relatives.

105. *Id.*

106. Representative Arlon Lindner, R-Corcoran, perhaps the most publicly vocal proponent of the state DOMA, read a letter on the floor of the Minnesota House of Representatives regarding the “homosexual agenda” to destroy the family as well as the gay rights platform which includes, among other things, a repeal of the laws regulating the age of sexual consent and the number of persons constituting a marriage. Audiotape of Minnesota House of Representatives, Tape 4, 80th Session, 61st day (May 16, 1997) (available at Minnesota Legislative Law Library). He also stated that sanctioning same-sex marriages would open the door to “a man marrying a child or a man marrying a dog.” See Patricia Lopez Baden, *Face to Face on Gay Marriage*, STAR TRIB. (Minneapolis), May 15, 1997, at 1B. Recounting an incident of molestation when he was a child, Lindner stated in a Star Tribune interview regarding same-sex marriage, that as a child he “wasn’t savvy to the ways of homosexuals at the time.” *Id.*

107. Senator Neville denied that the purpose for introducing the bill was hateful or malicious; the purpose was to protect the status quo from a legislatively active court. In defending the bill, however, Senator Neville relied on arguments regarding procreation in marriage, and implied that homosexuals are inferior to heterosexuals when it comes to nurturing children. Partial Audiotape of Senate Floor S. F. 1908, Tape 2, Side B, 80th Session (May 16, 1997).

108. See Patricia Lopez Baden, *Gay Marriage Ban Passes Easily Despite Spear’s Plea*, STAR TRIB. (Minneapolis), May 17, 1997, at 1B [hereinafter *Gay Marriage Ban Passes*]; Patricia Lopez Baden, *Gay Marriage Ban Meets Roadblock: State’s Version of Defense of Marriage Act Unlikely to Get Hearing this Session*, STAR TRIB. (Minneapolis), March 12, 1997, at 1B [hereinafter *Gay Marriage Ban Meets Roadblock*].

109. See *Gay Marriage Ban Passes*, *supra* note 108, at 1B.

110. See Patricia Lopez Baden, *Bid to Ban Same-Sex Marriage Advances: Measure*

port of the motion and the amendments, proponents argued that although the bill would not change Minnesota's substantive law, time was of the essence because Hawaii was poised to allow same-sex marriage. According to the bill's proponents, if Minnesota failed to pass the amendments, Minnesota would be required to give full faith and credit to Hawaii same-sex marriages or would be in the precarious position of having to apply the law retroactively.<sup>111</sup>

Later that same month, the legislative amendments were successfully tacked on to a five billion dollar omnibus Health and Human Services bill.<sup>112</sup> This was a crucial piece of legislation which the state was required to pass if it wanted to retain a significant amount of federal funding.<sup>113</sup> By including the DOMA amendments on this piece of legislation, DOMA proponents were guaranteed that the amendments would be considered. Moreover, the legislature would easily pass DOMA because legislators who might not otherwise vote in favor of DOMA would be hard-pressed to vote against a necessary piece of legislation.<sup>114</sup> This strategy also allowed an easy out for legislators who might otherwise have had to face angry gay and heterosexual constituents who supported same-sex marriage.

Despite the obvious impact the DOMA legislation would have on same-sex couples wishing to marry and an impassioned plea by Senate President Allen Spear, no public hearings were held on the topic.<sup>115</sup> On May 16, 1997, the legislation easily passed 54-12 in the Senate and 112 to 19 in the House, with little debate<sup>116</sup> or fanfare.<sup>117</sup>

*Added to Child Support Bill in House*, STAR TRIB. (Minneapolis), March 20, 1997, at 1B [hereinafter *Bid to Ban Same-Sex Marriage Advances*].

111. See *Bid to Ban Same-Sex Marriage Advances*, *supra* note 110, at 1B (comments of Rep. Charlie Weaver, R-Anoka); *Gay Marriage Ban Meets Roadblock*, *supra* note 108, at 1B (comments of Rep. Neville and Rep. Steve Sviggum, R-Kenyon).

112. See *Gay Marriage Ban Passes*, *supra* note 108, at 1B.

113. The sponsor of the HHS bill, Matt Entenza, DFL-St. Paul, who voted against the amendment, had little choice but to accept it because withdrawing the bill would have likely resulted in the loss of federal money. *Bid to Ban Same-Sex Marriage Advances*, *supra* note 110, at 1B.

114. See *Gay Marriage Ban Passes*, *supra* note 108, at 1B. The legislation provided, among other things, a 31 million dollar increase in children's funding including money for crisis nurseries, mental health collaboratives and child abuse prevention, and a 36 million dollar cost-of-living adjustment for personal care attendants and others providing care for the disabled and elderly.

115. See *Gay Marriage Ban Meets Roadblock*, *supra* note 108, at 1B. This is the same legislature that spent days in hearings on possible alternatives to adding a new area code in the Twin Cities metropolitan area.

116. Senator Samuelson acknowledged on the Senate Floor, after Senator

## VI. FULL FAITH AND CREDIT, CHOICE OF LAW, AND THE MINNESOTA DEFENSE OF MARRIAGE ACT

It is ironic that Minnesota passed special legislation so that it could, notwithstanding the Full Faith and Credit Clause of the United States Constitution, avoid recognizing same-sex marriages performed in Hawaii because full faith and credit probably would not have required such recognition given its public policy exception. Rather, whether Minnesota is required to recognize same-sex marriages performed elsewhere depends on its choice of law rules governing marriage. However, the provision of the state DOMA which allows Minnesota to ignore same-sex *divorce* clearly violates the Full Faith and Credit Clause. Divorce, unlike marriage, is reduced to a judgment. Significantly, no public policy exception enables a state to ignore a valid judgment obtained in another state.

### A. *Full Faith and Credit and Marriage*

In considering the constitutionality of Minnesota's DOMA, it makes sense to begin with a discussion of the Full Faith and Credit Clause of the United States Constitution because concerns regarding full faith and credit were the impetus for DOMA. In the end, however, the Full Faith and Credit Clause does not provide a serious constitutional challenge to DOMA because of its public policy exception. DOMA is much more likely to be struck down based upon its significant negative effect on the fundamental right to travel and because it is repugnant class legislation which violates equal protection.

The constitutional requirement of full faith and credit does not automatically compel a forum state to "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."<sup>118</sup> Full faith and credit

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Spear's comments, that the senate did not have an opportunity to debate the issue as it should have, and stated that there may have been a different attitude about it if it had been fully debated. May 16, 1997, Senate Floor S. F. 1908, Tape 2, Side A. The debate that did occur, however, was described as "some of the most acrimonious and personal debate of the legislative session." *Gay Marriage Ban Passes*, *supra* note 108, at 1B.

117. See *Gay Marriage Ban Passes*, *supra* note 108, at 1B. Governor Carlson signed the health care bill despite being critical of attaching controversial social policy amendments to spending bills and having previously vetoed health care bills containing abortion-related amendments. See Patricia Lopez Boden, *Ban on Gay Marriages Likely To Become Law*, STAR TRIB. (Minneapolis), May 15, 1997, at 1A.

118. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493,

does not require a state to give effect to another state's statutory policies when to do so would be counter to domestic policy.<sup>119</sup> Marriage is not only a subject matter which the states have traditionally legislated, it is a subject matter that has traditionally been within the *exclusive* province of the states. In other words, each state has the exclusive right and power to determine its resident and domiciled citizens' and subjects' status respecting marriage and divorce.<sup>120</sup>

In *Pennoyer v. Neff*,<sup>121</sup> the Supreme Court noted that a state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."<sup>122</sup> The State has an undeniable interest in ensuring that its domestic relations rules reflect the widely held values of its people.<sup>123</sup> No federal precedent, however, clearly resolves the ambiguities created by inconsistent state marriage laws, such as the existence and recognition of common law marriages, and full faith and credit has not been routinely applied in the domestic relations area.

When considering whether full faith and credit requires a state to give effect to another state's statutory policies or whether to do so would be counter to the state's domestic policy, the Supreme Court must choose between the two competing public policies involved.<sup>124</sup> The basic conflict, however, is really between the principles embodied in the Full Faith and Credit Clause on the one hand, and the policy of the state on the other.<sup>125</sup> Because the goal of full faith and credit is the "maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states,"<sup>126</sup> in some instances, states must sacrifice their own particular local policies as a part of the cost of membership in the

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501 (1939).

119. See *Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 833-34 (Minn. 1979).

120. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); see also *Warner v. Warner*, 219 Minn. 59, 67, 17 N.W.2d 58, 62 (1944).

121. 95 U.S. 714, 714 (1877).

122. *Pennoyer*, 95 U.S. at 734-35.

123. See *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring).

124. See *Hughes v. Fetter*, 341 U.S. 609, 611 (1951); *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 624-25 (1946).

125. See *Hughes*, 341 U.S. at 611.

126. *Id.* at 612; see also *Order of United Commercial Travelers of Am.*, 331 U.S. at 601.



federal system.<sup>127</sup>

It is likely that the Supreme Court would not require Minnesota (or the other 48 states which do not recognize same-sex marriage) to give full faith and credit to same-sex marriages performed in Hawaii given the feverish opposition to same-sex marriage. The result would likely be different if Minnesota were in a small minority of states that refused to permit or recognize same-sex marriage. In such circumstances, one can more easily imagine the Supreme Court holding that the unifying principles of federalism embedded in the Full Faith and Credit Clause require Minnesota's public policy against same-sex marriage to give way. Although "[t]he Full Faith and Credit Clause is not to be applied accordion-like to accommodate our personal predilections,"<sup>128</sup> here, it is one state's personal predilections which are being forced on all of the other states.

This is the strongest and most rational argument in support of DOMA, and the reason why many persons who might otherwise support human rights for gays and lesbians nevertheless support DOMA. Why should Hawaii (perhaps more accurately, the Hawaii Supreme Court) be allowed to force its particular local policies regarding same-sex marriage on the rest of the union?<sup>129</sup> The question is especially significant because each state has traditionally had the power to regulate its marriages, including the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties?<sup>130</sup>

Despite the fact that the Full Faith and Credit Clause will probably not require states to recognize Hawaii same-sex marriages by virtue of its public policy exception, it should. The Supreme Court has stated that only in "exceptional circumstances" should a state be allowed to refuse full faith and credit on the basis of its own public policy.<sup>131</sup> This is particularly true in the field of commercial law, where certainty is of high importance.<sup>132</sup> The fields of commercial law and contracts provide a fitting analogy to marriage,

127. See *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948).

128. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948).

129. See, e.g., Senator Phil Gramm's comments during the Senate Debate on DOMA, October 9, 1996, quoted in SULLIVAN, *supra* note 9, at 229-32.

130. See *Baehr v. Lewin*, 852 P.2d 44, 58 (1993).

131. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (Frankfurter, J., dissenting).

132. See *Hughes v. Fetter*, 341 U.S. 609, 615 (1951); *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 592 (1947).

which is, after all, a contract between two parties and the state.<sup>133</sup> The United States Supreme Court made this very analogy in the *Order of United Commercial Travelers of America v. Wolfe*, where it likened the act of becoming a member of a corporation to the act of marriage, and described it as “entering into a complex and abiding relation.”<sup>134</sup>

In commercial cases, the Supreme Court has often imposed a “rather rigid rule that [the] state must defer to the law of the state of incorporation, or to the law of the place of the contract.”<sup>135</sup> Full faith and credit is more likely to be given under such circumstances because there is a pre-existing relationship between the parties and a need that the parties be able to predict the consequences of their transaction at the time of its conception.<sup>136</sup> As in commercial transactions, spouses, be they of the same or opposite sex, should be able to expect that their relationship will remain legally intact unless and until one or both them decide to terminate it.<sup>137</sup> A cross-country automobile journey should not cause a couple’s marriage to appear and disappear upon the crossing of state lines.

Moreover, Minnesota recognizes that *each* state has the exclusive right and power to determine the status of its resident and domiciled citizens and subjects respecting the question of marriage and divorce.<sup>138</sup> Under the cooperative concept of federalism, a state should be willing to accept and regulate marriages, including same-sex marriages, licensed elsewhere in return for recognizing its own, possibly idiosyncratic, marriages.<sup>139</sup> If states do not give full faith and credit to marriages performed and legally recognized in other states, no certainty exists for married couples as they cross

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133. See *Robertson v. Roth*, 163 Minn. 501, 503, 204 N.W. 329, 329 (1925) (stating that marriage is contractual in nature and carries with it certain responsibilities and duties over which the parties have no control).

134. *Order of United Commercial Travelers of Am.*, 331 U.S. at 619-20 (quoting *Trapp v. Sovereign Corp. of the Woodmen of the World*, 102 Neb. 562, 168 N.W. 191 (1918)).

135. *Hughes*, 341 U.S. at 615; see also *Order of United Commercial Travelers of Am.*, 331 U.S. at 592.

136. See *Hughes*, 341 U.S. at 617-18 (distinguishing tort cases from commercial cases and stating that where the action does *not* rest on a pre-existing relationship, there is no need to enable the parties to predict consequences of the transaction).

137. See *Safranski v. Safranski*, 222 Minn. 358, 362, 24 N.W.2d 834, 836 (1946) (stating that marriage contract cannot be viewed as an ordinary contract because the parties may not simply agree to terminate at any time, but must instead seek a judgment of divorce).

138. *Ostrander v. Ostrander*, 190 Minn. 547, 549, 252 N.W. 449, 450 (1934).

139. See *Keane*, *supra* note 93, at 507-08.

state lines; they can be married in one state, but by the simple act of travel, not married in another.<sup>140</sup> This is an affront not only to the spouses themselves, but to the state performing the marriage as well.<sup>141</sup> If full faith and credit is not given to same-sex marriages, the rights and obligations of the parties become unpredictable and almost inevitably unequal.<sup>142</sup>

### B. Full Faith and Credit and Divorce

A significant constitutional issue is raised by Minnesota's DOMA legislation<sup>143</sup> to the extent that it means that the state will not give full faith and credit to a divorce decree arising from an otherwise valid same-sex marriage.<sup>144</sup> Well-established law demands that a dissolution be afforded full faith and credit because the dissolution has been reduced to a judgment. This is an anomaly in light of the fact that the marriage itself might not have been entitled to full faith and credit. However, Supreme Court precedent "differentiates the credit owed to laws (legislative measures and common law) and to judgments."<sup>145</sup> Simply stated, there is "no roving 'public policy exception' to the full faith and credit due judg-

140. Travelers would be subject to, among other things, the possibility of liability under state laws. See, e.g., MINN. STAT. § 609.34 (1996) (stating "[w]hen any man and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor").

141. See Keane, *supra* note 93, at 507-08. Keane argues that given the dual nature of marriage as both a discreet act and an ongoing legal relationship, the law of the state where the marriage occurred should apply to the lawfulness of the marriage itself. The marrying state has an intent to regulate the validity of the marriage. While the law of the domiciliary state should apply to the relationship itself given the domiciliary state's interest in regulating the ongoing relationship of its citizens. See *id.* at 507.

142. See *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 592 (1947).

143. See MINN. STAT. § 517.03 subd. 1(b). The statute provides:

A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.

*Id.* (emphasis added).

144. The difficulty gay persons have terminating their relationships is one of the more important aspects of gay marriage. Whereas heterosexual spouses may rely upon divorce proceedings to equitably put an end to their relationships, homosexual couples are, for the most part, left to sort things out on their own, using a costly smorgasbord of judicial remedies including conciliation court, unlawful detainer, restraining orders and other remedies in the district courts. See Wolfson, *supra* note 59, at 584.

145. *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4063 (Jan. 20, 1998).

ments.”<sup>146</sup>

Although full faith and credit has not been historically applied to marriage, it has been uniformly applied to divorce decrees. The Full Faith and Credit Clause of United States Constitution “requires” that a state “must” give the same final effect to divorce decree as was given in the state where the dissolution occurred.<sup>147</sup> There is no public policy exception here as full faith and credit orders submission by a state even to “hostile” policies reflected in the judgment of another state.<sup>148</sup> Thus it has been said that the requirements of full faith and credit, “so far as judgments are concerned, are exacting, if not inexorable . . .”<sup>149</sup>

Not surprisingly then, Minnesota uniformly affords full faith and credit to final judgments of divorce entered in other states provided the state had personal and subject matter jurisdiction.<sup>150</sup> According to the Minnesota Supreme Court another state court’s findings and decree of divorce is, “[w]ithout doubt . . . a final and conclusive adjudication, valid anywhere . . .”<sup>151</sup> This is true even if Minnesota does not approve of the other state’s marriage and divorce policies.<sup>152</sup> Yet, pursuant to Minnesota’s DOMA, the state will not enforce “contractual rights granted by virtue of the marriage *or its termination*.”<sup>153</sup> It is unclear whether “contractual rights” includes legal obligations resulting from a divorce judgment. If so, clearly that portion of DOMA is unconstitutional.

The practical consequences of not recognizing obligations arising from a decree of divorce are apparent and fraught with disaster. If Minnesota’s DOMA is interpreted to allow the state to refuse to credit a judgment for child custody<sup>154</sup> and support or spousal maintenance, or even if it is strictly interpreted to concern contrac-

146. *Id.* at 4064 (citation omitted) (emphasis in original).

147. *Bogen v. Bogen*, 261 N.W.2d 606, 609 (Minn. 1977).

148. *Estin v. Estin*, 334 U.S. 541, 546 (1948).

149. *Id.*

150. *See Mahoney v. Mahoney*, 433 N.W.2d 115, 119 (Minn. Ct. App. 1988) (relying upon *Roche v. McDonald*, 275 U.S. 449 (1928)).

151. *Larsen v. Erickson*, 222 Minn. 363, 366, 24 N.W.2d 711, 713 (1946).

152. *See Sherrer v. Sherrer*, 334 U.S. 343, 348-49 (1948); *Williams v. North Carolina*, 317 U.S. 287, 302-03 (1942).

153. MINN. STAT. § 517.03 subd. 1(b) (Supp. 1998).

154. Prior to the enactment of the Parental Kidnapping and Parentage Act and the Full Faith and Credit for Child Support Orders Act, Minnesota did not afford full faith and credit to child custody orders, but recognized them as a matter of comity. *Barker v. Barker*, 286 Minn. 314, 315, 176 N.W.2d 99, 101 (1970) (citing *May v. Anderson*, 345 U.S. 528 (1953)).

tual rights, individuals wishing to avoid their marital responsibilities, be it the marriage itself or obligations arising from the termination of the marriage, will simply move to this state (or any other state with similar laws), and the state, in turn, will reward the scoundrel by refusing to recognize the marriage and further, by refusing to give effect to any obligations arising thereunder.<sup>155</sup> The problems this anomaly could create are absolutely staggering.

### C. *Minnesota's Choice of Law Rules Regarding Marriage*

As previously indicated, Minnesota's common law choice of law rules have a greater bearing on whether the state would recognize same-sex marriages entered into in another state than does the Full Faith and Credit Clause of the United States Constitution. In Minnesota, the validity of marriage has for over a century been determined by applying the law of the place where the marriage was contracted.<sup>156</sup> A marriage valid according to the law where it was performed, be it another state or a foreign country, will be valid in Minnesota.<sup>157</sup> This is true even if the parties were mere sojourners in the place where the marriage took place<sup>158</sup> or if they purposefully left the state to evade its marriage laws.<sup>159</sup> This rule, which is commonly referred to as *lex loci contractus* or *celebrationis*,<sup>160</sup> recognizes that it is "obviously essential to the welfare of mankind that a marriage valid in one place should be valid everywhere."<sup>161</sup> Conversely, a marriage void where it was celebrated is void in Minnesota as well.<sup>162</sup>

An exception to the general celebration rule exists, however, if

155. Strasser, *supra* note 89, at 321.

156. See, e.g., *Bogen v. Bogen*, 261 N.W.2d 606, 609 (Minn. 1977) (recognizing marriage of persons domiciled in Minnesota if marriage is valid under the law of the state where it was contracted); *Earl v. Godley*, 42 Minn. 361, 362-63, 44 N.W. 254, 255 (1890) (same); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (stating "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

157. See *In re Ommang's Estate*, 183 Minn. 92, 95, 235 N.W. 529, 531 (1931); *In re Lando's Estate*, 112 Minn. 257, 261-62, 127 N.W. 1125, 1126 (1910) (applying German law to determine marriage was valid).

158. See *Lando's Estate*, 112 Minn. at 262, 127 N.W. at 1126.

159. See *Ommang's Estate*, 183 Minn. at 96, 235 N.W. at 531.

160. *Johnson v. Johnson*, 214 Minn. 462, 467, 8 N.W.2d 620, 622-23 (1943).

161. *Lando's Estate*, 112 Minn. at 262, 127 N.W. at 1126.

162. See *id.* at 261, 127 N.W. at 1126.

the marriage violates a “strong public policy” of the domicile of the parties.<sup>163</sup> “[P]ublic policy does not mean simply sound policy or good policy, but it means the laws of the state, whether found in our Constitution, statutes or our judicial records.”<sup>164</sup> Marriages declared absolutely void by the Minnesota legislature demonstrate such a strong public policy.<sup>165</sup> This is to be distinguished from statutes which simply prohibit certain marriages. If the statute does not expressly declare the marriage invalid, the Minnesota Supreme Court will not find that there is a strong public policy reason to invalidate a marriage lawfully contracted elsewhere.<sup>166</sup> But even this principle, which seems straight-forward enough, has not been uniformly applied or followed.

To demonstrate, Minnesota abolished common law marriages in 1941 by statute.<sup>167</sup> Thus, common law marriages contracted on or before April 26, 1941, are recognized as valid, and those contracted thereafter are not. In *Laikola v. Engineered Concrete*, the Minnesota Supreme Court, interpreting this statute, held that common law marriages cannot be consummated by Minnesota residents who temporarily visit a state that allows common law marriage.<sup>168</sup> However, The *Laikola* court also held that Minnesota will recognize common law marriages under certain circumstances.<sup>169</sup> While the former holding is entirely consistent with the celebration rule, the latter holding is entirely inconsistent with the public policy exception to the celebration rule. The Minnesota Supreme Court recognized that common law marriages consummated after a certain date, having been deemed to be null and void by the legislature, *are* against public policy, but held that Minnesota *will* recognize them if the couple resided (more than temporarily) in a

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163. See *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 656 (Minn. 1979).

164. *Chubbuck v. Holloway*, 182 Minn. 225, 227, 234 N.W. 314, 315 (1931).

165. See *In re Kinkad's Estate*, 239 Minn. 27, 30, 57 N.W.2d 628, 631 (1953) (holding marriage valid by law of place contracted, valid everywhere unless it violates public policy of the state of domicile).

166. See *id.* at 35-37, 57 N.W.2d at 632-35 (holding that state's prohibition on marriages contracted within six months after either party has been divorced does not invalidate a marriage of Minnesota residents and citizens contracted in Iowa, even where the Iowa marriage license was procured through fraud and perjury); see also *Bogen v. Bogen*, 261 N.W.2d 606, 609 (Minn. 1977) (same).

167. See MINN. STAT. § 517.01 (1996) (abolishing common law marriage).

168. *Laikola*, 277 N.W.2d at 656.

169. See e.g., *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977); *Laikola*, 277 N.W.2d at 658; but see *Baker v. Baker*, 222 Minn. 169, 171, 23 N.W.2d 582, 583 (1946).

state that recognizes common law marriage.<sup>170</sup>

What then to make of the state DOMA provisions? The Minnesota legislature has declared same-sex marriages null and void, disposing of the issue of whether same-sex marriages are contrary to the state's public policy. However, it appears that under *Laikola* Minnesota should nevertheless recognize a same-sex marriage if the couple resided in the state which married them and met all of that state's requirements for marriage. Thus, according to Minnesota's common law, same-sex couples who reside and marry in Hawaii could later move to Minnesota and expect that their marriage would be honored. This is apparently true even if the couple purposefully fled from Minnesota to escape its marriage laws, as long as the couple resided in Hawaii at the time of the marriage.

But for the statutory conclusion that same-sex marriage is contrary to the public policy of Minnesota, it is questionable whether the state could establish a true basis for concluding that same-sex marriage is contrary to the "strong" public policy of this state. The typical reasons cited for prohibiting same-sex marriages are to foster procreation, encourage morality and maintain family stability.<sup>171</sup> If the state has a sodomy statute, it is also argued that allowing same-sex marriage would conflict with the prohibition on homosexual acts.<sup>172</sup> Indeed, all of these reasons, explicitly or implicitly, were argued by proponents of Minnesota's DOMA on the House and Senate Floors. None of these justifications, however, bear close scrutiny.

Marriage, in Minnesota or any other state, has never been reserved for those couples who intend to or are physically able to procreate.<sup>173</sup> Senator Spear correctly argued on the Senate floor

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170. See *Laikola*, 277 N.W.2d at 658.

171. See Curt Pham, *Let's Get Married in Hawaii: A Story of Conflicting Laws, Same-Sex Couples, and Marriage*, 30 FAM. L.Q. 727, 733 (Fall 1996).

172. See *id.*

173. See Wolfson, *supra* note 59, at 579. Wolfson states:

[I]n America today, marriage is not a mere dynastic or property arrangement; it is not best understood as a tool or creature of the state or church; and it is not simply, primarily, or necessarily about parenting, let alone procreation. Whatever the history, today marriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community. And that concept of marriage, no more and no less, should hold for gay people seeking to marry. (citations omitted).

*Id.*

that the ability to marry in Minnesota is in no way limited to individuals who intend to have children.<sup>174</sup> Persons who are infertile or who simply do not intend to have children are nevertheless legally entitled to be married. Senator Spear argued that we celebrate the marriage of elderly persons because of the companionship and emotional support which flow from the marriage, not because we expect that children will be born of the marriage.<sup>175</sup> It is simply disingenuous to deny same-sex couples the right to marry based upon a procreation argument when procreation plays no role in the decision to allow opposite-sex couples to marry. Moreover, many same-sex couples do in fact give birth to and raise children, be they through former relationships, adoption or artificial means.<sup>176</sup>

It is difficult to see how *banning* same-sex marriage *encourages* morality. Allowing persons of the same sex to marry, an act which promotes "a way of life," "harmony in living" and "bilateral loyalty,"<sup>177</sup> actually encourages monogamy in a class which is often criticized for being promiscuous. Minnesota also statutorily protects homosexuals from discrimination,<sup>178</sup> but relying on the Minnesota Human Rights Act to support same-sex marriage is fraught with difficulty. Significantly, the Act specifically provides that nothing in it should be construed to mean that the state condones homosexuality or authorizes the recognition of same-sex marriage.<sup>179</sup>

Opponents of same-sex marriage will likely point to Minnesota's sodomy law in support of their argument that same-sex marriage is contrary to the state's public policy.<sup>180</sup> In *Bowers v. Hard-*

174. See Partial Audiotape of Senate Floor, S.F. 1908, Tape 2, Side A, 80th Session (May 16, 1997).

175. *Id.*

176. The number of children raised in households with gay or lesbian parents ranges from six to fourteen million. See Wolfson, *supra* note 59, at 577 n.44.

177. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

178. See MINN. STAT. § 363.01 subd. 45 (Supp. 1998). In 1993, the legislature amended the Minnesota Human Rights Act to protect persons from discrimination on the basis of sexual orientation. The statute currently defines sexual orientation as:

having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. 'Sexual orientation' does not include a physical or sexual attachment to children by an adult.

*Id.*

179. MINN. STAT. § 363.021(1) & (4) (Supp. 1998).

180. See MINN. STAT. § 609.293 (1987).



wick, the United States Supreme Court held that the belief of the majority of the population that homosexual sodomy is immoral and unacceptable provides a rational basis for sodomy statutes.<sup>181</sup> The sodomy argument is not particularly compelling because Minnesota's sodomy law does not differentiate between homosexual and heterosexual conduct,<sup>182</sup> and the statute is rarely enforced.<sup>183</sup>

Moreover, the United States Supreme Court has recognized that the attributes of marriage go well beyond the act of consummating the marriage. In *Turner v. Safley*,<sup>184</sup> in which the Court found marriage to be a fundamental right of prison inmates under *Zablocki*, marriage was trumpeted as an important expression of emotional support and public commitment.<sup>185</sup> The court further noted that to many persons marriage has a spiritual significance and may be an exercise of religious faith as well as an expression of personal dedication.<sup>186</sup> Marriage, the Supreme Court also recognized, is often a precondition to the receipt of important governmental benefits, property rights, and other less tangible benefits, such as the legitimization of children born out of wedlock.<sup>187</sup> Thus, governmental recognition of same-sex marriage should not be viewed as moral approval, but a recognition that the rights of homosexuals and heterosexuals are equal when it comes to conferring important financial and legal benefits.<sup>188</sup>

As was ably demonstrated in Hawaii, proper child-rearing and family stability do not depend upon the sex or sexual orientation of the parents, but upon the nurturing relationship which develops between parents and child.<sup>189</sup> There is a wide diversity in the structure and configuration of families throughout this nation. Single parents, gay and lesbian parents, and other non-traditional parents can be and are as fit and loving parents as are opposite-sex couples.<sup>190</sup> Moreover, as the *Baehr* court recognized, allowing same-sex marriage may actually have a positive effect on the optimal devel-

181. See 478 U.S. 186, 196 (1986).

182. See *State v. Schweppe*, 306 Minn. 395, 402, 237 N.W.2d 609, 615 (1975) (stating that the fact that a person is a homosexual does not constitute a crime).

183. See *Bowers*, 478 U.S. at 198 n.2.

184. 482 U.S. 78 (1987).

185. See *id.* at 95-96.

186. See *id.* at 96.

187. See *id.*

188. See Wolfson, *supra* note 59, at 615.

189. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*17 (Haw. Cir. Ct. Dec. 3, 1996).

190. See *id.*

opment of children because same-sex couples may then be able to obtain certain protections and benefits that come with or become available as a result of marriage.<sup>191</sup>

Finally, same-sex marriage is different and distinct from other marriages prohibited by chapter 517 of the Minnesota Statutes, which seeks, among other things, to protect such presumptively vulnerable persons as children and close family members.<sup>192</sup> There is nothing presumptively vulnerable about an adult who simply wishes to marry someone of the same sex.<sup>193</sup> For this reason, the ban on same-sex marriage is much more closely analogous to the now unconstitutional ban on interracial marriages in that the true reason for the legislation stems from prejudice, fear or a sense of morality rather than any rational concern for the persons entering into the relationship.<sup>194</sup>

As a matter of public policy, Minnesota's DOMA, like its federal counterpart, is a disaster because there is no compelling reason for banning same-sex marriage. "Rather, there is an emotional repugnance to homosexuality that is overwhelming rational consideration of this issue."<sup>195</sup> DOMA "promotes bigotry, undermines the stability and certainty of marriage, hurts innocent individuals, and provides a relatively easy way for individuals to avoid their marital responsibilities."<sup>196</sup> "The Act would be laughable were its effects not so potentially dangerous and tragic."<sup>197</sup>

## VII. THE FUNDAMENTAL RIGHT TO TRAVEL AND THE MINNESOTA DEFENSE OF MARRIAGE ACT

Perhaps one of the strongest, and most overlooked, challenges to DOMA legislation is based upon each citizen's fundamental constitutional right to interstate travel.<sup>198</sup> The United States Supreme Court has long recognized that the very nature of the United States and our constitutional concepts of personal liberty "unite to require that all citizens be free to travel throughout the length and

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191. See *id.* at \*18.

192. See Ruskay-Kidd, *supra* note 89, at 1442.

193. See *id.*

194. See *id.*

195. See Wolfson, *supra* note 59, at 614 (quoting *State Should Drop Ban on Same-Sex Marriage*, STAR BULL. (Honolulu), Feb. 4, 1994, at A12).

196. See Strasser, *supra* note 89, at 323.

197. See *id.*

198. See *State v. Cuypers*, 559 N.W.2d 435, 436-37 (Minn. Ct. App. 1997) (citing *United States v. Guest*, 383 U.S. 745, 759 (1966)).

breadth of the land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."<sup>199</sup> This freedom of travel, whatever its constitutional origins,<sup>200</sup> "includes the freedom to enter and abide in any state."<sup>201</sup> Minnesota may not rely on the federal DOMA to justify any burden on the right to interstate travel because "Congress may not authorize the States to violate the Equal Protection Clause."<sup>202</sup>

It has been said that the personal right to travel is "unconditional,"<sup>203</sup> and implicated when a statute (1) *actually deters* such travel, (2) when *impeding* travel is its primary objective, or (3) when it uses any *classification* which serves to *penalize* the exercise of that right.<sup>204</sup> If a statute implicates the right to travel in a meaningful and significant way, the state must show a compelling state interest to justify the legislation. The state must show more than that the legislation is rationally related to a governmental objective because the right to travel is fundamental.<sup>205</sup> "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis."<sup>206</sup>

In *Mitchell v. Steffen*, the Minnesota Supreme Court considered whether a six-month durational residency requirement for full general assistance work readiness benefits burdened the fundamental right to travel even if newly arrived state residents could receive benefits equal to those they were eligible to receive in their former state.<sup>207</sup> The court first determined that there was no evi-

199. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

200. See *Guest*, 383 U.S. at 758. The *Guest* court stated, "[a]lthough the Articles of Confederation provided that 'the people of each State shall have free ingress and egress to and from any other State', the right to travel finds no explicit mention in the United States Constitution." *Id.* Indeed, there has been a significant amount of debate concerning the constitutional origins of this right, which is now roundly recognized as being fundamental. Some trace it to the Privileges and Immunities Clause, others to the Commerce Clause, some from both, and still others from the Due Process Clause of the Fifth Amendment. See *Shapiro*, 394 U.S. at 630 n.8; *Guest*, 383 U.S. at 762-75 (Harlan, J., concurring in part, dissenting in part).

201. See *Davis v. Davis*, 297 Minn. 187, 189, 210 N.W.2d 221, 223 (1973) (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

202. See *Shapiro*, 394 U.S. at 641.

203. See *id.* at 643 (Stewart, J., concurring).

204. See *Mitchell v. Steffen*, 504 N.W.2d 198, 200 (Minn. 1993).

205. See *Shapiro*, 394 U.S. at 634; *Davis*, 297 Minn. at 191, 210 N.W.2d at 224 (citations omitted).

206. See *Mitchell*, 504 N.W.2d at 200 (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1981)).

207. See *id.* at 199-200.

dence that the six-month durational residency requirement deterred migration or sought to impede travel into the state.<sup>208</sup> Indigent newcomers to the state were no worse off than they were in their former state because the benefits provided by Minnesota would remain the same as those provided by the indigent's former state.<sup>209</sup> Thus, although the purpose of the statute was to conserve the public fisc, it was intended to save money without deterring an indigent's decision to travel.<sup>210</sup> Because the *Mitchell* Court concluded that the durational residency requirement did not deter travel and did not have the purpose of impeding travel, it considered whether the legislation used a classification to penalize a person's right to travel.<sup>211</sup>

"[A] state may not impose a penalty upon those who exercise a right guaranteed by the Constitution."<sup>212</sup> When considering whether a statute unconstitutionally penalizes a person's fundamental right to travel, the Minnesota Supreme Court has concluded that the severity of the penalty is relevant in determining the constitutionality of the legislation; the greater the penalty, the closer the scrutiny.<sup>213</sup> "Penalize," as used in this context, does not mean to sanction or to punish, but rather to suffer some disadvantage, loss or hardship.<sup>214</sup> Not every penalty on interstate travel will trigger the compelling state interest test, and the court may weigh the harshness of the penalty when determining whether there has been a denial of equal protection.<sup>215</sup> "[T]he question is not so much whether the right to travel has been 'violated,' but whether the right to travel has been so burdened by [the legislation] that the statute's classification requires strict scrutiny rather than minimal rational basis analysis."<sup>216</sup>

208. *See id.* at 200.

209. *See id.*

210. *See id.*

211. *See id.*

212. *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)).

213. *See Davis v. Davis*, 297 Minn. 187, 191, 210 N.W.2d 221, 224 (1973).

214. *See Mitchell*, 504 N.W.2d at 202 (citing *Cole v. Hous. Auth. of City of Newport*, 435 F.2d 807, 811 (1st Cir. 1970)).

215. *See Davis*, 297 Minn. at 192, 210 N.W.2d at 225; *see also Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (upholding Minnesota's one-year residency requirement for qualifying for in-state tuition despite the fact that it constituted a penalty on interstate travel and is difficult to find any compelling state interest to justify it).

216. *Mitchell*, 504 N.W.2d at 200.

The *Mitchell* court concluded that the statute clearly failed under this test because the durational residency requirement divided residents into two classes, old residents and new residents, and discriminated against the latter on the basis of their recent travel.<sup>217</sup> The court reached its conclusion even though there is no constitutional requirement that the state provide welfare benefits in any amount, let alone an adequate amount.<sup>218</sup> Although the *Mitchell* court recognized that the right to travel might more appropriately focus on interstate travel itself and not on what happens after the travel has ended, it concluded that the right to travel includes a "right to abide in any state" without being disadvantaged because of that choice.<sup>219</sup> In short, if the state decides to provide welfare benefits, the right to travel mandates that it distribute the benefits equally to its similarly situated needy residents, without distinguishing between them on the basis of the duration of their residency.<sup>220</sup>

In *Davis v. Davis*, the Minnesota Supreme Court, considering the constitutionality of a statute which prohibited the granting of a divorce unless the plaintiff had resided in the state for a period of one year immediately prior to the filing of the complaint, reached the opposite result.<sup>221</sup> The Court concluded that the interest affected by the durational residency requirement in the divorce statute was much less urgent than those interests affected by the durational residency requirements in the cases relied upon by the plaintiff, namely, the right of individuals to subsist, to survive and to vote.<sup>222</sup> The *Davis* court applied the rational basis test rather than the compelling interest test based upon its conclusion that the ultimate right to divorce was simply delayed by the legislation and that no economic prejudice resulted from the durational residency requirement because an action for support and maintenance could be brought immediately.<sup>223</sup> The divorce statute was upheld because

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217. See *Mitchell*, 504 N.W.2d at 199. The statute provided needy residents of Minnesota, who had resided in the state less than six months, only 60% of the work-readiness benefits that other, equally needy residents of the state received. *Id.*

218. See *id.* at 203.

219. *Id.* at 201 (citing *Dunn*, 405 U.S. at 338).

220. See *id.* at 203.

221. See 297 Minn. 187, 194, 210 N.W.2d 221, 226 (1973).

222. See *id.* at 193, 210 N.W.2d at 225 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969) (involving the denial of welfare benefits to persons who had not resided in the state for one year); *Dunn*, 405 U.S. at 330 (involving a one-year durational residency requirement for voter registration)).

223. See *Davis*, 297 Minn. at 194-95, 210 N.W.2d at 226.

it was rationally related to the state's legitimate goal of limiting the access of nonresidents to Minnesota courts and of compelling nonresidents to apply to their own state's courts for relief.<sup>224</sup>

Unlike the legislation at issue in *Mitchell*, it appears certain that Minnesota's Defense of Marriage legislation will actually deter travel and migration into the state. To make this determination, there need not be a finding that the statute actually deters travel; the test is whether it is reasonable to infer that individuals would be discouraged from migrating.<sup>225</sup> Consider the following hypothetical involving a same-sex couple, Julie and Sarah, lawfully married in Hawaii shortly after the Hawaii Supreme Court upheld the trial court's decision in *Baehr*:

Julie works for a national company, and Sarah is self-employed and works at home so that she can raise their son, John, who Sarah gave birth to during the marriage as a result of in vitro fertilization. Julie's employer provides benefits, including health insurance, to Sarah and John. Five years after their marriage, Julie's company offers her a substantial promotion, but the promotion will require Julie's family to relocate in Minnesota.

If Julie and Sarah's family moves to Minnesota, however, they will no longer constitute a family in the legal sense of the word. Sarah and Julie's marriage will be declared null and void.<sup>226</sup> Julie's employer will no longer be required to provide benefits and health insurance to Sarah and John. If Sarah is hospitalized, Julie will have no inherent right to visit her in the hospital, let alone to make important decisions about Sarah's course of treatment. Finally, if Sarah dies intestate, her property will pass to her next-of-kin, and John will be an orphaned "bastard," and will become a ward of the state.<sup>227</sup> Query whether Sarah and Julie will hesitate to migrate to

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224. See *id.* at 195-196, 210 N.W.2d at 227 (citing *Bechtel v. Bechtel*, 101 Minn. 511, 514, 112 N.W. 883, 884 (1907)).

225. See *Mitchell*, 504 N.W.2d at 202; see also *Shapiro*, 394 U.S. at 629 (1969) (stating that "[a]n indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute.").

226. See MINN. STAT. § 517.03 subd. 1(b) (Supp. 1998).

227. See *Estin v. Estin*, 334 U.S. 541, 546-47 (1948) (noting that a state's interest in the marital status of its domiciliaries extends "throughout the farthest reaches of the nation," and that children born of a marriage legally valid in one

Minnesota under such circumstances. Query whether Minnesota's Defense of Marriage legislation deters their fundamental right to interstate travel and to take up residence in Minnesota.

The obvious deterrent effect of Minnesota's DOMA is much more apparent than in those United States Supreme Court cases where the court rejected the states' claims that there was no evidence of a deterrent effect. In cases like *Shapiro* and *Memorial Hospital*, the Supreme Court found a deterrent effect based solely on the possibility that something bad might happen to a person after the person migrates to another state.<sup>228</sup> With DOMA, on the other hand, the deterrent effect is not just contingent, it is quite real. Minnesota's marriage laws will strip same-sex spouses of their marital relationship, period. Even if a same-sex couple whose marriage was nullified by the state experienced no tangible repercussions as a result of the nullification, the intangible effects of nullification are great. Even the staunchest heterosexual proponents of DOMA would have to concede that they would hesitate to move to a state that refused to recognize their marriage even if there were no actual, measurable consequences which would result from non-recognition.

It appears also that one of the purposes of the state Defense of Marriage Act was to impede same-sex couples from moving to Minnesota. The legislature not only declared that marriages entered into in this state must be between persons of the opposite sex, it went on to legislate that marriages between same-sex couples married elsewhere will not be recognized here.<sup>229</sup> The fact that the legislature passed this law in the wake of the trial court's decision in *Baehr* sanctioning same-sex marriage seems to be persuasive evidence that it sought to deter the in-migration of same-sex couples from Hawaii, a patently unconstitutional purpose.

Finally, the Minnesota Defense of Marriage legislation creates two classes of residents who were married pursuant to another

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state should not carry the stigma of bastardy when they move somewhere else).

228. See, e.g., *Shapiro*, 394 U.S. at 629 (holding that an indigent who wishes to migrate will hesitate if he knows he must risk moving without the possibility of obtaining state welfare assistance during his first year of residence); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257-58 (1974) (stating that person suffering from serious respiratory illness might be deterred from moving to Arizona because of state's twelve-month residency requirement for indigents to be eligible for non-emergency medical care).

229. See MINN. STAT. § 517.03 (Supp. 1998).

state's laws: opposite-sex spouses and same-sex spouses.<sup>230</sup> On the basis of this sole classification, the first class is granted, and the second class is denied, all of the rights and privileges of marriage.<sup>231</sup> Denial of these rights and privileges is not a temporary penalty, like those reviewed in the durational residency requirement cases; it is a permanent penalty.<sup>232</sup> Travel to Minnesota is permitted for same-sex couples, but only at a hefty price—the absolute denial of a couple's otherwise lawful marriage.<sup>233</sup> Minnesota's Defense of Marriage legislation forever strips same-sex spouses of their marital status and all of the rights and privileges which go along with it upon moving to Minnesota. A similarly situated opposite-sex couple may relocate in Minnesota with absolutely no change to their relationship, status, rights or privileges.

Proponents of DOMA will likely argue that DOMA does not implicate the right to travel and that the durational residency requirement cases do not apply to a DOMA question. Proponents will stress that Minnesota is not denying same-sex marriage to persons because they have chosen to travel; instead, Minnesota prohibits same-sex marriage across the board.<sup>234</sup> In other words, DOMA does not penalize travel because it does not require newcomers to accept a status inferior to that of other Minnesota residents.<sup>235</sup> Strasser argues convincingly that this argument is facile:

[A]pppearances notwithstanding, the state would not be treating domicilliaris and nondomicilliaris in the same

230. *See id.* subd. 1.

231. Rights and benefits of marriage in Minnesota include a variety of state income tax advantages, including deductions, credits, rates, exemptions and estimates; public assistance; control, division, acquisition, and disposition of marital property; rights relating to hospital access and decisions regarding medical care and treatment; rights relating to inheritance; award of child custody and support and spousal support in divorce proceedings; the benefit of spousal privilege and confidential marital communications; and the right to bring a wrongful death action or one for loss of consortium. *See Wilson, supra* note 1, at 540.

232. This penalty is akin to but even more substantial than a state's denial of certain benefits to nonresident veterans. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911-12 (1986) (striking down New York's statute which permanently deprived nonresident veterans of their benefits).

233. *Cf. Crandall v. Nevada*, 73 U.S. 35 (1867) (finding that a one dollar tax imposed for passing through Nevada, while not truly depriving a citizen of any valuable right, was an unconstitutional violation of the right to interstate travel).

234. *See* MINN. STAT. § 517.03, subd. 1 (Supp. 1998).

235. *See Dunn v. Blumstein*, 405 U.S. 330, 342 n.12 (1972) (hypothesizing that there is no penalty and a different constitutional question is presented where an interstate migrant loses his driver's license as a result of the new state's higher age requirement because all residents are treated alike).



way. When a state passes legislation declaring a particular marriage void, it prevents its domiciliaries from contracting a marriage of that type. A couple domiciled in a state where such marriages are void could not make plans and develop expectations based on the good faith belief that their marriage, solemnized in another state, would be treated as valid by the domicile. However, the situation is quite different where the domicile does recognize such a marriage, since couples living there would have a justified, good faith belief that they had a valid marriage. It would be both understandable and appropriate for them to make plans, develop expectations, and enter into binding legal agreements based on their marriage.<sup>236</sup>

Allowing states to invalidate previously valid marriages frustrates the reasonable expectations of the parties, alters the status of their children, clouds title to their property, and places third-party creditors in a tenuous position.<sup>237</sup>

Arguments may be made that DOMA does not unconstitutionally penalize same-sex couples' right to travel because no court has ever found a fundamental right to same-sex marriage and because the state has wide discretion in framing the qualifications for marriage.<sup>238</sup> However, there is no right to welfare assistance, yet the courts have recognized that if the state provides welfare it must do so in a manner which does not penalize a person's right to travel.<sup>239</sup> DOMA forces married same-sex couples to choose between traveling to Minnesota and their marriage, because they cannot have both.<sup>240</sup> Surely this is a penalty of such magnitude that it requires strict scrutiny, the most exacting constitutional analysis.

In conclusion, a person domiciled and legally married in one state should not be allowed to suffer the penalties of another state simply by virtue of crossing a state line. As Justice Jackson has noted,

If there is one thing that the people are entitled to expect

236. Strasser, *supra* note 89, at 309-10.

237. *See id.* at 311.

238. *See supra* notes 198-211 and accompanying text.

239. *See Mitchell v. Steffen*, 504 N.W.2d 198, 203 (Minn. 1993).

240. Minnesota's DOMA discourages same-sex spouses from even traveling through the state. *See Strasser, supra* note 89, at 308-09 (discussing ramifications for same-sex spouses involved in a motor vehicle accident while traveling through a state which refuses to give effect to any right or claim arising from a same-sex marriage, including the loss of the rights to have input concerning medical treatment, to bring a wrongful death action, and to seek loss of consortium damages).

from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude.<sup>241</sup>

Even under the analysis that Justice Rehnquist would apply in right to travel cases, i.e., "whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote,"<sup>242</sup> the Minnesota Defense of Marriage Act is patently unconstitutional.

#### VIII. REEXAMINING *BAKER*: HOW *ROMER* AFFECTS EQUAL PROTECTION FOR HOMOSEXUALS AND THE MINNESOTA DEFENSE OF MARRIAGE ACT

Given the Minnesota Supreme Court's decision in *Baker v Nelson*, it would seem that challenging the state's DOMA on equal protection grounds would be one of the least viable alternatives. *Baker* establishes, after all, that there is no fundamental right to same-sex marriage and, although its analysis is extremely vague and consequently weak, that the state has a rational basis for prohibiting same-sex marriage.<sup>243</sup> The Minnesota Supreme Court would likely hesitate to overturn this precedent. This is not to say, however, that an equal protection challenge is not warranted. DOMA raises equal protection concerns wholly apart from those considered in *Baker*. Moreover, *Baker* did not challenge Minnesota's marriage laws on the basis of sex, as *Baehr* did so successfully.<sup>244</sup> Finally, the

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241. *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

242. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 285 (1974).

243. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).

244. When considering whether a gender-based classification survives constitutional scrutiny under the equal protection clause of the Fourteenth Amendment, the Minnesota Supreme Court will consider whether the classification serves "important governmental objectives" and is "substantially related to

United States Supreme Court's decision in *Romer v. Evans*<sup>245</sup> adds fuel to the equal protection fire and ably demonstrates that the courts' treatment of gay and lesbian issues is evolving.

When considering whether DOMA violates equal protection under either the state<sup>246</sup> or federal constitution, the most important question will be what standard applies—rational basis, strict scrutiny or something in between. While *Baker* presumptively establishes that the state has a rational basis for prohibiting same-sex marriage, *Baehr* teaches that the state would almost certainly fail to meet the strict scrutiny test. It also seems likely, based upon the utter failure of the state's case in *Baehr*, that Minnesota would not be able to meet its burden if an intermediate standard were applied. It is highly unlikely that either the United States or Minnesota Supreme Courts will find that there is a fundamental right to same-sex marriage. Thus, if strict scrutiny is to apply, it will have to originate from some other source.

An equal protection challenge under the federal rational basis test requires only that the state have a "legitimate purpose for the challenged legislation" and that it "was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose."<sup>247</sup> If a statute treats classes of persons differently, the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."<sup>248</sup> By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, the courts ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.<sup>249</sup> These minimal requirements are grounded in

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achievement of those objectives." State *ex rel.* Forslund v. Bronson, 305 N.W.2d 748, 750 (Minn. 1981) (citations omitted).

245. 116 S. Ct. 1620, 1623 (1996).

246. See MINN. CONST. art. 1, § 2. Equal protection is confirmed in the Minnesota Constitution as an "unenumerated right." Article 1, section 2 provides in part: "No member of this State shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

247. State v. Russell, 477 N.W.2d 886, 887-88 (Minn. 1991) (citing Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)).

248. Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928) (citation omitted).

249. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J. concurring).

the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy.<sup>250</sup>

Federal strict scrutiny, on the other hand, requires the state to demonstrate that the law at issue is “supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>251</sup> “Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>252</sup> “If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”<sup>253</sup> Laws which single out a class of citizens for disfavored legal status or general hardships are rare because “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.”<sup>254</sup> “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>255</sup>

Minnesota does not follow and does not consider itself bound by the federal equal protection rational basis test.<sup>256</sup> Instead, since the late seventies and early eighties, the Minnesota Supreme Court has articulated the following requirements when considering equal protection:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately at-

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250. *See id.* at 175.

251. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

252. *Louisville Gas & Elec. Co.*, 277 U.S. at 37-38.

253. *Fritz*, 449 U.S. at 181.

254. *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

255. *Id.* at 1628.

256. *See State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (stating that statutory distinctions drawn between the quantity of crack cocaine and the quantity of cocaine powder possessed violates both the Federal and State Constitution because no rational basis exists for the distinction which had a discriminatory impact on blacks).

tempt to achieve.<sup>257</sup>

In short, the state's equal protection clause requires that persons similarly situated be treated alike unless a sufficient basis exists for discriminating among them.<sup>258</sup> Minnesota courts, unlike the federal courts, will not "hypothesize" a rational basis to justify a classification.<sup>259</sup>

With respect to strict scrutiny, the Minnesota Supreme Court has expressly rejected and criticized federal equal protection analysis, describing as "virtually insurmountable" the federal courts' requirement that the challenger prove that the legislature enacted the particular statute "because of" not merely "in spite of" an anticipatory discriminatory effect.<sup>260</sup> Thus, although Minnesota's constitution "embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment of the United State Constitution,"<sup>261</sup> the Minnesota Supreme Court may nevertheless apply a more stringent standard of review when reviewing legislation under the State's equal protection clause.<sup>262</sup>

The question of whether the United States Supreme Court or the Minnesota Supreme Court will treat sexual orientation as a protected, suspect class is very much up in the air following the United States Supreme Court's decision in *Romer v. Evans*,<sup>263</sup> the landmark case which invalidated Colorado's attempt to prohibit municipalities and other governmental subdivisions from banning discrimination in many transaction and activities, including housing, employment, education, public accommodations and health and welfare services, on the basis of sexual orientation. The constitutional amendment ("Amendment 2") adopted by statewide referendum in 1992, repealed and rescinded non-discrimination ordinances passed by Denver, Aspen and Boulder, among others, and prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals.<sup>264</sup>

The Supreme Court began its analysis of the constitutionality

257. *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981); see also *Price v. Amdal*, 256 N.W.2d 461, 468 (Minn. 1977).

258. See *Bernthal v. City of St. Paul*, 376 N.W.2d 422, 424 (Minn. 1985).

259. See *Russell*, 477 N.W.2d at 889.

260. *Id.* at 888 n.2 (citing *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)).

261. *Id.* at 889 n.3.

262. See *id.* at 889 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1980)).

263. *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996).

264. See *id.*

of Amendment 2 by reciting familiar law regarding equal protection.<sup>265</sup> Recognizing that the “Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,” the Court stated that “if a law neither burdens a fundamental right nor targets a suspect class,” it would be upheld provided the legislation “bears a rational relation to some legitimate end.”<sup>266</sup> However, the Supreme Court opted to put aside these traditional principles of equal protection analysis, concluding that Amendment 2 “defies, even this conventional inquiry.”<sup>267</sup> In striking down Amendment 2, the Supreme Court first noted that Amendment 2 “has the peculiar property of imposing a broad and undifferentiated disability on a single named group,” which the Court described as an “exceptional” and “invalid” form of legislation.<sup>268</sup> As the Supreme Court recognized, by virtue of Amendment 2,

[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.<sup>269</sup>

The Court held that Amendment 2 was unprecedented in American jurisprudence because it identified persons by a single trait and denied this class of persons specific protections of the law across the board.<sup>270</sup>

The Court next concluded that Amendment 2 was borne of animus, and nothing else.<sup>271</sup> It rejected the state’s primary argument in defense of Amendment 2—that it put gays and lesbians in the same position as all other persons and did nothing more than deny homosexuals special rights—calling the argument “implausible.”<sup>272</sup> In addition, the Court stated “[I]f the constitutional conception of ‘equal protection of the laws’ means anything,

265. *See id.* at 1627.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Romer v. Evans*, 116 S. Ct. 1620, 1625.

270. *See id.* at 1628.

271. *See id.*

272. *See id.* at 1624.

it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>273</sup> The Court found that Amendment 2 enacted severe consequences on gays and lesbians because it not only barred homosexuals from securing protection against the injuries that anti-discrimination laws were meant to address, it also nullified specific legal protections for this targeted class in both the public and private sectors.<sup>274</sup> In short, “[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”<sup>275</sup> Amendment 2, because it provided that gays and lesbians cannot have any particular protections under the law, inflicted on them immediate, continuing and real injuries that belied any of its justifications.<sup>276</sup>

When considering the constitutionality of the federal and state DOMAs, the words Justice Kennedy used to begin and to end the *Romer* opinion are instructive. Justice Kennedy began his opinion with the words,

One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ *Plessey v. Ferguson*, 163 U.S. 537, 559, 16 S. Ct. 1138, 1146, 41 L. Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.<sup>277</sup>

Justice Kennedy concluded that:

Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.<sup>278</sup>

Like Amendment 2, Minnesota’s DOMA singles out homosexuals and declares that they are not entitled to marry the person of their choice.<sup>279</sup> The federal DOMA specifically sanctions such

273. *Id.* at 1628 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

274. *See id.* at 1626 (discussing affected protections in the areas of housing, real estate, education and employment).

275. *Id.* at 1627.

276. *See id.* at 1626-28.

277. *Id.* at 1623.

278. *Id.* at 1629 (holding that Amendment 2 violates the Equal Protection Clause).

279. *See* MINN. STAT. § 517.03 subd. 1(a)(4) (Supp. 1998).

laws.<sup>280</sup> Discussing the effect of Amendment 2, the Court noted that the “special protections” which Amendment 2 sought to withhold were not special at all, but “protections taken for granted by most people because they already have them or do not need them; . . . protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>281</sup> Clearly the right to marry is one of the transactions most people take for granted, an endeavor that constitutes ordinary civic life in a free society. The federal and state DOMAs, like Amendment 2, classify homosexuals not to further a proper legislative end but to make them unequal to everyone else.

*Romer* commands that courts considering the constitutionality of either the federal or state version of DOMA must look at whether Congress or the state legislature intended to discriminate against homosexuals.<sup>282</sup> The answer to that question is apparent: of course they did. There can be no question that the DOMA legislation, on its face, specifically targets homosexuals who wish to marry and prohibits them from exercising and enjoying what is for everyone else, even felons confined to prison,<sup>283</sup> a fundamental right. Even if the legislative purpose or interest was not clear on its face, the legislative history<sup>284</sup> would clarify any doubt as to the true purpose of the DOMAs.<sup>285</sup> Although “private biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect.”<sup>286</sup> As such, the state and federal DOMAs must be

280. See 1 U.S.C.A. § 7 (supp. 1997); 28 U.S.C.A. § 1738C (Supp. 1997).

281. *Romer*, 116 S. Ct. at 1627.

282. See *id.* It is safe to assume, based upon the dissenting opinion in *Romer*, that at least three of the Justices who presently make up the United States Supreme Court, would not find homosexuality a suspect class. Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, repeatedly referred to the status gays and lesbians have obtained over the years, deeming homosexuals “a politically powerful minority” and an “elite class” and stating that they “possess political power much greater than their numbers” and “enjoy enormous influence in American media and politics.” *Id.* at 1629, 1634, & 1637 (Scalia, J., dissenting).

283. See *Turner v. Safley*, 482 U.S. 78, 99 (1987).

284. See *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

285. See Strasser, *supra* note 89, at 301-06 (discussing and citing statements made during congressional deliberations on DOMA and comparing arguments made in support of DOMA to arguments made in support of anti-miscegenation laws); but see Brown, *supra* note 89, at 174-76, 182-84 (arguing that DOMA, conduct-based legislation is not based upon status because it applies regardless of an individual’s sexual orientation, and that DOMA was not enacted solely as a result of animus).

286. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).



struck down as being constitutionally repugnant.<sup>287</sup>

Equal protection generally means that the rights of all persons must rest upon the same rule under similar circumstances, and the equal protection clause applies to the exercise of all the powers of the state which can affect the individual or the individual's property.<sup>288</sup> Although the federal and state governments will fully recognize opposite-sex marriages performed in Hawaii, they will not recognize equally valid same-sex marriages based solely upon the class of persons who seek to have their marriages recognized. Congress has journeyed into an area of the law where it has rarely ventured before, specifically and purposefully trampling on the rights of homosexuals.

Similarly, Minnesota has carved out a statutory exception to its marriage laws which is unprecedented (although *Baehr* was equally unprecedented). One of the inherent rights secured to a free people by our state equal protection clause is the inherent right to "equal and impartial laws which govern the whole community and each member thereof."<sup>289</sup> Justice Yetka, in a special concurrence in *State v. Russell*, noted that while a legislature's power to enact legislation regarding criminal penalties is broad, its power is not so broad as to allow distinctions that have a harsher impact on minority groups, particularly when those distinctions are based on minimal information.<sup>290</sup> Justice Yetka observed, "When [the legislature] deliberately passes laws which effectively penalize a suspect class, it appears to me that, regardless of which equal protection standard is applied, that action violates both the state and federal Constitutions."<sup>291</sup>

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287. See Brown, *supra* note 89, at 175. One need look no further than Brown's comment itself and the congressional statements cited therein. Although Brown argues that DOMA is not based upon animus toward homosexuals, he compares same-sex couples who wish to marry to drunken alcoholics who wish to drive. *Id.* That is a false analogy. Alcoholics, although they may have a predisposition to drinking, nevertheless choose to drive. In so doing, they put other persons lives at stake. Homosexuals who wish to marry, on the other hand, do not pose any physical threat, real or imagined, to society at large. Congressman Talent, whose comments on the House floor Brown describes as "poignant," compares homosexuality to polygamy and incest. *Id.* at 183. Both Talent and Brown refer to the "homosexual agenda" and invoke, implicitly or explicitly, religion to justify their positions. *Id.*

288. *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1927).

289. *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 225, 14 N.W.2d 400, 405 (1944).

290. *State v. Russell*, 477 N.W.2d 886, 892 (Minn. 1991).

291. *Id.*

Although it may be difficult to convince the Minnesota Supreme Court to reverse *Baker* and find that there is a fundamental right to same-sex marriage, it certainly appears that both the federal and state DOMAs violate equal protection as impermissible class legislation under *Romer*, purposefully singling out homosexuals for different, unequal treatment.

### IX. CONCLUSION

The primary purpose of this article has been to examine the constitutionality or unconstitutionality, as it turns out, of the Minnesota Defense of Marriage Act. This Act will no doubt be challenged if and when the Hawaii Supreme Court affirms the district court in *Baehr* and allows same-sex marriage. Minnesota same-sex couples will travel to Hawaii and then return to Minnesota, demanding that their marriages be recognized. Pursuant to the Act, Minnesota will deny recognition of same-sex marriages, and litigation will ensue. Concurrently, there will be challenges to the federal Defense of Marriage Act and to DOMA-like legislation in other states. Courts around the country will likely reach different results regarding the constitutionality of DOMA and equivalent state legislations. These issues may eventually be decided by the United States Supreme Court.

Both the federal and state versions of DOMA should be struck down as unconstitutional. The federal DOMA violates the Full Faith and Credit Clause of the United States Constitution in that it hinders rather than fosters federalism, allowing states to ignore marriages validly performed elsewhere and allowing states to disregard judgments of divorce. Because of the public policy exception to the Full Faith and Credit Clause, the state DOMA probably violates full faith and credit only if Minnesota will not recognize same-sex divorce decrees. Judgments of divorce have always been entitled to full faith and credit if the state granting the divorce had the requisite jurisdiction.

Both the state and federal versions of DOMA violate equal protection under *Romer* because it is apparent that Congress and the Minnesota legislature, in passing the Acts, intended to discriminate against homosexuals. Because the Acts represent impermissible class legislation, singling out homosexuals for unequal treatment, they should be found constitutionally repugnant even under a rational basis inquiry.

Finally, Minnesota's DOMA patently impinges upon the fun-

damental right to travel and to enter and abide in the state of one's choosing. Not only does the state's DOMA actually deter and penalize travel by same-sex spouses, impeding travel seems to have been one of its primary objectives. Courts will apply strict scrutiny where the fundamental right to travel is implicated. Even if the federal version of DOMA survives a court challenge, Minnesota cannot constitutionally burden interstate travel.

The make-up of the United States Supreme Court at the time DOMA is challenged, and the level of constitutional scrutiny to which the Acts are subjected, will likely determine these hot-button issues. If strict scrutiny or some intermediate standard applies, the Acts will likely fail to pass constitutional muster as was ably demonstrated in Hawaii. On the other hand, if the state and federal governments need only show a rational basis for the Acts, they will likely be upheld. But if the *Romer* majority remains, the Acts may be found constitutionally repugnant and struck down.

The recognition of same-sex marriage in Minnesota is not a foregone conclusion if Minnesota's DOMA is found unconstitutional. Without DOMA, Minnesota is simply back to square one—the celebration rule and its public policy exception. While Minnesota would not be compelled to grant marriage licenses to same-sex applicants, it would, under *Laikola*, likely be compelled to recognize same-sex marriages performed in Hawaii (or elsewhere) if the spouses were residents of Hawaii at the time of their marriage. The right to same-sex marriage in Minnesota will only be guaranteed if *Baker* is reversed or if the Minnesota Supreme Court follows Hawaii's lead and holds that the denial of same-sex marriage constitutes discrimination on the basis of sex.

If Minnesota and other states are forced to recognize same-sex marriages performed elsewhere, it will be only a matter of time before our legislators and the general public see that same-sex marriage, like interracial marriage, is nothing to be frightened about, but something we will accept if not embrace in this democracy of ours. And, hopefully, the prohibition on same-sex marriage and general disdain for homosexuals will be nothing more than an embarrassing chapter in our nation's history.