

# APA Newsletters

NEWSLETTER ON PHILOSOPHY AND LESBIAN, GAY,  
BISEXUAL, and TRANSGENDER ISSUES

Volume 09, Number 1

Fall 2009

---

**LGBT COMMITTEE, 2009-2010**

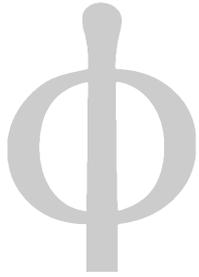
**FROM THE EDITOR, TIMOTHY F. MURPHY**

**ARTICLE**

RICHARD NUNAN

“Constitutional Rights versus State Autonomy and Direct Democracy:  
The Story So Far on Same-Sex Marriage”





# Philosophy and Lesbian, Gay, Bisexual, and Transgender Issues

---

Timothy F. Murphy, Editor

Fall 2009

Volume 09, Number 1

---

---

## LGBT COMMITTEE 2009-2010

---

Talia Bettcher, Chair; Loren Cannon, Margaret Denike, Kimberly J. Leighton; Lanei Rodemeyer; Lori Watson; Shannon Winnubst; and Timothy F. Murphy.

---

## FROM THE EDITOR

---

We are devoting this entire issue to the matter of gay and lesbian marriage, as one of the most important political and moral issues of the day. Richard Nunan has looked closely at the arguments in favor and against, and discusses them against the backdrop of key court decisions and likely legislative action. I hope for a wide readership for all the newsletters but especially this one. Send it around promiscuously!

---

## ARTICLE

---

### ***Constitutional Rights versus State Autonomy and Direct Democracy: The Story So Far on Same-Sex Marriage***

**Richard Nunan**  
*College of Charleston*

The pace of the political and legal machinations surrounding same-sex marriage has been accelerating to the point of bewilderment. Depending on where one looks, recent events have been both remarkably promising and deeply troubling. What follows is an attempt to summarize and make some sense of the story so far.

#### **1. Legislative and Judicial History**

Although there were some unsuccessful attempts to seek judicial ratification of same-sex marriage prior to the nineties,<sup>1</sup> the 1993 Hawaii Supreme Court's equal protection ruling in *Baehr v. Levin*<sup>2</sup> really marks the beginning of the DOMA era, the initiation of state and federal *Defense of Marriage Acts*: legislative or referendum-based initiatives prohibiting same-sex marriages by statute. In trying to apply the equal protection language of Hawaii's State Constitution honestly, that state's supreme court unleashed a firestorm, not just locally, but in other states fearing the prospect of being obliged, under the

U.S. Constitution's full faith and credit clause,<sup>3</sup> to recognize unorthodox marriage licensing procedures in a sister state. The federal courts have always been reluctant to enforce this principle against expressly contradictory public policy in another state, however.<sup>4</sup> Given that judicial history, many states began the process of making contrary popular sentiment explicit by means of DOMA statutes—first in Utah in 1995, followed by Idaho, South Carolina, and Illinois in the spring of 1996. The federal DOMA was passed in September of 1996, and the publicity associated with that precipitated a flood of state DOMA initiatives between 1996 and 2000—twenty-nine additional DOMAs during that period, a total of thirty-seven to date.

Over the past decade, anti-gay marriage forces shifted from a campaign for *statutory* marriage reform to the more radical (because more permanent) strategy of conveying state-wide public policy sentiment by means of *constitutional amendments* restricting marriage to heterosexual couples. This movement began with the 1998 Constitutional Amendments in Hawaii and Alaska,<sup>5</sup> but didn't really gather steam until the years following Vermont's 1999 Supreme Court ruling that that state constitution's common benefits clause, which guarantees all citizens equal benefit and protection of Vermont law, entitled petitioning gay couples in Vermont to the same state-level benefits and protections afforded married couples.<sup>6</sup> This led ultimately to Vermont's civil union statute in 2000, the first serious attempt in the nation to provide a statutory vehicle extending to same-sex couples a set of legal rights and duties equivalent to those assigned to married heterosexual couples (again, at the state level only).<sup>7</sup>

Most anti-gay marriage amendments were enacted in direct response to the action of Vermont, and subsequent developments in Massachusetts, where the state supreme court ruled in 2003 that prohibition of same-sex marriages violated both equal protection rights and the dignity of persons protected under the state constitution, and did so for irrational reasons.<sup>8</sup> A few months later, the same court ruled that a civil union law would be inadequate to address the equal protection and due process requirements of the Massachusetts Constitution.<sup>9</sup> In consequence, the state legislature made Massachusetts the first state in the nation to sanction gay marriages in May 2004. It was then that the proponents of constitutional amendments redoubled their efforts: fourteen states ratified anti-gay marriage constitutional amendments in the remainder of that year, and twelve more since.<sup>10</sup>

On the other side of the ledger, successes have been more modest: six states with same-sex marriage licensing in force or pending as of this writing: Massachusetts (2004), Connecticut (2008), Iowa (April 2009), Vermont (April 2009; September 1, 2009, implementation date), Maine (May 2009; September 14, 2009, implementation date), and New Hampshire (June 2009; January 1, 2010, implementation date). Four states plus the District of Columbia have civil unions or robust domestic partnerships: California (1999, strengthened periodically since),

---

New Jersey (2006), Oregon (2007), and Washington (2007, strengthened in 2008).<sup>11</sup>

This calculus is complicated by overlaps. In addition to the thirty-eight DOMA and/or constitutional prohibition states,<sup>12</sup> three more (Maryland, New Hampshire, and Wyoming) have (or had) statutory requirements prohibiting same-sex marriages which predate the DOMA era, bringing that total to forty-one. But since Iowa has reversed its DOMA statute through court action, and Maine and New Hampshire have reversed their statutes legislatively, that reduces the total number of states hostile to same-sex unions to thirty-eight. By means of its domestic partnership statute, Washington has qualified, but not actually reversed, its same-sex marriage prohibition, reducing the hostile total to thirty-seven.<sup>13</sup> Since there are actually only ten significantly “pro-union” states at present count, the above reckoning leaves three “neutral” states unaccounted for: New Mexico, New York, and Rhode Island, which have neither DOMA statutes nor constitutional amendments prohibiting same-sex marriage, nor legislation favoring same-sex unions. New York is unusual, however, in having administrative law (issued by Governor Paterson in 2008) recognizing same-sex marriages performed elsewhere.

With one early exception (California, discussed below), until very recently most successful same-sex union and same-sex marriage initiatives have been provoked by court rulings. This was true not only in Vermont and Massachusetts, as previously discussed, but also in New Jersey, when its supreme court ruled in October 2006 that New Jersey’s 2004 domestic partnership law was inadequate to the job of ensuring equal rights for gay couples in New Jersey.<sup>14</sup> The state legislature opted for the Vermont solution, enacting New Jersey’s civil union law two months later.<sup>15</sup> A similar pattern unfolded in three of the most recent cases, in California (May 2008), Connecticut (October 2008), and most recently in Iowa (April 2009), all of which, like *Goodridge* in Massachusetts, upheld same-sex marriage on state constitutional grounds.

In California, although the state legislature independently endorsed the California equivalent of civil unions much earlier, it was by court action that same-sex marriage was authorized in that state for a brief half-year window, when the California Supreme Court struck down Proposition 22, a statutory referendum which explicitly restricted marriage to heterosexual unions, endorsed by California voters back in 2000. In their 4-3 decision, *In re Marriage Cases*,<sup>16</sup> the Court majority reasoned that sexual orientation was a suspect classification, and therefore laws targeting sexual orientation for disparate treatment, such as California’s 2000 DOMA referendum, should be subject to strict judicial scrutiny. (See note 8, *supra*.) Applying this standard to Proposition 22, the Court concluded that the statute violated both the state Constitution’s equal protection provision and the state’s recognition of a fundamental right of marriage, which had been noted sixty years earlier, when the Court struck down California’s anti-miscegenation law.<sup>17</sup> Consequently, the Court also concluded that California’s domestic partnership law, which had evolved in the shadow of Proposition 22, was inadequate to address equal protection concerns. The legislature would have to permit same-sex marriages instead.

In *Kerrigan v. Commissioner of Public Health*,<sup>18</sup> the Connecticut Supreme Court, relying on both the Massachusetts and (especially) the California courts’ reasoning, ruled in October 2008 that homosexuals constitute a quasi-suspect class, thus invoking a due process standard requiring heightened judicial scrutiny of Connecticut’s existing marriage and partnership laws.<sup>19</sup> The Court concluded that, in confining marriage exclusively to heterosexual couples, the state failed

to meet that higher standard of review governing some classes of equal protection violations under the state constitution. The following month Connecticut became the second state to begin offering same-sex marriage licenses. The timing, coming just a week after the passage of Proposition 8 in California, was ironic.

*Varner v. Brien*,<sup>20</sup> Iowa’s contribution to this national debate, was decided on essentially the same reasoning as *Kerrigan*.<sup>21</sup> But *Varner* was especially distinctive both in terms of geography and of political culture. Iowa was the first state not in New England or on the West Coast to take such a step, and only the second “purple” state (after New Hampshire) to sanction some form of same-sex unions. Most remarkable is the Court’s unanimity: the Massachusetts, California, and Connecticut decisions were all 4-3 splits.

The recent legislative initiatives in Vermont, Maine, and New Hampshire do not conform to this pattern, however. None of them were court-mandated. Vermont’s high court tolerated civil unions nearly a decade ago. Maine and New Hampshire have experienced no court action on same-sex unions.<sup>22</sup> So each of these legislative initiatives were entirely voluntary, marking the extent to which national public opinion has shifted on this topic.

## 2. Electoral Backlash: Judicially Mandated Reform Strategy and Its Critics

The past few years have been marked not only by further splintering in the same-sex marriage policies of individual states, but also by an increasingly reflective national discourse on the subject of gay rights generally. Public sentiment concerning gays and lesbians in the military is a useful barometer of the cultural sea change we are currently experiencing. A recent *Washington Post*-ABC News poll indicates that 75 percent of Americans now believe the Clinton-era “Don’t Ask Don’t Tell” policy should be scrapped, reflecting a dramatic shift in polling since the policy was first crafted in 1993, when 44 percent regarded it as untenable.<sup>23</sup> Even Colin Powell, Chairman of the Joint Chiefs in the early years of the Clinton Administration, has conceded in a recent (04/02/09) interview with MSNBC News talk-show host Rachel Maddow that the policy ought to be reviewed, and that he would now support its elimination. This is coming from the chief architect of “Don’t Ask Don’t Tell,” whose position on the subject back in 1993 could fairly be characterized as unintentionally bigoted.<sup>24</sup>

But we are still quite culturally divided on the question of same-sex marriage, and on the question of gay rights, generally. On the day the American electorate marked a dramatic step forward in the politics of inclusion by electing its first identifiably African-American President, voters in California, Arizona, Florida, and Arkansas simultaneously reaffirmed the politics of exclusion in a different context, delivering majorities ratifying constitutional amendments prohibiting same-sex marriage in the first three states, and approving an adoption law restriction in Arkansas that could only be characterized as socially vicious.<sup>25</sup>

For gay rights strategists who advocate same-sex marriage licensing as a path to broader legal recognition of both civil and human rights for LGBTQ Americans, the Proposition 8 vote in California was particularly disheartening. The politics of Florida and Arizona were widely regarded as too socially conservative (and in Florida’s case, too old) to serve as good test cases to measure the extent of the shift in social attitudes on the moral legitimacy of same-sex marriage. But Californians seemed different in three important respects.

First, the collective attitude of the state legislature has been quite progressive for a prolonged interval. California was the

first state in which a legislative assembly enacted a domestic partnership statute—and more recently same-sex marriage bills—on its own initiative instead of doing so in response to a state court ruling.<sup>26</sup> In a series of legislative reforms since its initial passage in 1999, California’s domestic partnership law has expanded from a very modest domestic registry affording its participants virtually no additional legal rights, into a policy comparable to New Jersey’s civil union statute, and almost as expansive as the civil unions available in Vermont and New Hampshire up until their replacement by same-sex marriage. The California state legislature has even approved same sex marriage twice, in 2005 and 2007. But both bills were subsequently vetoed by Arnold Schwarzenegger, in part because he took the view that the popular will had too recently been expressed to the contrary through Proposition 22, and in part because the constitutional status of Proposition 22 had not yet worked its way through the state judicial system: *In re Marriage Cases* had not yet been decided.

Second, the California legislature’s behavior reflects the gradual increase in popular support for same-sex unions in California, to the point where a May 2008 Field Poll revealed majority support for same-sex marriage for the first time (51 percent to 42 percent),<sup>27</sup> a striking contrast to popular sentiment eight years earlier, when the California electorate voted 61 percent to 38 percent in favor of Proposition 22. In a series of polls taken between May and mid-September, it appeared that majority support for same-sex marriage, in the form of opposition to Proposition 8, was holding steady, fluctuating between 49 percent and 55 percent, with support for the anti-gay marriage amendment hovering in the low forties.<sup>28</sup>

And finally, in the wake of the California Supreme Court’s mid-May decision striking down the earlier enactment of Proposition 22 as unconstitutional, Governor Schwarzenegger began advocating the rejection of Proposition 8 as needlessly divisive.

Thus, until late September 2008, it appeared that the state supreme court, California’s governor, legislature, and electorate all favored the ratification of same-sex marriage. But then popular support for Proposition 8 increased, ultimately leading to a 52.3 percent to 47.7 percent repudiation of same-sex marriage, and of the May 2008 California Supreme Court decision.

What are we to make of this latest development in the campaign for same-sex marriage? Some fervent advocates of gay rights have argued that the entire strategy of using same-sex marriage as a vehicle for cultivating public sympathy for a much broader array of same-sex rights is morally indefensible, either because marriage as a civil institution is profoundly sexist, even misogynistic,<sup>29</sup> or because the campaign for same-sex marriage is itself afflicted with the same exclusionary proclivities as heterosexual marriage. The latter argument relies sometimes on a specific objection—e.g., that polygamous and polyandrous couples are excluded from the reform movement<sup>30</sup>—and sometimes on the more general observation that same-sex marriage as a “stand alone issue” conceives of legally sanctioned family relationships much too narrowly.<sup>31</sup>

Although I share some sympathies with the various moral critiques of marriage as a social institution, especially the relatively non-judgmental inclusionary vision expressed in the beyondmarriage.org manifesto, the more uncompromising theoretical critiques on the left (*supra*, notes 29 and 30), and on the right,<sup>32</sup> strike me as unpersuasively inflexible. Against theoretical critiques from the right, arguments about “what is natural” with respect to intimate relationships, or about the best interests of children, have the ring of unreflective bigotry, together with a heavy dose of religious intolerance, and have

certainly lacked for reasoned argument and empirical support. Against the theoretical critiques from the left, the public discourse on the proper scope of marriage has, over the last half century, had some salutary effect on the sexist aspects of the legal machinery governing marriage. Residual sexism is unlikely to disappear completely, but institutional arrangements always involve compromises between competing aspirational ideals.

There is something to be said for reliance on judicial enforcement of equal protection and due process arguments to extend the scope of legal and economic benefits of marriage as widely as might be presently possible. If society sees fit to reward some long-term, consensual, monogamous relationships as prudent public policy, why not others as well? The secular reasons typically given for encouraging heterosexual monogamy—stabilization of family unit with respect to child-rearing, stabilization of property distribution (between families, between spouses), transfer of property (inheritance by matrimonially legitimated heirs), state delegation of primary care-giving responsibilities to marriage partners and their legally recognized offspring, respect for individual choice concerning long-term partnership in sexual intimacy, and the “calming” or “civilizing” influence of marriage (especially for males)<sup>33</sup>—are all arguments which apply equally to same-sex couples, a fact which has been recognized repeatedly in those state courts which have been taking the equal protection and due process arguments for same-sex marriage seriously.

This is basically a socially conservative set of arguments for same-sex marriage. It is undeniable that the movement to recognize same-sex marriage will serve, in some ways, to reinforce traditional social conventions that we might be better off without. But traditional utilitarian arguments for marriage of the sort offered above are the most likely to be persuasive to the courts and the electorate. Social attitudes evolve slowly, and heterosexism will still be here tomorrow. It is equally true, however, that enlarging the scope of civil marriage to encompass same-sex couples will have a corrosive effect on some of those traditional social conventions in other ways, introducing doubts about gender binarism, and about the conviction that only heterosexual couples are really fit to raise children, for example. (I think this is why many social conservatives are still so fearful of what is essentially a conservative position.)

Other opponents of the same-sex marriage campaign have taken a more pragmatic line, arguing that, because the debate has been carried on largely through the courts, the least democratic branch of government, same-sex marriage advocacy has proven politically damaging to the broader cause of LGBTQ rights, because it has served as a rallying point for a reactionary public backlash in the form of legislative statutes and popular referenda.<sup>34</sup> On this analysis, the success of the anti-gay marriage ballot initiatives in California, Arizona, and Florida are simply the latest instantiations of the direct public retaliation against the folly of agitating for the extension of civil marriage to same-sex couples.

The California result in particular, emerging in one of the most socially liberal electorates in the country, during a banner election year for Democrats, appears to confirm the electoral backlash hypothesis, as does the incontrovertible fact that, wherever popular referendums have been held on the constitutional question about same-sex marriages, advocates of same-sex marriage have, with one temporary qualification, thus far batted zero for thirty in state constitutional referenda around the country.<sup>35</sup>

Similarly, the Arkansas adoption initiative becomes the latest illustration of the related collateral damage hypothesis—the idea that the national debate on same-sex marriage has a profound indirect adverse impact on other LGBTQ legal rights

issues. Were it not for the rancor engendered by gay marriage litigation, the level of intensity of electoral homophobia would be insufficient to motivate such hostile initiatives, or so the story goes.

### 3. Against the Electoral Backlash Hypothesis

Would we in fact be better off agitating for civil unions in legislative assemblies, rather than attempting to achieve constitutional ratification of same-sex marriage in state and federal courts? The latter strategy, if successful, undoubtedly risks public hostility and more “democratic” retaliatory responses in the form of legislative initiatives or ballot measures. If the assessment of this argument were a simple matter of keeping a score card, litigation might seem a bad strategy. The state and federal DOMAs and the anti-gay marriage constitutional amendments illustrate the backlash hypothesis on a grand scale. In my view, however, the pragmatic arguments against the litigation strategy are both implausible and morally indefensible.

It is worth noting first that it is not practicable to stop the flow of civil rights litigation on the issue of same-sex marriage. Although such lawsuits are frequently funded and sustained by political organizations such as Lambda Legal or the ACLU, they are also occasionally initiated by individual citizens acting on their own political principles. There is no disciplined central planning entity with final decision-making authority over the orchestration of the social movement for gay rights in this country. This was dramatically illustrated the day after the California Supreme Court handed down its May 26, 2009, 6-1 decision in *Strauss v. Horton*,<sup>36</sup> upholding the constitutional legitimacy of the Proposition 8 vote, when high profile attorneys David Boies and Theodore Olson announced an anti-Proposition 8 federal lawsuit filed a few days earlier on behalf of two gay California couples (*Perry v. Schwarzenegger*), in anticipation of the California Supreme Court ruling.

Although Boies’ and Olson’s chief contentions—that Proposition 8 violates the *federal* constitutional guarantees of equal protection and due process—is quite plausible, legal strategists at Lambda Legal and the ACLU, who have been involved in the same-sex marriage battle for the long haul, have been very wary of this litigation strategy,<sup>37</sup> adopting instead a state-by-state approach. By taking advantage of the legal compartmentalization afforded by the presence of fifty quasi-autonomous jurisdictions in our federalist system, the entire war is not lost in any individual battle with an adverse outcome. They have deliberately avoided the federal route for fear of what an ideologically blinkered Supreme Court might do, were it to grant *certiorari* in a same-sex marriage case.<sup>38</sup>

Their fears are not without foundation. The Supreme Court’s constitutionally appalling 1986 decision to uphold Georgia’s sodomy law, *Bowers v. Hardwick*,<sup>39</sup> damaged the cause of gay rights for years to come, emboldening lower courts to treat gay and lesbian litigants as criminal plaintiffs, undeserving of serious judicial consideration.<sup>40</sup> In the final analysis, the logic of the arguments and the force of constitutional text, read with a bare minimum of interpretive charity, matter less than the ideological proclivities of any five members of the Supreme Court bench. And there is good reason today to think that at least four of them (Roberts, Scalia, Thomas, and Alito) might prove quite hostile to same-sex marriage plaintiffs. Anthony Kennedy, who took positions favorable to gay rights in *Romer v. Evans*,<sup>41</sup> striking down Colorado’s anti-gay rights referendum in 1996, and in *Lawrence v. Texas*,<sup>42</sup> the 2003 reversal of *Hardwick*, is the likely swing vote, but even the views of the Court’s “liberal” wing are unknown on this topic. The Boies and Olson strategy, and others like it, seem pretty risky in light of the Court’s current make-up.

That said, it seems to me quite appropriate to challenge the courts, federal as well as state, to engage controversial social issues with constitutional implications. Otherwise, we might reasonably ask: Just what are our courts *for*, when it comes to the task of dispensing justice? Judicial dispute can itself be understood as part of the democratic process, whereby otherwise muzzled voices of disenfranchised minorities can be heard in the national political forum. Even judicially instituted injustices serve to bring electoral attention to the plight of the disenfranchised, and judges themselves are not impervious to the evolution of public opinion. That is at least one of the reasons why it took just seventeen years for the *Lawrence* Court to reverse the *Hardwick* precedent, a relatively short turn around for a Supreme Court reversal. (Recall that it took over half a century for the Court to reverse *Plessy v. Ferguson*’s separate but equal doctrine in *Brown v. Board of Education I.*) The reasoning expressed in *Hardwick*, and its legal consequences, were so manifestly unjust that even the Court itself soon found the decision an embarrassment.

Social progress on culturally controversial issues has frequently originated through judicial action. The action may not be uniformly successful in the short run,<sup>43</sup> but it is through those judicial successes and failures that national attention is ultimately brought to bear on unjust policies. That has certainly been the case with same-sex marriage. Apart from California’s legislative efforts to implement domestic partnerships and same-sex marriage, and the recent initiatives in New Hampshire, Oregon, Maine, and Vermont, all significant state-wide successes thus far (seven, by my count) can be traced directly to court action. Arguably, even in those states which have voluntarily entertained marriage law reform, the legislative assemblies were feeling the effects of the national debate provoked by court battles elsewhere.

The electoral and legislative backlash against judicial recognition of same-sex marriage rights has begun to develop its own backlash, as a growing proportion of the electorate becomes increasingly reflective about, and resentful of, the manner in which the religious right has thus far successfully hijacked this aspect of national social policy debate through unprincipled misrepresentation of the issues relevant to the various anti-gay rights referenda campaigns. The transparent folly of the “Don’t Ask, Don’t Tell” policy concerning gays and lesbians in the military was the first major *agent provocateur* in this evolution of social attitudes. The homophobic “no special rights” campaigns of the mid-nineties (e.g., the unsuccessful one in Oregon, and the successful one in Colorado, leading ultimately to the Supreme Court’s repudiation of such practices in *Romer v. Evans*) also provoked some sympathy for the targets of those initiatives, and the anti-gay marriage movement has been a third catalyst for change, perhaps the most effective one, as evidenced in the series of more or less spontaneous protests across California in the two weeks following the passage of Proposition 8, and the grass-roots protests in cities large and small across the nation on Saturday, November 15.<sup>44</sup> This process was repeated on a more modest scale six months later, in the wake of the California Supreme Court’s decision to sustain Proposition 8.<sup>45</sup>

Judicial debate about these electoral and legislative disputes help to sharpen the issues, because the prospect of real, if sometimes temporary, consequences of judicial decisions compel at least some attention from citizens generally. Political timidity motivated by fear of hostile judicial ideology on the bench is misplaced—not because we should naively assume that judges leave their ideological proclivities at the courtroom door (they demonstrably do not), but because those ideological proclivities *should* be exposed to the light of day, via

their opinions. Only by recognizing ideology through scrutiny of judicial opinions can we hope not to be enslaved by it. The process is a bit like being liberated from the tyranny of one's neuroses through psychotherapeutic exercises designed to bring us to recognition of their presence.

Odd as it might sound to those who rail that courts are anti-democratic political institutions, in actual fact they are no such things. The constrained public debate inherent in judicial opinions is also part of what it means to govern ourselves democratically. For judges are, to a considerable degree, reflective mirrors of public opinion—even life-appointed judges fill this role. Their opinions constitute crystallized images of some aspects of popular sentiment (usually a few beats behind currently prevailing views), affording us an opportunity to examine some of our collective but somewhat fluid social attitudes in a freeze-frame perspective, an opportunity to reflect upon those attitudes perhaps a little more dispassionately than we might in the heat of electoral politics. When constitutionally well-grounded litigation is abandoned for fear of ideologically motivated judicial responses, we deny ourselves this opportunity for public reflection, and oppressive ideology retains the upper hand.

Finally, there is the simple need to tend to social injustice. However flawed, our appellate courts have always been intended to serve an important role in that cause. And there certainly are multiple serious questions about injustice at stake in the same-sex marriage debate. The next two sections of this survey focus on those questions in two important contexts: the legal implications of *Strauss v. Horton*, the recent California Supreme Court decision sustaining Proposition 8, and the future of *federal* litigation on the constitutionality of the national DOMA passed by Congress, a topic we have not yet examined.

#### 4. *Strauss v. Horton*: Direct Democracy and Constitutional Integrity

In addition to the issues of equal protection and substantive due process reviewed earlier in this article, the May 2009 California Supreme Court decision raises an entirely new and arguably more profound question concerning the very idea of a constitutional referendum prohibiting same-sex marriage. *Legislation* by direct majority vote, like Proposition 22, California's 2000 DOMA referendum, is one thing, but *constitutional reform* by this means, like Proposition 8 in November 2008, is quite another.

Constitutions serve two basic purposes: to define the structure of government, and to protect fundamental rights of individual citizens against government intrusion—most especially the rights of “discrete and insular minorities” from the tyranny of the majority. The possibility of constitutional amendments by bare majority certainly threatens the latter function of constitutions, and raises serious questions about the proper role of the courts in protecting both individual rights and the integrity of constitutional texts.

Seventeen states, including California, have public petition-initiated constitutional amendment processes, as distinct from (and in addition to) legislatively initiated ones. The requisite petition percentages to get such measures on the ballot range from a mere 3 percent of the total vote cast in a previous election cycle (Massachusetts), to a high of 15 percent (Arizona, Florida, and Oklahoma). There are, however, important distinctions to be made here. The initiative process in Massachusetts, for example, is indirect. A constitutional measure can go before the electorate only after the state legislature has failed to act on the petition. And even then one-quarter of the members of each chamber must approve the initiative going to the people in two successive legislative sessions. This set of hurdles was key in

preventing a reversal of Massachusetts' same-sex marriage law by constitutional referendum during the initial period of public hostility, when Massachusetts stood alone on this question. Even stronger constraints apply in Connecticut, Iowa, Maine, New Hampshire, and Vermont, all of which require legislative initiation before amendments can go to popular referendum (i.e., the process cannot be initiated by public petition), and all of which (except Iowa) require supermajorities in one or both chambers of the legislature. (Iowa requires simple majority in both chambers before sending a referendum to the people, but it does so in two successive legislative sessions. Connecticut also permits this approach, coupled with the alternative option of requiring a three-fourths supermajority in each legislative chamber in order for an amendment to be submitted to a popular vote after authorization in a *single* legislative session.)

Petition-initiated “direct” constitutional referenda states have no such legislative constraints. Nonetheless, some direct initiative states—Mississippi, Nebraska, Nevada, and Oklahoma—have such draconian petition requirements as to make amendment by popular referendum almost as difficult as amendment by legislative initiative elsewhere. Mississippi, for example, requires signatures of 12 percent of the electorate voting in the last gubernatorial election, divided evenly among its five Congressional districts, and collected within the space of a single year. This does not preclude the passage of amendments where popular sentiment is sufficiently strong, of course, as happened with the anti-same-sex marriage amendments in Nevada and Florida (two referenda in successive election cycles in Nevada, and a 60 percent supermajority for constitutional changes by popular referendum in Florida).

Some other direct constitutional referenda states make public access to constitutional tinkering so easy that constitutional protections of individual rights are effectively no more stable than legislatively protected rights. North Dakota, with a 4 percent petition requirement to get an amendment on the ballot, and no other constraints, is a good example.<sup>46</sup> At the end of the day, constitutional protections are only worth as much as the people governed by them are willing to invest in constitutional authority.

What should state courts say about direct constitutional referenda processes with easy access to the ballot and bare majority approval required to alter a state constitution? In some states, such as North Dakota, the answer is simple: the power to enact a constitution resides ultimately with the people. The people of North Dakota, whether consciously or not, wisely or not, have chosen to eviscerate their constitutional protections for the sake of greater direct democracy, which ties the hands of that state's supreme court.

Courts will occasionally veto popular will for the sake of what they regard as a higher moral or political principle, but only when they can do so under color of plausibly relevant statutory or constitutional language. No such language would be available to the North Dakota Supreme Court in the face of an electoral majority voting in favor of abrogation of some generally recognized constitutional right for some subset of its populace (at least, not at the *state* level; a federal court might invoke a conflicting provision of the *federal* constitution, which is much harder to modify).

California is an interesting test case because its method of amendment by popular referendum is constrained by that state's distinction between a constitutional *amendment*, which may be implemented by a simple majority referendum on an initiative placed on the ballot by petition of 8 percent of the total number of votes in the last gubernatorial election, and a constitutional *revision*, which requires either a constitutional

convention or passage by two-thirds of both houses of the state legislature, followed then by majority approval in a popular referendum. Because there is no specific constitutional language governing the difference between an amendment and a revision, the California Supreme Court, unlike my hypothetical case confronting the North Dakota Supreme Court, had the option of defending the constitutional protection of an individual right against majoritarian hostility, under color of plausible legal authority. Sadly, in *Strauss v. Horton* it chose not to rise to that challenge.

The *Strauss* majority could easily have ruled in light of its responsibility to protect the integrity of constitutional rights, by interpreting the distinction between amendments and revisions as Kathryn Werdegar and Carlos Moreno did in their concurrence and dissent, respectively. Their argument can be traced originally to Werdegar's quotation of *Livermore v. Waite*, an 1894 case in which the distinction was first discussed in the California Supreme Court:

[t]he very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.<sup>47</sup>

Werdegar and Moreno each contended that the question before the *Strauss* Court was whether Proposition 8's modification of the California Constitution was best understood as an erosion of fundamental principles embedded in that document, or merely a change which did not significantly alter "the purpose for which [the Constitution] was framed." Moreno concluded that tolerating bare majority constraints on equal protection rights fundamentally undermines "the countermajoritarian nature of the equal protection clause" (*Strauss*, 699), and therefore should only be done by means of the constitutional revision process. Werdegar, in contrast, is dismissive of the content of Proposition 8 as Juliet Capulet was about surnames in the balcony scene from *Romeo and Juliet*:

Deny thy father and refuse thy name; or, if thou wilt not, be but sworn my love, and I'll no longer be a Capulet. ... What's Montague? It is nor hand, nor foot, nor arm, nor face, nor any other part belonging to a man. O, be some other name! What's in a name? That which we call a rose by any other name would smell as sweet; so Romeo would, were he not Romeo call'd, retain that dear perfection which he owns without that title. (II, ii)

Under Werdegar's nominalist approach, Proposition 8 merely denies the use of a name—"marriage"—perhaps not much more than a *flatus vocis*,<sup>48</sup> but still tolerates all the other rights of marriage within the state's power to bequeath.<sup>49</sup> This small modification, she contends, does not constitute an erosion of California's constitutional doctrine of equal protection sufficient to rise to the level of a constitutional *revision*.

Werdegar's position is awkward (to put it charitably), since a year earlier she had signed off on the *In re Marriage Cases* majority opinion, in which the Court had argued precisely that the state's equal protection provision was seriously threatened by Proposition 22's prohibition against the use of the term "marriage" for same-sex unions, regardless of the other rights afforded such couples.<sup>50</sup>

The remaining five justices in the majority resorted to the sophistry that the concept of a constitutional revision applies only when the Constitution's role in laying out the structure of state government is implicated, not when the Constitution's role in protecting individual rights is implicated. This analysis, quite plausibly skewered in both Werdegar's and Moreno's opinions, sets a disastrous precedent for constitutional protections of individual rights in California. In effect, it eliminates the distinction between California's constitutional referendum process and that of North Dakota (apart from the numerical difference between the 8 percent and 4 percent petition requirements).

That the *Strauss* majority did not choose at least to embrace Werdegar's attempt to divide the question—salvaging some degree of constitutional integrity in the referendum process, while nonetheless abandoning the principle of equal protection in this instance—was not particularly surprising. Courts everywhere are loath to defy direct expressions of popular will (another illustration of the extent to which courts actually reflect popular will), perhaps especially when the judges themselves are subject to electoral recall, as is the case in California.

## 5. Federal Court Cases and the Federal DOMA

The question of the courts' proper role in balancing democratic governance against constitutional protections is a much larger issue than the particular question of same-sex marriage rights. Sometimes, as in North Dakota, the citizenry simply give the courts no latitude to address the question any further than majoritarian tolerance will allow at the time. Sometimes, as just happened in California, state law is such that the courts could reasonably take on the question, but decline the invitation. In the federal system, where passage of amendments is more onerous than in any of the fifty states,<sup>52</sup> courts should reasonably be understood to be charged with the responsibility to protect constitutionally recognized rights of besieged minorities against the will of hostile majorities. The difficulty of the federal amendment process was designed partly to afford federal judges the latitude to do just that.

Whether the federal judiciary will actually do any better than the California Supreme Court in this regard, with respect to same-sex marriage in particular, is unclear. The federal courts, typically loathe to embroil themselves in social controversies, have thus far been able to duck the issue because early cases (discussed below) provided the courts with ready excuses to buy time. But time is running out, now that some states have instituted same-sex marriage licensing procedures. For, by passing the 1996 federal DOMA, Congress directly implicated the federal government in the machinations of discriminatory state laws on the side of states with homophobic policies, and against the states with relatively progressive policies. That situation is unsustainable in a federal system in which the central government is supposed to function as a neutral broker among fifty quasi-autonomous polities.

To understand the nature of the problem now confronting the federal courts, we must first examine the two substantive provisions of the federal DOMA. The first one (section 2 of the bill) is the provision in which Congress declared that socially conservative states opposed to same-sex marriage need pay no attention to any future same-sex marriage licensing practices which may emerge in socially liberal 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, or tribe, or a right or claim arising from such relationship. [28U.S.C.§1738C]

Congress implemented this provision out of fear of that the federal courts might invoke the U.S. Constitution's full faith and credit clause (note 3, *supra*) to compel recognition in all fifty states of same-sex marriage licenses issued by a handful of states.

Although 28U.S.C.§1738C does pose several important conceptual problems, most of them are in fact likely to be avoided by the courts, for the simple reason that this provision is nothing more than a qualified legislative reaffirmation of the general public policy exception which federal courts have long recognized—the principle that one state may decline to recognize the “public acts or records” of another state when they conflict with the forum state's public policy.<sup>53</sup> In this sense at least, 28U.S.C.§1738C is a paper tiger. That quickly became apparent in *Wilson v. Ake*,<sup>54</sup> the earliest federal case to challenge this provision after Massachusetts began issuing same-sex marriage licenses. A federal district court invoked the public policy exception to dismiss a lesbian couple's constitutional challenge to 28U.S.C.§1738C, on the ground that Florida, the couple's state of residence, was under no obligation to recognize the marriage license which they had secured by travelling to Massachusetts for the purpose. The fact that Florida's DOMA expressed a public policy clearly inconsistent with Massachusetts' licensing practice was sufficient to rebuff the challenge.

From the federal courts' perspective, the real problem with the federal DOMA is its second substantive provision, which requires that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. [1U.S.C.§7(3)]

Although same-sex marriages existed nowhere in the U.S. when this measure was first passed, 1U.S.C.§7(3) does now prohibit the extension of federally protected marriage benefits to same-sex couples who have actually married in any of the states which now issue such licenses. To that extent, at least, it clearly violates the equal protection clause of the First Amendment to the U.S. Constitution. But for the most part, early cases against the federal DOMA came before the availability of same-sex marriages anywhere in the U.S., and did not fare well.

Prior to the legalization of same-sex marriage in Massachusetts, plaintiffs were dismissed for lacking the standing to sue, simply because they didn't actually possess marriage licenses in any state in the country, and therefore had not actually been denied any federal benefits accorded to married people or surviving spouses. This was the Ninth Circuit Court of Appeals' response in *Smelt v. Orange County*,<sup>55</sup> since the California-resident plaintiffs had been issued no marriage license in California, because none was available at the time of their suit.<sup>56</sup> In addition, because that particular case came from California, at a time when litigation about Proposition 22 was still underway in the state courts, the federal courts had yet another excuse to decline to address the complaint: it was not yet ripe for litigation at the federal level, because state judicial remedies had not yet been exhausted.

The first crack in the DOMA edifice appeared in an Oklahoma federal district case, *Bishop v. Oklahoma ex. rel. Edmondson*.<sup>57</sup> Like the *Smelt* plaintiffs in California, *Bishop*

included unmarried Oklahoma residents filing constitutional complaints about the withholding of federal marriage benefits (since Oklahoma refused to license same-sex marriage). Those plaintiffs were dismissed for lack of standing. But *Bishop* included additional plaintiffs who possessed either a civil union license from Vermont, or a Canadian same-sex marriage license. Those plaintiffs *were* ruled to have sufficient standing to sue concerning the constitutionality of the federal benefits, an important concession. The court declined to rule on the merits, however, because the plaintiffs had singled out no specific harm that had been done to them under that section of the federal DOMA. Oddly, in their unsuccessful appeal to the Tenth Circuit, the plaintiffs ignored the outstanding question about the federal law, failing to appeal the constitutionality of 1 U.S.C. §7(3).<sup>58</sup>

Among the current crop of federal cases, it is conceivable that *Perry v. Schwarzenegger*, the Olson and Boies case questioning the federal constitutionality of Proposition 8 on equal protection and due process grounds,<sup>59</sup> might meet the same fate as *Smelt v. Orange County*—not because such a response is reasonable, but because the federal courts might simply be disposed to weigh their longstanding deference to state licensing authorities more heavily than their respect for the First Amendment's equal protection clause. Asking federal courts to repudiate state sovereignty on the strength of a balancing test among such abstract principles is a tall order. It was done in the two *Brown v. Board of Education* cases, but it's a rare response, made somewhat more unlikely in this instance by the outcome in the popular vote supporting marriage discrimination at the state level (i.e., the Proposition 8 referendum result).

But a lot has happened since the original *Smelt* case was filed, including the further growth of social tolerance toward the idea of same-sex marriage. Most dramatically, in June 2009, both Jerry Brown (California's current attorney general) and Arnold Schwarzenegger, the two chief named defendants in the case, have gone on record as refusing to defend Proposition 8 against the charges of unconstitutionality filed the previous month in *Perry*. Brown has gone so far as to agree that the charges are well-founded.<sup>60</sup> The executive branch of California's state government has, in effect, left the task of defending a state initiative up to the executive branch of the federal government.

If we were to judge by the Obama Administration's simultaneous action in *Smelt v. U.S. (Smelt II hereafter)*,<sup>61</sup> the federal government might defend Proposition 8 quite vigorously in *Perry*. *Smelt II* is a marginally revised version of *Smelt v. Orange County (Smelt I)*, only now the *Smelt I* plaintiffs come to their new case brandishing a California marriage license secured in July 2008, during the window between *In re Marriage Cases* and the passage of Proposition 8, when 18,000 legally secure same-sex marriage licenses were issued in California. Arthur Smelt and Christopher Hammer now contend that both provisions of the federal DOMA violate their federal equal protection and due process rights as a married couple, but they once again fail to specify what particular federal benefits they have actually petitioned for and been denied in their newly married state, and they supply no evidence that they intend to move from California to a state which would deny recognition of their marriage.

The *Smelt II* plaintiff's brief is not well-crafted. In addition to the defects just listed, the brief claims violation of the constitutionally recognized right to travel and right of privacy, but does not explain how either right is violated. It also claims violation of “the Right to Life, Liberty, and the Pursuit of Happiness,” a phrase from the Declaration of Independence

which appears nowhere in the U.S. Constitution. Nor is there any precedential history of a federally recognized right to the “pursuit of happiness,” for which a method of enforcement would be hard to imagine.

On June 11, 2009, the day before the California Attorney General’s repudiation of Proposition 8’s federal constitutionality, the Obama Department of Justice filed its response to *Smelt II*. This proved to be a remarkably obtuse defense of the federal DOMA against the various charges listed above. If the goal was to avoid embroiling the Obama Administration in a court battle over the constitutional legitimacy of the federal DOMA (which Obama says he would prefer to get repealed in Congress), it would have been a simple enough matter for the government’s brief to argue for dismissal of the case on standing grounds, given the litigants’ failure to specify actual harms done to them with respect to equal protection, due process, or the rights to travel and privacy. Given the similar precedent in the Ninth Circuit’s *Smelt I* decision, it is easy to imagine that Court agreeing with the standing argument, without ever going into the merits of the federal DOMA provisions under attack.

Conceivably, the federal district court of initial jurisdiction might choose to behave otherwise, at least on the federal benefits provision, by issuing an invitation to the plaintiffs to enumerate and document specific denials of benefits, as the Oklahoma federal district court effectively did in *Bishop*. But such a development should not trouble the Obama Administration. It would play into the Administration’s publicly professed sympathy for gay rights (although not same-sex marriage in particular), and its desire to scrap the federal DOMA, without implicating the Administration in a frontal judicial attack on DOMA (since the attack would have been initiated by the court itself).

The Administration’s Motion to Dismiss did include the standing argument, and added a reasonably plausible defense of DOMA’s public policy exception provision:

Consistent with our federalist system, which allows each State to “serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country,”...DOMA does not address whether a same-sex couple may marry within the United States. Instead, it permits the citizens of each State to decide that question for themselves. To preserve the autonomy of the States in this area, therefore, Section 2 of DOMA provides that each State may decide whether to recognize a same-sex marriage performed under the law of another State. (*Smelt v. U.S.* Motion to Dismiss, 1-2)

Unable to leave well enough alone, the Administration’s response did not stop with this pair of relatively uncontentious arguments. Concerning the merits of the public policy exception, the brief overreaches by also attempting to ground that principle in constitutional text—specifically the second sentence of the full faith and credit clause (*supra*, note 3), the one which grants Congress the authority to prescribe the *manner* in which the *effect* of the acts, records, and proceedings of one state must be *proved* (i.e., honored and executed) in another. After acknowledging that, “[i]n the Framers view, the [full faith and credit] provision in the Articles of Confederation was deficient because it did not declare what was to be the effect of a judgment obtained in one state in another state” (Motion to Dismiss, 19), the brief contends, quite implausibly, that this means that Congress was thereby granted the authority to dictate that states could simply ignore specified acts, records, or proceedings of sister states (Motion to Dismiss, 20).

What the brief’s historical excavation actually reveals, of course, is that the second sentence was added to the full faith and credit principle expressly in order to ensure that it *would* be honored in sister states, by granting Congress the power to craft rules of implementation. *McElmoyle, ex rel. Bailey v. Cohen*,<sup>62</sup> the original judicial precedent which the Motion to Dismiss cites as its authority for the contrary reading, actually reaffirms the breadth of the full faith and credit doctrine, repeatedly insisting that, when a court in one state (South Carolina in *McElmoyle*) is petitioned to remedy an unaddressed grievance on which judgment has been rendered in another state’s court (Georgia, in this instance), the court in the forum state (South Carolina) has no business questioning the judgment on the merits previously rendered in Georgia. South Carolina must accord the Georgia judgment “full faith and credit.” The only question at issue was which state’s laws should govern the means of remedy. On this issue, in the interest of avoiding the legal chaos that might ensue, the U.S. Supreme Court came down on the side of the forum state—meaning South Carolina law should govern South Carolina remedies. But the idea that South Carolina could simply repudiate the Georgia judgment was expressly prohibited in *McElmoyle*.<sup>63</sup>

In other words, the Motion to Dismiss actually reminds us that the public policy exception is entirely a creature of judicial precedent, not textually grounded in the Constitution at all. The federal courts might conclude that, confronted with the choice between honoring the constitutional text on the one hand, and adhering to the view that the individual states function sometimes as laboratories for novel social experiments from which the rest of the country might prudently be insulated (at least for a cautious span of time), sticking with the latter policy (and the public policy exception) may be the better part of discretion. But inadvertently drawing federal courts’ attention to the public policy exception’s lack of textual support seems unintelligent.

The Motion to Dismiss is far more offensive, however, in its defense of DOMA’s denial of federal benefits to the holders of same-sex marriage licenses (and civil union licenses, for that matter). The motion contends that “DOMA in no way prohibits same-sex couples from marrying” because “no court has ever found a right to federal benefits [on the basis of same-sex marriage] to be fundamental” (Motion to Dismiss, 4). This language is reminiscent of Byron White’s transparently specious claim that *Bowers v. Hardwick* was about an alleged fundamental right to engage in homosexual sodomy,<sup>64</sup> a characterization of the plaintiff’s complaint justly ridiculed in Harry Blackmun’s dissent:

This case is no more about “a fundamental right to engage in homosexual sodomy” ...than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”<sup>65</sup>

The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.<sup>66</sup>

Whatever we might say about *Smelt II*’s deficiencies, that case does raise serious equal protection and due process issues about the selective denial of federal benefits to married couples. Arguably, this practice contradicts the Motion to

Dismiss's flat assertion that "DOMA in no way prohibits same-sex couples from marrying." Insofar as *civil* marriage is all about government-sponsored inducements to participate in a certain type of socially stabilizing relationship, civil marriage can plausibly be equated with those inducements. By denying access to all of the inducements under its direct control, the federal government is indeed prohibiting same-sex couples from marrying in a very real sense. To deny this, as the Motion to Dismiss does, is simply intellectually dishonest. To dismiss the equal protection claims in *Smelt II* on the ground that no federal court has yet recognized them is to commit the fallacy of appeal to tradition. Novel legal arguments are entitled to a hearing.

After declaring that there are *no* equal protection or due process issues at stake in this case, the Motion to Dismiss goes on to address them anyway, arguing that Congress had four good reasons for discriminating against same-sex couples, or as the Motion puts it, for granting "preferred legal status to a particular kind of loving relationship, heterosexual marriage": (1) "the role [heterosexual marriage] plays in procreation and childrearing"; (2) "further[ing] Congress's...interest in traditional notions of morality"; (3) "protecting state sovereignty and democratic self-governance"; and (4) saving money (Motion to Dismiss, 6-7). Of these, reason (3), the only even modestly persuasive consideration, is relevant only to the first provision of DOMA, which I have already argued that the federal courts might continue enforcing even without assistance from Congress. Reason (1) has now widely been argued (in state courts, for example) to apply also to same-sex couples. Reason (4) is a non-starter in the face of equal protection violations. And, finally, reason (2) invites Harry Blackmun's withering comment on Byron White's analogous appeal to homophobic tradition in *Hardwick*:

Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>67</sup>

Reason (2) is also inconsistent with reason (3): if the role of Congress with respect to "social experiments" is to serve as an honest broker between the divergent polities of the individual states, then why should Congress be taking sides in this matter at all, which, despite sophistical pretensions to the contrary in the Motion to Dismiss, Congress undeniably has done in enacting the federal DOMA?

## 6. Conclusion: Wither Hence?

It is hard to know just what to make of the Obama Administration's critique of *Smelt II*. Despite its assertion that the federal DOMA is entirely non-discriminatory, barely a week later the President himself publicly reaffirmed his previously stated view that the federal DOMA is indeed discriminatory, and that Congress should repeal it.<sup>68</sup>

We have, of course, seen this act before. After Bill Clinton advocated elimination of anti-gay policies in the U.S. military forces in 1992, he promptly caved to political expediency during his first year in office, and cooperated actively with the drafting of the "Don't Ask, Don't Tell" legislation. Upon signing the bill, he quite hypocritically characterized it as a good compromise, when it was apparent to all, then and now, that it was simply the transformation of previous administrative practice into federal statute. (Military authorities were in fact emboldened to discharge even more gay and lesbian service personnel in the years following this Congressional action.) In 1996, Clinton's behavior was even more morally deficient:

after decrying the federal DOMA legislation as discriminatory, he went ahead and signed it anyway, and then, in a breathtaking excess of hypocrisy, proceeded to ingratiate himself to socially conservative voters in select stump speeches by citing his support of DOMA.

Perhaps Barack Obama is cut from the same cloth. In his grimmer older years, Kurt Vonnegut referred to the upper echelons of the Bush Administration as "psychopathic personalities" and intimated that this feature of our political landscape was not peculiar to the then current crop of residents of the West Wing of the White House and their intimates.<sup>69</sup> Certainly Bill Clinton fit Vonnegut's description of "PPs," as he nicknamed them, although his version of the illness manifested itself differently.

But I'm still unconvinced that Obama is Bill Clinton redux. A more likely explanation is that the *Smelt II* Motion to Dismiss was simply a mistake—not with respect to its author, W. Scott Simpson, a Bush Administration staff legacy in the Department of Justice (and one presumably afflicted with Bush Administration ideological blinders)—but with respect to its ever having seen the light of day. It is, after all, almost as ill-crafted as *Smelt II* itself, as likely to encourage the judiciary to take *Smelt II* more seriously as it is to provoke dismissal. What the opinion suggests is that Assistant Attorney General Tony West, an Obama appointee who had to sign off on the Motion to Dismiss in order for it to go forward, was either asleep at the wheel or incompetent, for having released this dog of an opinion from its cage. My guess is that the President himself was completely unaware of the opinion written on his behalf until it became fodder for the national press. Perhaps the Department of Justice will eventually repudiate this motion and substitute another, but I think that unlikely, because such a move would be a different kind of political dynamite, when the Obama Administration already has a great deal on its plate concerning health care and the economy.

In any event, it would be surprising if *Smelt II* proves to be a landmark case. Its defects make it likely to be dismissed for plaintiffs' failure to establish adequate standing to sue, or, at best, returned to plaintiffs with a demand that they establish a record of actual harms experienced. At that point, historical events will start to pass this case by. The issues are already too fluid to wait on the authors of *Smelt II* to get their act together.

Nor do I think *Perry v. Schwarzenegger* will settle the debate about the federal DOMA. Technically, it is only about the constitutionality of a state-level constitutional amendment. But a *Perry*-motivated judicial repudiation of Proposition 8 would have major implications for both provisions of the federal DOMA, as well as for every state DOMA and at least twenty-eight of the twenty-nine other anti-same-sex state constitutional amendments.<sup>70</sup> If the U.S. Supreme Court were to rule that Proposition 8 violated the federal equal protection clause, the same would surely be true of all the other state DOMA and amendment actions, which are generally more draconian in their treatment of same-sex couples than Proposition 8. If it is constitutionally unjustifiable for individual states to engage in these homophobic "social experiments," then surely it is equally unacceptable for Congress to abet them [28U.S.C. §1738C] and augment them [1U.S.C. §7(3)].

This would be a remarkably sweeping set of results for the Supreme Court to entertain, involving, as it does, the repudiation of direct democratic action in twenty-nine states, frequently by very large majorities. While not entirely unwilling to defend constitutional principles in the face of popular opposition, the Supreme Court is mindful of the limits on public tolerance of its rulings. On this one, I don't think the Court would risk it.

*Perry* may not get that far. The Ninth Circuit may see fit to protect the Supreme Court by devising an argument to let Proposition 8 stand, in which case the Supreme Court will probably gratefully deny cert, regardless of the merits of the Ninth Circuit argument. If, on the other hand, the Ninth Circuit were to strike down Proposition 8, then I think the Supreme Court response to *Perry* might be to adopt Kathryn Werdegar's strategy in *Strauss*: Juliet's nominalism. If Proposition 8 is cast in that light, the Court can avoid addressing the larger question of government benefits denied elsewhere, including in the federal DOMA, on the ground that *Perry* does not concern such issues, because Proposition 8 revokes no rights afforded married couples, other than a mere name.

This does not mean that *Perry* should not even go forward. The national scrutiny would surely advance public sensitivity to the issue, even more profoundly if five members of the Supreme Court should see fit to write a truly mean-spirited opinion, as was done in *Hardwick*.<sup>71</sup> Whether an emergent Supreme Court majority opinion in *Perry* proved principled or prejudiced, it would bring the national debate on the true meaning of equal protection into sharper focus, and do so in a positive way. Either way, the resulting scrutiny of the equal protection principle will ultimately advance its cause, just as scrutiny of the California Supreme Court's decision in *Strauss* will, perversely, sensitize more Californians to the comprehensive significance of equal protection over the long run. We ought to have more faith in the underlying sense of fairness of the American people. For the most part, questions of social justice are simply a matter of getting their attention for a sufficiently prolonged period.

There is yet another federal case, however, that I think far more likely to settle intermediate term public policy on same-sex marriage generally, and the constitutional permissibility of the federal DOMA more particularly. GLAD's *Gill v. Office of Personnel Management, USPS* (*supra*, note 38) is sufficiently narrowly drawn with respect to an equal protection argument to elicit sympathy in the federal courts—indeed, probably to *compel* that sympathy, as it will be very difficult for federal courts to argue coherently against the complaints set forth there. *Gill* concerns the withholding of specific federal rights from eight Massachusetts-resident same-sex couple plaintiffs, and three more surviving spouses of such couples, all of whom are (or were) participants in Massachusetts-licensed same-sex marriages. The challenge here takes up the invitation *Bishop* failed to pursue: the constitutionality of Section 3 of the federal DOMA, which precludes (depending on the plaintiff): availability of federal income tax benefits offered to married heterosexual couples; ability to have one's spouse added to family health insurance coverage as a Post Office employee; ability to have one's name changed to a new married name on one's passport; ability to secure survivor benefits under social security, or a survivor annuity as the spouse of a deceased former member of Congress.<sup>72</sup> All of the plaintiffs are long-term Massachusetts residents who married in Massachusetts, and who have each expressly applied for and been denied the federal benefits in question. Similarly circumstanced opposite-sex spouses would be eligible for each of these federal benefits.

Unlike *Bishop* and *Smelt II*, the plaintiffs in *Gill* do not suffer from the defect of being unable to identify the specific harms done to them, so standing should not be an issue. Unlike *Perry* and *Smelt II*, the complaint is narrowly drawn, focusing exclusively on the "no federal benefits" provision of the federal DOMA. That provision, I think, is doomed. The only question is whether *Congress* or *Gill* will get there first. I would bet on Congress, just as soon as *Gill* wins in the federal district court in Boston, which I think inevitable. Congress will not care to wait for the U.S. Supreme Court to clean up its mess, which

I also think inevitable. It is conceivable that some of the four conservative justices might disgrace themselves by arguing that the federal government's treatment of the *Gill* plaintiffs somehow doesn't violate equal protection, or that there is a sufficiently compelling reason for the violation, but it seems quite unlikely that Anthony Kennedy would go along with either proposition, given his previous votes in *Lawrence v. Texas* and, especially, *Romer v. Evans*.

In short, over the next two years, I believe the federal DOMA will be reduced to Congress's affirmation of the public policy exception to the full faith and credit clause, which the federal courts have already been invoking for two centuries in other contexts. Even though there is no evidence that the Framers contemplated such an exception, it has become "settled law" through many judicial rulings, and the federal courts are unlikely to dismantle it on the strength of its mere absence from constitutional text. The second substantive provision, though, prohibiting same-sex couples access to federal benefits, will, I think, soon be gone, both for married couples and for participants in civil unions or domestic partnerships of broad scope. Moreover, federal benefits will be portable: a same-sex couple who marries in Massachusetts and then moves to South Carolina will carry their federal benefits with them. But, in keeping with the public policy exception to the full faith and credit clause, I doubt that they will enjoy *state*-sponsored marriage benefits in South Carolina, at least not for the time being.

Remaining reforms will have to continue coming state-by-state, but I assume they will gather steam quickly after the reform of the federal DOMA. Proposition 8 will probably be killed in the 2010 California election; it has already received a considerable amount of bad publicity, and regardless of the outcome in *Perry*, that case will be adding fuel to the fire in the meantime. New York and New Jersey are both likely to have same-sex marriage sometime during their next legislative sessions, after which it is just a matter of time before other states come round—only a little time in states like Illinois, probably a long time here in South Carolina. On the whole, the future of same-sex marriage in this country looks considerably more promising than last fall's election results might appear to suggest.

#### Endnotes

1. Most notably *Baker v. Nelson*, 191 N.W.2d 185 (MN 1971), a Minnesota Supreme Court affirmation of a county clerk's decision to deny Richard Baker and James McConnell a marriage license. Plaintiffs' appeal to the U.S. Supreme Court was dismissed "for want of [a] substantial federal question," 409 U.S. 810 (1972). See also *Jones v. Hallahan*, 501 S.W.2d 588 (KY 1973), for a similar state supreme court outcome two years later.
2. 852 P.2d 44 (HA 1993).
3. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." (*U. S. Constitution*, Article IV.1)
4. There is no public policy exception written into the U.S. Constitution. But that principle (as applied to culturally divergent foreign sovereign authorities) has a legal history long predating the formulation of the full faith and credit clause. So while that clause might arguably have been intended by the Framers as a repudiation of the public policy exception where the enactments of the newly federated sister states were concerned, federal courts proved in fact reluctant to abandon domestic application of the principle entirely. A somewhat attenuated version of the public policy exception thus remains applicable within the domestic sphere of interstate legal transactions. As a matter of practical judicial politics, the language of any constitutional clause is

only worth as much as will be allowed by the judicial bodies charged with its interpretation, however transparent that language may appear to some.

5. Alaska's amendment was the first direct constitutional restriction of marriage to heterosexual couples. Hawaii's amendment merely granted the legislature the authority to pass DOMA legislation, although this had the practical effect of repudiating (by popular referendum) the state supreme court's conclusion that the state constitution's equal protection clause encompassed same-sex couples.
6. *Baker v. Vermont*, 744 A.2d 864 (VT 1999). State courts have no jurisdictional authority over the allocation of *federal* benefits, of course.
7. *VT Statutes Annotated*, Title 15, Chapter 23. Hawaii's 1997 domestic partnership statute (Hawaii Revised Statutes (HRS) 572c), passed in response to the 1993 Hawaii Supreme Court ruling, was, by contrast, a pale imitation of the real thing. It did provide for registered domestic partners to be covered under state employee health insurance and retirement plans, and some inheritance rights, workers' compensation survivor benefits, the right to pursue wrongful death suits, and domestic abuse protections. On the other hand, the Hawaii legislature balked at addressing the issue of joint taxation (sometimes advantageous for couples, and sometimes not), at extending to domestic partners the privilege of exemption from having to testify against ones spouse, at the question of financial support or distribution of property at the termination of a domestic partnership (which could be achieved by simple unilateral action by either partner), and at securing legal support for domestic partners as potential parents, even though such a support network is already in place for heterosexual parents.

The legislature was reluctant to go further because it was fearful of leaving the impression that such a move would indeed constitute a *de facto* recognition of same-sex marriage as morally comparable to heterosexual marriage. Consequently, the legislature made the domestic partnership law virtually universal in scope of eligibility, so that it would not single out same-sex couples for special status. It chose a more neutral name for the legal relationship, calling it a "reciprocal beneficiary relationship," and opened it to all Hawaiian citizens who could comprise "couples composed of two individuals who are legally prohibited from marrying under state law." Lest there be any confusion about the legislative intent, lawmakers took pains to add an explanatory gloss: it is available not just to "two individuals who are of the same gender," but equally to "a widowed mother and her unmarried son." (Hawaii Revised Statutes (HRS) 572c-2)

8. *Goodridge v. Massachusetts Department of Public Health*, 798 NE2d 941 (MA 2003). The last point, the charge of reliance on "irrational reasons," speaks to the judicial concept of *substantive due process*, which is distinct from *procedural due process*, the idea that laws must conform to certain procedural constraints, such as being read one's Miranda rights upon arrest, or a state prosecutor's obligation to notify a defendant (in a timely fashion) about any exculpatory evidence in the prosecutor's possession. Substantive due process, on the other hand, requires laws to *respect* certain basic legal rights to which all American citizens are entitled—e.g., free speech rights, some property rights, the right to practice one's religious beliefs, the right not to be subjected to cruel and unusual punishment, etc. Violations of substantive due process occur not when these rights are violated, but when they are violated without sufficient justification, i.e., without sufficient respect for the relative importance of the right in question. If a court determines that such a law is arbitrary or capricious (i.e., if it doesn't effectively promote some public interest sufficiently important to outweigh the protected right, or if it is simply deemed an irrational restriction on the threatened right), that court may strike that law.

Both forms of due process jurisprudence came to be applied by federal courts against state laws through the Fourteenth

Amendment's due process clause. (There is an identically worded Fifth Amendment due process clause which expressly targets *federal* law.) In both contexts, substantive due process in particular is a twentieth-century judicial doctrine, developed over the course of a series of cases treating of legislative protections of the economic welfare of workers. The cases *Lochner v. New York* [198 U.S. 45 (1905)] and *West Coast Hotel v. Parish* [300 U.S. 379 (1937)] can be taken as reasonable beginning and end points of the maturation of this doctrine.

In more recent years, the forcefulness of the justification needed to overcome the substantive due process bar has come to depend on the U.S. Supreme Court's view of the seriousness of the right violated. If the right is classified as "fundamental," then the courts may apply *strict scrutiny*, a very high standard of judicial review requiring that the governmental intrusion on the right in question constitute a *narrowly tailored* and *least intrusive means* of achieving a state interest that is *compelling*. Mere economic rights, on the other hand, such as those treated in *Lochner* and *West Coast Hotel*, may be overridden provided that the government can offer some *rational basis* for the intrusion, a standard which can be quite modest.

A similar (but tri-partite) scale of judicial review applies to equal protection violations (also applied to the states through the Fourteenth Amendment), with gender violations occupying a middle ground between the rational basis and strict scrutiny standards, while race and religion fall under strict scrutiny. There is considerable lack of judicial clarity just where on the scale of equal protection violations we should assign unequal treatment of sexual orientation. Such state action has most frequently been cataloged under the rational basis standard, rather than the strict scrutiny standard, or the intermediate scrutiny standard applied to gender. But judicial behavior has been shifting towards one or the other of the stricter standards in recent (state-level) same-sex marriage cases.

9. *Opinions of the Justices to the Senate* 802 N.E.2d 565 (MA 2004).
10. Including the earlier provisions in Alaska and Hawaii, and amendments enacted in Nebraska (2000) and Nevada (2002), that brings the total to thirty. Many of these amendments were also motivated by the fear that local state supreme courts might similarly rule local statutory marriage restrictions unconstitutional. That might have been the fate, for example, of Hawaii's reciprocal beneficiary relationship, were it not for the preemptive ratification of that state's constitutional amendment permitting the state legislature to ignore the state constitution's equal protection provision where marriage law was concerned.
11. This is not the entire picture, of course. In addition to Vermont's 2000 civil union statute, New Hampshire passed a comparably comprehensive civil union bill in 2007, both remaining in application until the respective implementation dates of each state's same-sex marriage statute. Hawaii still has reciprocal beneficiary relationships. But, as discussed in note 7, *supra*, these represent relatively modest commitments as compared with marriage, both from the perspective of the state and from the perspective of the partners. Similarly, at the end of May 2009, the Nevada legislature overrode the governor's veto to legalize its version of domestic partnerships, bringing to seventeen the total number of states which offer *some* recognition of same-sex partnerships. But recognition of such partnerships in ways significantly comparable to recognition of heterosexual marriage is limited to the ten states mentioned above.
12. In 2000, Nebraska bypassed the strategy of enacting a DOMA by legislation or referendum, and went straight to a constitutional amendment prohibiting same-sex marriage. All other amendment states constitute a subset of DOMA states.

13. The same could be said of New Hampshire back in 2007. But with the passage of its same-sex marriage law, that state has subsequently eliminated its anti-gay marriage statutory language altogether.
14. *Lewis v. Harris*, 908 A.2d 196.
15. It is possible that New Jersey's civil union statute may yet be transformed into a same-sex marriage statute, in light of December 2008 recommendations to that effect from a Civil Unions Commission appointed for the purpose of reviewing the impact of the new statute. The Commission took a position similar to that of the Massachusetts Supreme Court in *Goodridge*.  
New York is also a potentially hospitable climate for same-sex marriage in the near future. The New York State Assembly has twice now passed a same-sex marriage bill (in 2007 and again in May 2009), but the 2007 bill was repudiated by the Republican-controlled state Senate, and the 2009 bill fell victim to an end-of-session inter-party power struggle in a Senate split evenly between Democrats and Republicans. If the New York Senate does eventually reverse course sometime during the Paterson administration, such legislation would almost certainly be signed into law by the Governor, a vocal advocate for same-sex marriage.
16. 183 P.3d 384 (CA 2008).
17. *Perez v. Sharp* 32 Cal.2d 711 (CA 1948).
18. 957 A.2d 407 (CT 2008).
19. This is the "intermediate scrutiny standard" applied in gender cases (see discussion in note 8, *supra*). The Massachusetts court, relying instead on the rational basis standard, was, in one sense, offering a more robust ruling than either the California or Connecticut courts, since the Massachusetts court was contending, in effect, that exclusionary marriage statutes were so thoroughly irrational that they could not even survive the weakest standard of judicial review employed in due process and equal protection cases.
20. 763 N.W.2d 862 (Iowa 2009).
21. To date, all the same-sex marriage cases have relied on equal protection and/or substantive due process arguments of the sort referenced above. Other possible strategies are conceivable, but thus far untested. I offer a First Amendment free expression argument in "Transgendered Marriage and the Legal Coercion of Gender Identity," forthcoming.
22. Should the New York legislature eventually go the way of Vermont, Maine, and Massachusetts, it would be the first to do so in which a state high court has gone the other way, supporting statutory or administrative prohibitions against recognition of same-sex marriage. In *Hernandez v. Robles*, 855 N.E.2d 1 (NY 2006), the provocation was not a DOMA, since New York has none, but a 2004 state attorney general reading of statutory references to "husband" and "wife" as prohibiting marriage between same-sex couples. In *Hernandez*, New York Court of Appeals upheld that interpretation.
23. "Acceptance of Gay People in Military Grows Dramatically." *Washington Post* (July 19, 2008): A3.
24. See my "Gays in the Military and the Excuse of Constitutional Deference." *APA Newsletter on Philosophy and Law* 97:1 (Fall 1997): 74-79, at 77; available electronically at: [http://www.apaonline.org/publications/newsletters/v97n1\\_Law\\_05.aspx](http://www.apaonline.org/publications/newsletters/v97n1_Law_05.aspx).
25. Although targeted specifically at same-sex couples, the Arkansas ballot initiative, approved 57 percent to 43 percent, prohibits any "individual...cohabiting with a sexual partner outside of a marriage...valid under the laws and Constitution of [Arkansas]" from fostering or adopting children. The measure explicitly "applies equally to cohabiting opposite-sex and same-sex individuals." As one commentator framed the issue, an Arkansas grandmother cohabiting with her opposite sex partner (in order to avoid a marriage penalty on their respective pension benefits) will now be prohibited from adopting her own grandchild, and a man living in a same-sex partnership will now be prohibited from adopting his deceased sister's children. (See Dan Savage, "Anti-Gay, Anti-Family," *New York Times* (November 12, 2008): A31.)
26. Four other states can now make similar claims. New Hampshire's legislature passed a comprehensive civil union bill in 2007 (effective January 1, 2008) without any prior court ruling, and repeated this performance with its 2009 enactment of same-sex marriage (discussed earlier). Oregon's legislature passed a comparable domestic partnership bill on virtually the same timeline as New Hampshire's civil union legislation (the chief difference being that Oregon expressly does not presume that its domestic partnerships should be recognized elsewhere). More recently, Maine and Vermont passed their 2009 same-sex marriage statutes without the provocation of previous court rulings, in Maine's case reversing that state's 1997 DOMA. (Vermont, of course, did have a previous court ruling, but that mandated only civil unions, not marriage.) Washington State also passed a domestic partnership bill in 2007 (made significantly more comprehensive in 2008), but did so partly in response to judicial invitation, when the State Supreme Court declined to rule Washington's 1998 Defense of Marriage Act unconstitutional (*Anderson v. King County*, 138 P.3d 963 [WA 2006]).
27. John Wildermuth. "California Majority Backs Gay Marriage." *San Francisco Chronicle* (May 28, 2008): A1.
28. See [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_8\\_\(2008\)](http://ballotpedia.org/wiki/index.php/California_Proposition_8_(2008)) for a summary of those poll results.
29. Claudia Card. "Against Marriage and Motherhood." *Hypatia* 11:3 (1996): 1-23.
30. Cheshire Calhoun. "Who's Afraid of Polygamous Marriage: Lessons for Same-Sex Marriage Advocacy from the History of Polygamy." *San Diego Law Review* 42 (2005): 1023-42.
31. The Beyondmarriage.org petition statement is a good example of this latter view. The initial round of signatories on the July 2006 document include such notables as: Judith Butler, John d'Emilio, Martin Duberman, Anne Fausto-Sterling, Leslie Feinberg, Judith (Jack) Halberstam, Jonathan Ned Katz, Armistead Maupin, Dean Spade, Cornel West, Robin West (a small sample culled from a much longer list).
32. See, e.g., John Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Law Review* 69 (1994): 1049-76, and Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal of Jurisprudence* 42 (1997): 97-134.
33. This last argument has been pressed by Jonathan Rauch in particular (note 34, *infra*).
34. For an early expression of this view, from the left (and anticipating some of Claudia Card's arguments, note 5, *supra*), see Paula Ettelbrick, "Since When is Marriage a Path to Liberation?" *Out/Look: National Lesbian and Gay Quarterly* 6 (Fall 1989): 9, 14-17. Reprinted in various anthologies. And from the right, see, in some respects, Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (Time Books, 2004). For a recent reaffirmation of the political strategy Rauch sketched there, see Rauch, "Try a Little Learning," *Independent Gay Forum* (November 6, 2008), at: <http://www.indegayforum.org/blog/show/31644.html#20021>.  
For a more centrist assessment of these concerns (coming down ultimately on the side of promoting same-sex marriage through litigation), see Carlos A. Ball, "The Backlash Thesis and Same-Sex Marriage: Learning from *Brown v. Board of Education* and its Aftermath," *William & Mary Bill of Rights Journal* 14 (2006): 1493-1538.
35. Strictly speaking, only twenty-nine states have thus far implemented anti-gay marriage constitutional amendments via thirty-one popular referenda since 1998. (Recall that Hawaii only amended its constitution to empower the state legislature to restrict marriage to opposite-sex couples.) The two additional referenda reflect two oddities: (1) Nevada's constitutional requirement that amendments achieve

majority approval during two successive election cycles (2000 & 2002 in this case); and (2) the fact that Arizona has conducted a pair of constitutional ballot initiatives.

Arizona bears the distinction of being the only state in the nation to reject a popular vote initiative designed to ban same-sex marriage, in 2006. That initiative lost narrowly (52 percent to 48 percent) because it was correctly perceived to prohibit not just same-sex marriage, but also any future recognition of civil unions in Arizona, a state known for its libertarian proclivities. Having once overreached themselves, Arizona's opponents of same-sex marriage regrouped for the 2008 general election, and successfully (56 percent to 44 percent) negotiated passage of a constitutional amendment prohibiting only same-sex marriage.

36. 93 Cal.Rptr.3d 591.
37. Lambda Legal and ACLU reactions are discussed in Jesse McKinley, "Bush v. Gore Foes Join to Fight Gay Marriage Ban," *New York Times* (May 28, 2009): A1, A15.
38. The New England gay rights political action group GLAD (*Gay & Lesbian Advocates & Defenders*) has recently (March 2009) abandoned this strategy, filing *Gill v. Office of Personnel Management, United States Postal Service* in federal district court in Boston (Case No. 1: 2009cv10309, discussed below).
39. 478 U.S. 186.
40. For a brief discussion of the judicial hostility to gay rights fostered by *Bowers v. Hardwick*, see my "Legal Aspects of Gay and Lesbian Rights," *APA Newsletter on Philosophy and Law* 97:1 (Fall 1997): 60-65, at 60-61; available electronically at: [http://www.apaonline.org/publications/newsletters/v97n1\\_Law\\_05.aspx](http://www.apaonline.org/publications/newsletters/v97n1_Law_05.aspx). For a more detailed discussion of the judicial impact of that case, see Joyce Murdoch & Deb Price, *Courting Justice: Gay Men And Lesbians v. The Supreme Court* (New York: Basic Books, 2001).
41. 517 U.S. 620.
42. 539 U.S. 558.
43. On this point, see sections 4 and 5 of this article.
44. See, e.g., John Wildermuth and Demian Bulwa, "Same-sex Marriage Backers Hit Capitol, Churches," *San Francisco Chronicle* (November 10, 2008): A1. Jessica Knoll, "Prop. 8 Opponents Rally across California to Protest Gay-marriage Ban," *Los Angeles Times* (November 16, 2008): A1. Jay Lindsay, "Gay Advocates Protest Marriage Ban across Nation," AP wire service, appearing in *USA Today* (November 16, 2008): A1.
45. John Coté, *et al.* "Nonviolent Protests Follow Ruling," *San Francisco Chronicle* (May 27, 2009): A8; Nancy Dillon, *et al.* "California Court Backs Gay Nups Ban: Ruling Sparks Uproar, Protests in San Francisco & in City, with Activists Vowing to Continue Fight." *New York Daily News* (May 27, 2009): 8.
46. Technically, constitutionally protected rights are marginally more secure than legislatively protected ones in North Dakota, because the state ballot initiative policy allows the opportunity for popular vote repudiation of legislative statutes by means of ballot measure petitions with only 2 percent of the voters. But that's not much of a distinction.
47. *Livermore v. Waite* (1894) 102 Cal. 113, as quoted by Werdegar at *Strauss*, 685-86.
48. A "sound fart," as Peter Abelard (in his *History of My Calamities*) memorably characterized Roscelin's view of the significance of words designating universals, which is to say that Roscelin, according to Abelard, didn't believe universal categories were anything more than mere words—the sorts of things which, unlike sticks and stones, couldn't really do us any harm (provided that we recognized them for what they were).
49. The measure puts one solution beyond reach by prohibiting the state from naming future same-sex unions "marriages," but it does not otherwise affect the state's obligation to enforce the equal protection clause by protecting the "fundamental right...of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other official recognized family relationships" (*Strauss*, 687-88).
50. We need not decide in this case whether the name "marriage" is *invariably* a core element of the state constitutional right to marry so that the state would violate a couple's constitutional right even if—perhaps in order to emphasize and clarify that this civil institution is distinct from the religious institution of marriage—the state were to assign a name other than marriage as the official designation of the formal family relationship for *all* couples. Under the current statutes, the state has not revised the name of the official family relationship for *all* couples, but rather has drawn a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership). One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect (*In re Marriage Cases*, 782-83).
51. Three of California's seven Supreme Court justices are up for reelection in 2010: Chief Justice Ronald George and Associate Justices Marvin Baxter and Carlos Moreno. A couple of cautionary notes, however: (1) because terms on the California Supreme Court run twelve years, none of the other four are up for electoral retaliation for years; (2) while the eventual prospect of election may sensitize judges somewhat more to the winds of public opinion, it would be imprudent to infer any direct correlation between imminent electoral exposure and particular judicial opinions. Of the three who are subject to more immediate electoral recall, only George could conceivably be directly influenced by the imminent prospect of reelection, and that simply in terms of the contrast between his majority opinions in the 2009 Proposition 8 case (*Strauss v. Horton*), and the 2008 Proposition 22 case (*In re Marriage Cases*), his pre-Proposition 8 majority ruling that marriage licenses could not be withheld from same-sex couples. Baxter, in contrast, was one of the three dissenters in 2008, and wrote the chief dissenting opinion, so it would have been surprising if he did not join the majority in *Strauss*. Moreno, despite his pending review by the voters, was the lone dissenter in *Strauss*.
52. The standard method (short of another constitutional convention, which must be approved by two-thirds of the states) is for an amendment to be approved first by three-fourths of the members of both houses of Congress, and then approved by three-fourths of the state legislatures (by simple majority).
53. "Judicial proceedings," the third leg of the full faith and credit clause, enjoy no public policy exception. The federal courts have repeatedly held that state judicial judgments must be recognized throughout the country. Otherwise, residents with local judgments against them could evade the consequences simply by moving to another state. (See discussion of *McElmoyle*, *supra* [notes 61, 62, and accompanying text].)
54. 354 F. Supp. 2d 1298 (M.D. FL 2006).
55. 447 F.3d 673 (9th Cir. 2006) cert. denied., 127 S. Ct. 396 (U.S. Oct. 10, 2006).
56. The plaintiffs in *Wilson v. Ake*, who *were* married, complained only about the inter-state recognition section of DOMA, not about the denial of federal benefits section.
57. 447 F.Supp.2d 1239 (N.D. OK 2006).
58. *Bishop v. Oklahoma*, WL 1566802 (June 05, 2009). Their appeal concerning the federal constitutionality of the *state*

- prohibition of same-sex marriage in Oklahoma was dismissed on a technicality.
59. The litigants are a lesbian couple and a gay couple, all California residents, all denied California marriage licenses subsequent to the passage of Proposition 8 (a few days before the California Supreme Court's *Strauss v. Horton* opinion was handed down).
  60. Maura Dolan. "Schwarzenegger Decides against Defending Prop. 8 in Federal Court." *Los Angeles Times* (June 19, 2009).
  61. SACV09-00286, filed originally (and oddly, given the federal complaints) in a California state court (December 2008), but transferred (by federal authorities) to federal district court in March 2009.
  62. 38 U.S. 312 (1839).
  63. [A] judgment obtained in the Court of a state is not to be regarded in the Courts of her sister states as a foreign judgment, or as merely prima facie evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, . . . the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed. It must be obvious, when the Constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state. (*Id.*, at 324)
  64. 478 U.S. 186, at 190 and throughout White's majority opinion.
  65. *Id.* at 199 (Harry Blackmun in dissent, quoting Louis Brandeis from *Olmstead v. United States*).
  66. *Id.* at 206.
  67. *Id.* at 199 (Blackmun quoting Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457, at 469.)
  68. Jim Rutenberg. "Outcry on Federal Same-Sex Benefits." *New York Times* (June 18, 2009): A18.
  69. Kurt Vonnegut. *A Man Without a Country* (Seven Stories Press/Random House, 2005).
  70. Hawaii's amendment (although not its DOMA) might once again prove an exception, since the amendment itself does not prohibit same-sex marriages.
  71. I think that scenario unlikely; times have changed a great deal on the topic of gay rights in this country, and even people as socially insulated as Supreme Court justices can hardly have failed to notice.
  72. The last litigant in question is perhaps the most well-known: Dean Hara, the surviving spouse of former Massachusetts Congressman Gerry Studds, who passed away in 2006. Hara and Studds, partnered since 1991, were married in 2004, a week after Massachusetts began issuing same-sex marriage licenses. Studds retired from Congress in 1997, after twenty-four years of service in that role. Federal law allows anyone married to current or former members of Congress at the time of their death to collect half of that congressman's pension for the rest of the surviving spouse's life. Hara has been denied this benefit because provision 1U.S.C. §7(3) of the federal DOMA precludes federal recognition of same-sex marriages, regardless of their status at the state level, an inequity likely to be particularly embarrassing to Congress as this case progresses.