Same-Sex Marriage in 2014: The 21st Century Battle Between the States

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A. Introduction

With respect to the June 2013 decisions by United States Supreme Court (the "Supreme Court") on the issue of same-sex marriage, most of the attention was garnered on United States v. Windsor,[1] which held the Federal "Defense of Marriage Act" ("DOMA," or, more specifically, § 3 of DOMA)[2] to be unconstitutional as a violation of the due process and equal protection rights granted to persons under the Fifth Amendment to the United States Constitution. However, perhaps the greater impact was felt from the Supreme Court's failure to decide the merits of Hollingsworth v. Perry.[3] While Windsor focused on Federal rights with respect to same-sex marriage, the crux of the Perry case was state law rights. Because the Supreme Court failed to decide the constitutionality of state law restrictions on same-sex marriage, the door is open for the new "battle among the states" as it pertains to the allowance and recognition of same-sex marriages.

B. Perry Primer

In order to understand the issue, a brief history of the Perry opinion is required.

Beginning with several 2004 cases in the California state courts alleging that the California's marriage statutes violated the California Constitution, the cases, which were consolidated into the "In re Marriage Cases," eventually were appealed to the California Supreme Court, which held that the fundamental right to marry provided by the California Constitution could not be denied to same-sex couple. Such couples are guaranteed "the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage," so, therefore, such statutes were stricken, and, as of June 16, 2008, same-sex marriage was allowed in California.[4]

In response, voter signatures were gathered and an initiative was placed on the 2008 California state election ballot, known as "Proposition 8," which sought to add a new provision to the California Constitution's Declaration of Rights, immediately following the Constitution's due process and equal protection clauses, to state that "only marriage between a man and a woman is valid or recognized in California."

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[1] 570 U.S. ____, 133 S.Ct. 2675 (2013).
[2] References herein to "DOMA" may also refer to certain state law same-sex marriage prohibitions.
[3] 570 U.S. ____, 133 S.Ct. 2652 (2013).
[4] In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).

Following a contentious campaign period, Proposition 8 passed with 52.3% of the popular vote and, as of the next day, the language of Proposition 8 became Article I, Section 7.5 of the California Constitution.

Opponents of Proposition 8 then brought an original action for a writ of mandate in the California Supreme Court, contending that Proposition 8 exceeded the scope of the People's initiative power because it revised, rather than amended, the California Constitution (note that no federal constitutional challenges were raised). Ultimately, the California Supreme Court upheld Proposition 8 as a valid initiative but construed the measure as not nullifying the 18,000–plus marriages of same-sex couples that had already been performed in the State.[5]

In May 2009, two same-sex couples, plaintiffs Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, after being denied marriage licenses by the County Clerks of Alameda County and Los Angeles County, respectively, filed an action in the U.S. Northern District of California alleging that Proposition 8 violates the Fourteenth Amendment to the United States Constitution. The District Court held a twelve-day bench trial, during which it heard testimony from nineteen witnesses and, after giving the parties a full and fair opportunity to present evidence and argument, built an extensive evidentiary record. In a thorough opinion in August 2010, the District Court issued 80 findings of fact and adopted the relevant conclusions of law, all of which resulted in a holding that Proposition 8 was unconstitutional both under the 14th Amendment's Due Process Clause (because no compelling state interest justifies denying same-sex couples the fundamental right to marry) and the Equal Protection Clause (because there is no rational basis for limiting the designation of "marriage" to opposite-sex couples).[6]

On February 7, 2012, the U.S. 9th Circuit Court of Appeals overturned Proposition 8 by a 2-1 decision, upholding the District Court's decision that that Proposition 8 violated the equal protection clause of the U.S. Constitution as failing the rational basis test.[7] The 9th Circuit, however, did not affirm the entire District Court Opinion; instead, it limited the decision to the process with respect to Proposition 8, which would limit the applicability of the ruling. If the decision stood, it would have limited effect outside California because it is based on voter repeal of a right a minority

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[5] Strauss v. Horton, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009).

[6] Perry v. Schwarzenegger (referred to in the pertinent appellate opinion as "Perry IV"), 704 F.Supp.2d 921 (N.D. Cal. 2010).

[7] *See* Dolan, *Prop. 8: Gay-Marriage Ban Unconstitutional, Court Rules*, LOS ANGELES TIMES, http://latimesblogs.latimes.com/lanow/2012/02/gay-marriage-prop-8s-ban-ruled-unconstitutional.html (February 7, 2012).

already enjoyed.[8] In any event, the affirmation, in part, of the District Court decision cleared the way for an appeal to the Supreme Court.

On Friday December 6, 2012, the U.S. Supreme Court granted certiorari to both Perry (then referred to as Hollingsworth, Dennis, et al. v. Perry, Kristin M., et al.) and Windsor. In theory, the Supreme Court decided to hear both the State and Federal issues in one fell swoop – Windsor as to Federal DOMA, and Perry as to the effect of a DOMA-type state law.

In a not-so-surprising move to some, in a 5-4 opinion, the Supreme Court stated that the appellants did not have "Article III standing" to appeal the District Court's order and therefore were able to avoid a discussion on the merits of the case.

The majority consisted of Justice Roberts, joined by Justices Scalia, Ginsburg, Breyer and Kagan. Focusing on the proper parties, the majority noted that elected stated officials, who were parties in the District Court case, elected not to appeal, but rather the appeal was brought by officials claiming an interest in the Proposition 8 ballot initiative.[9] The critical standing question is whether Article III standing can be attributed to those who are not injured in the case or controversy. To have standing, the Court explained, a litigant must seek relief for an injury that affects him in a "personal and individual way."[10] Petitioners, who were not elected officials of California, thus had not suffered an injury in fact, but sought to invoke that the judicially cognizable interest of someone else, i.e., the State of California.[11] While the petitioners sought to cite other cases in which standing was present, the fact remained that in such cases, the officials were acting in their capacity as elected officials, and here the petitioners were not.[12]

The majority rejected the notion that the decision of the California Supreme Court that granted petitioners standing because this does not mean that the petitioners became *de facto* public officials and thus entitled them to Article III standing.[13] The majority also rejected several additional standing claims from the appellants, one of which was that the election laws gave them a unique role in the initiative process which gives them standing, finding in each instance that only the state may assert the rights of the state.

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[8] Dolan, *Prop. 8: Ruling To Have Limited Effect Outside California*, LOS ANGELES TIMES, http://latimesblogs.latimes.com/lanow/2012/02/gay-marriage-prop-8.html (February 7, 2012)
[9] Perry – Supreme Court, Opinion of the Court, at 4.
[10] Id. at 7.
[11] Id. at 8, 10.
[12] *See generally* Id. at 11-13.
[13] *See generally* Id. at 14.

The bottom line is that no agency relationship existed between the petitioners and the State of California, and lacking such a relationship, non-state elected officials cannot bring an action on behalf of the state; further, the Supreme Court has never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to, and the Court declined to do so for the first time here.[14]

C. Now What? Doesn't Windsor Mean that States Must Recognize Same-Sex Marriages? Perhaps Not

The failure of the Supreme Court to rule on the merits in Perry leaves open the question as to universal state law recognition. Some have questioned whether a decision on Perry was even necessary – after all, the Supreme Court already determined that prohibitions on same-sex marriage is unconstitutional, so it should follow that one state should be prohibited from recognizing another state's valid same-sex marriage. In other words, the main question for state law purposes is, absent a specific mandate from the Supreme Court, does the federal acceptance of same-sex marriages require those states that do not recognize same-sex marriages (referred to as "non-recognition states") to recognize such marriages or even to allow such marriages to be conducted within their borders?

Commenters have focused on three areas of Constitutional law to answer this question: full faith and credit, comity and conflict of laws. Arguably, each can be applied to analyze this question. For this article, the central focus shall be on the "full faith and credit" issue.

(1) Full Faith and Credit Primer

Article IV, § 1 of the United States Constitution provides that "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."

Over time, Congress has enacted several laws to assure the operation of the Full Faith and Credit Clause, such as the Parental Kidnapping Prevention Act, the Child Support Orders Act of 1994 and the Safe Homes for Women Act of 1994.[15]

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[14] Id. at 15, 17

[15] Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (Summer 1998) at 947-8.

The broad language of the Full Faith and Credit Clause contains no exceptions to its requirements; however, the Supreme Court has never considered the requirements of the Full Faith and Credit Clause to be absolute as instead, the clause has been interpreted to impose certain minimum requirements.[16] The Supreme Court eventually crafted an exception to Full Faith and Credit in that the requirement of Full Faith and Credit do not extend to those acts, records, or proceedings, which, if recognized, who would violate the public policy of the state (the "Public Policy Exception").[17] The public policy rationale prevents states from being forced to recognize those acts of other states which are fundamentally at odds with the views of the resident state – "…in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."[18] The Public Policy Exception is limited - while the Supreme Court has recognized the Public Policy Exception to Full Faith and Credit as it applies to a forum state in determining the law applicable to a controversy, it has also specified that judgments are not subject to the Public Policy Exception.[19]

(2) Full Faith and Credit As Applied to Marriages

Under the choice of law rules governing marriage currently accepted by most states, a forum state will generally recognize a foreign marriage if the marriage was lawful where it was celebrated.[20] This applies even if the persons marrying would not otherwise be eligible to marry in the formal state. For example, in New Jersey, a couple

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[16] Id. at 954-5, *citing* Wells v. Simonds Abrasive Company, 345 U.S. 514 (1953), in which the Court noted that "[t]he Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state."

[17] Id. at 957, *citing* Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)

[18] Pacific Ins. Co. at 502.

[19] Kevin Oates, *Public Policy and the Recognition of Same-Sex Marriage*, 12 NEVADA LAWYER 32, at 33, *citing* (in footnote 16) Baker v. General Motors Corp., 522 U.S. 222 (1998), stating that "The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate (*citing* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."

[20] Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 FLA. L.R. 47 (January 2011), at 63, *citing in Footnote 57*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception,* 106 YALE L.J. 1965 (1997), at 1969.

must wait 72 hours after applying for a marriage certificate in order to be married; there is no such waiting period in Nevada. That being said, a New Jersey couple who marries in Nevada without a waiting period are nevertheless considered to be married upon their return in New Jersey.

Under a Full Faith and Credit analysis, states are not likely to be bound to recognize a marriage that would not be valid under its own law because family law is local and the law of the parties' domicile normally determines their marital rights both during the marriage and at divorce.[21] Under the principal set forth in Allstate Insurance Co. v. Hague,[22] states generally have broad powers to apply their laws to disputes before their courts as long as they have significant contacts with the case giving them legitimate interests in applying their law and application of their law is not fundamentally unfair to any party. Under this standard, the Constitution has been interpreted to allow states to consider the better rule of law but not to require this.[23] Further, states have always reserved for themselves the right to reject marriages that violate their own public policies, thus escaping the application of Full Faith and Credit.[24]

(3) Full Faith and Credit and Section 2 of DOMA

While most of the focus of most of the DOMA challenges has been on § 3 of DOMA, an important aspect of state law recognition is found in § 2 of DOMA, which provides as follows:

> "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."

As opposed to the aforementioned Acts ensuring Full Faith and Credit, § 2 of DOMA was passed to assure the Full Faith and Credit would not operate in the arena of

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[21] Singer at 32, *citing at Footnote 97*, Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies - International Child Abduction and Same Sex Unions,* 32 HOFSTRA L. REV. 233 (2003).
[22] 449 U.S. 302 (1981).
[23] Singer at 32-33, *quoting* Allstate Ins.
[24] Levin at 62, *citing in Footnote 47,* Kramer at 1976-92; *see also* Singer at 31.

same-sex marriages.[25] Query whether § 2 is constitutional as a violation of Full Faith and Credit considering that the clause explicitly eschews Full Faith and Credit. In Thomas v. Washington Gas Light Co.,[26] the Supreme Court stated that "the full faith and credit area presents special problems, because the Constitution expressly delegates to Congress the authority "by general Laws … [to] prescribe the Manner in which [the States'] Acts, Records and Proceedings shall be proved, and the Effect thereof.". . . Yet it is quite clear that Congress's power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation. … Thus, while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court."[27] The Court's language in Thomas makes clear that Congress has the power to require states to recognize the acts and judgments of sister states, but also suggests that the Supreme Court will question the constitutionality of any congressional attempt to pass legislation that authorizes states to ignore the acts of sister states.[28]

Note that even if § 2 of DOMA were determined to be unconstitutional, this would not afford Full Faith and Credit to the recognition of valid same-sex marriages in those states that do not recognize same-sex marriages ("Non-Recognition States"); the reason for this is the Public Policy Exception. "Public Policy" is a very broad term and is not necessary limited to factors in the law; for example, a popular vote can be indicative of a state's public policy. Thus, a state such as Florida, which enacted a DOMA constitutional provision in 2008, arguably has a public mandate against same-sex marriage which would fall within the Public Policy Exception. Further, Ohio, for example, built in the Public Policy Exception within the statute: Ohio Revised Code § 3101.01(C)(3), in pertinent part, that "The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes *is against the strong public policy of this state*." (Emphasis added).

The next question is whether the Public Policy Exception is even constitutional. With respect to same-sex marriages, while the Public Policy Exception may arguably provide grounds for a court to refuse to recognize the law of another state allowing for same-sex marriage, the Public Policy Exception should not provide grounds to refuse recognition of a judgment based on the relationship of marriage validly entered into by

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[25] Hamilton at 950.
[26] 448 U.S. 261 (1980),
[27] Hamilton at 953-4, *quoting* Thomas.
[28] Hamilton at 954

two members of the same sex in another state (where the judgment is the actual ceremony and licensing of the marriage).[29] A more direct view of unconstitutionality of the Public Policy Exception is espoused by Professor Larry Kramer, who states that although a forum state may reject some foreign marriages, it may not do so simply as a result of substantive disagreement as to the desirability of the particular marriage in question. Professor Kramer argues that the public policy exception that allows states to decline to recognize or apply other states' laws (including marriage status conferred by other states) is unconstitutional in that a forum state may not reject same-sex marriages from marriage states if the forum state otherwise recognizes similarly situated opposite-sex marriages; but states may adopt choice of law rules that equally affect all foreign marriages.[30]

Several authors, while crediting Prof. Kramer with innovative thinking, ultimately believe that such a position would be rejected by the Supreme Court.[31] The numerous bases on which a state could find the existence of a public policy against same-sex marriages illustrate the difficulty a same-sex couple would face in getting their validly contracted marriage recognized in sister-states; the reason for this is that, while the invocation of the Public Policy Exception is not conclusive, same-sex couples will face an uphill battle when attempting to have sister-states recognize their out-of-state marriages.[32]

D. Post-Perry State Case Law

Armed with the background that there are defenses available to states with respect to a judicial challenge to its DOMA provisions, since the Perry non-decision, a plethora of state law challenges have surfaced. The following is not intended to be all-inclusive, but, rather, a sampling of the cases and the issues being raised, some of which are very novel.

The challenge is seemingly simple – in states such as Florida where state constitutional prohibitions on same-sex marriage exist, the only certain mechanism in which to overturn such laws is through the courts. Given the seemingly seismic and sudden shift in public opinion as to same-sex marriages, it would appear to be a foregone conclusion that nationwide recognition and acceptance of same-sex marriage is not a matter of "if" but "when." That being said, many conservative jurisdictions can slow down the inevitable. Recall that the United States Supreme Court refused to decide the merits of the Perry opinion because both parties who could have been

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[29] Oates at 33.
[30] Levin at 62-63, *citing* Kramer at 1966-69, 1986, 1998-99.
[31] *See* Levin at 64-5; Singer at 33.
[32] Hamilton at 965.

injured by the opinion – the same-sex marriage proponents challenging California law and the State of California to defend its law – were not before the Court (California was not a party). Query whether this approach is a blueprint for other states to halt or slow down the recognition process – if an action is brought to challenge a state law, what if the particular state failed to appeal an adverse decision. Would this have the effect of preventing a global ruling? Perhaps, for as Perry seemingly states, if the particular state is not a party, then a high court likely cannot issue a ruling.

How, then, can this be overcome? Perhaps it would take a state to pursue the matter judicially, defending its statute while privately seeking a judicial overturn.

(1) Prelude to State Law Case Analysis– the Importance of Baker v. Nelson

In some of the analysis presented below, one case that reappears rather frequently by the same-sex marriage prohibition proponents is a 1971 Supreme Court decision of Baker v. Nelson.[33] In understanding both sides of the debate, an analysis of this case is essential as it is cited in nearly every federal case involving federal or state law DOMA provisions.

Baker involved a challenge to a Minnesota DOMA-style statute. In upholding the Minnesota statute, the Minnesota Supreme Court stated that, "the equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry."[34] Upon certiorari to the Supreme Court, the Supreme Court issued a summary dismissal "for want of a substantial federal question."

Until recently, federal courts that had been asked to determine an equal protection argument as to DOMA tend to decline to opine, stating that it was not up to that particular court to rule in a way opposite of the Baker opinion and that if the Supreme Court believed that the Minnesota Supreme Court's Baker decision was wrong, it would have stated as such.

In Windsor, prior to the Supreme Court's decision, the U.S. 2nd Circuit Court of Appeals issued its opinion.[35] The 2nd Circuit presented one of the more thorough Constitutional analyses with respect to same-sex individuals and the right to marry. Within this opinion was its analysis of the Baker decision and whether it applied to the current DOMA debate.

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[33] 409 U.S. 810 (1972).
[34] 291 Minn. 210, 191 N.W.2d 185 (Minn. 1971).
[35] 669 F.3d 169 (CA 2, 2012).

Some of the Baker analysis was particular to the Windsor facts, i.e., that the issue as to whether the federal government may constitutionally define marriage as it does in § 3 of DOMA, a federal statute, is sufficiently distinct from the question in Baker, which was whether same sex marriage may be constitutionally restricted by the states and that in Baker, the plaintiffs were persons seeking to be married, whereas Mrs. Windsor and Mrs. Spyer were already married. However, of importance in any federal action challenging a state law DOMA provision, the 2nd Circuit stated that in the 40 years since Baker had been decided, there have been changes to the Supreme Court's equal protection jurisprudence in the sense that "intermediate scrutiny" was not in the Supreme Court's vernacular in 1971. This suggests that if "intermediate scrutiny" were available in 1971, perhaps the Supreme Court may have accepted certiorari and rendered a decision on the merits of Baker. Thus, the true question is whether the advent of "intermediate scrutiny" is sufficient for a federal court, including ultimately the Supreme Court, to distinguish the current line of cases from Baker.

(2) Post-Windsor and Perry State Law Case and Statutory Summaries

The cases presented below are in no particular order, with the exception of the Texas and Nevada cases as, in the author's opinion, those cases arguably have the shortest time-line to possibly reach the Supreme Court.

(a) Texas

Two divorce cases involving same-sex individuals were granted review by the Texas Supreme Court on August 23, 2013, with Oral Argument scheduled for November 5, 2013.[36]

The first case is In the Matter of the Marriage of JB and HB.[37] In this case, an action was brought by an individual to dissolve his same-sex marriage from another state. The State filed a petition to intervene as a party respondent and sought dismissal of the action. Judge Tena Callahan of the 302nd Judicial District Court, Dallas County, entered an order finding that it had subject matter jurisdiction and striking the State's petition for intervention. The State appealed and filed petition for writ of mandamus to correct allegedly erroneous denial of petition.

In denying the right to divorce, the Texas Court of Appeals issued four key points as part of its ruling. First, State courts have no subject-matter jurisdiction to adjudicate divorce petitions in the context of same-sex marriage. Second, sexual

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[36] Terrence Stutz, *Texas Supreme Court Hears Same-Sex Divorce Cases*, DALLAS MORNING NEWS (November 5, 2013).

[37] 326 S.W.3d 654 (Tex. 5th App.– Dallas, August 31, 2010)

orientation was not a suspect classification. Third, the right to legal recognition of same-sex marriage was not a fundamental right. Fourth, the statute prohibiting same-sex marriage did not violate Equal Protection Clause of the 14th Amendment.

It is important to note that the JB/HB decision determined that the Texas law was not a violation of the 14th Amendment, thus invoking a federal issue. This is a very important distinction because the federal issue is the ticket to a potential ultimate appeal to the Supreme Court.

The second Texas case is Texas v. Naylor.[38] This case involved the divorce proceedings of a same-sex couple who had married under Massachusetts law. Judge Scott H. Jenkins of the 126th Judicial District Court, Travis County, entered final divorce decree. The State had appealed as purported intervener, but the Court of Appeals denied the State's intervention for procedural grounds. The Court initially stated that because the State's attempt at intervention was denied because it was untimely. The Court further stated that there was no identity of interest between State and any named party to divorce judgment as would allow State to be virtually represented in the case. Finally, even if State were a deemed party by virtual representation, equitable considerations weighed against allowing State to appeal.

No decision is expected to be announced by the Texas Supreme Court before Spring 2014.

(b) Nevada

In the Nevada case of Sevick v. Sandoval,[39] same-sex couples brought an action against governor of Nevada and other officials, seeking declaratory and injunctive relief regarding Nevada's prohibition of same-sex marriages and refusal to recognize such marriages from other jurisdictions. The Defendants moved to dismiss and cross-motions for summary judgment were filed.

Judge Robert C. Jones of the U.S. District Court for Nevada held that the challenge to the Nevada statute was precluded by Supreme Court decision in Baker. Judge Jones stated that the prohibition against same-sex marriages made distinctions based on sexual-orientation, rather than gender. Contradicting the various federal cases led by Windsor, Judge Jones stated that there was a rational basis for Nevada's prohibition and that such a prohibition did not violate equal protection as a removal of an existing right or as an enactment of sweeping changes to a group's legal status.

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[38] 330 S.W.3d 434 (Tex. 3d App.– Austin, January 07, 2011)
[39] 911 F.Supp.2d 996 (D. Nev., November 26, 2012)

An appeal to U.S. 9th Circuit Court of Appeals was filed on December 3, 2012. The opening brief filed by Lambda Legal, on behalf of the eight plaintiffs, on October 18, 2013. While the appellees' answering briefs were due November 18, 2013, additional delays for the filing of such briefs were granted, the latest of which occurred on December 20, 2013 and which granted an additional 30 days in which to file the briefs.[40]

(c) Utah

In the span of 19 days, Utah went from a state allowing same-sex marriage to a state in limbo pending a federal appeal.

In Kitchen et. al. v. Herbert et. al.,[41] the U.S. District Court for Utah generally held that the rationale of Windsor applied to the 14th Amendment equal protection and due process arguments and that Baker is no longer a controlling precedent. The ruling is noteworthy as it is the first federal decision on a state law banning same-sex marriages or denying recognition of legal same-sex marriages since the Windsor opinion.[42]

Between December 20, 2013 and January 6, 2014, approximately 1,300 same-sex marriages were performed in Utah; this is relevant because the Utah Attorney General immediately filed an appeal to the U.S. 10th Circuit Court of Appeals on this decision and sought an immediate stay of the District Court's opinion from the Supreme Court. On January 6, 2014, the Supreme Court acceded to the Utah Attorney General's wishes and issued a stay to the relief granted in the Kitchen case pending the 10th Circuit's decision.[43] Compounding the stay is the position taken by the Utah's Governor's office which stated that Utah will not recognize the same-sex marriages performed prior to the Supreme Court's stay. [44]

What is interesting about the Utah decision is that in a similar issue, courtesy of the California Supreme Court's decision in In re Marriage Cases,[45] restrictions on California same-sex marriages was unconstitutional. Over 17,000 marriages were performed from the effective date of that opinion, June 16, 2008, through November 4, 2008. On that subsequent date, California's Proposition 8 passed, effectively prohibiting

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[40] Scottie Thomaston, *Further Delay for Briefing in Nevada Same-Sex Marriage Appeal,* equalityontrial.com (December 27, 2013).
[41] ___ F.Supp.2d ___, 2013 WL 6697874 (D. Utah December 20, 2013).
[42] Brooke Adams, *Federal Judge Strikes Down Utah Ban on Same-Sex Marriage*, SALT LAKE TRIBUNE (December 22, 2013).
[43] 571 U.S. _____ (January 6, 2014).
[44] Jack Healy, *Utah Says It Won't Recognize Same-Sex Marriages It Licensed*, NEW YORK TIMES (January 8, 2014).
[45] 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).

same-sex marriages. Subsequently, as previously stated, on May 26, 2009 the California Supreme Court issued an opinion in in Strauss v. Horton[46] that stated that Proposition 8 was held to be valid but all same-sex marriages performed between June 16, 2008 and November 5, 2008 were held to be valid. Contrast this to Li & Kennedy v. State of Oregon,[47] under which apparently valid same-sex marriages in Oregon performed prior the passage of a same-sex marriages prohibition voter initiative were deemed to be invalid.

In response to the Utah position that all same-sex marriages performed prior to the Supreme Court's stay are invalid, U.S. Attorney General Eric Holder announced on January 10, 2014 that such marriages will be recognized for federal purposes. Holder stated, "I am confirming today that, for purposes of federal law, these marriages will be recognized as lawful and considered eligible for all relevant federal benefits on the same terms as other same-sex marriages."[48]

(d) Hawaii

A companion case to Nevada's Sevick case is Hawaii's Jackson v. Abercrombie.[49] In this case, a same-sex couple brought action against Governor Abercrombie and the Director of Hawaii's Department of Health, seeking an injunction barring enforcement of a statute limiting valid marriage as between a man and a woman. The Hawaii Family Forum, a group advocating for opposite-sex marriage, intervened as a defendant. All parties cross-moved for summary judgment, and Hawaii Family Forum moved to dismiss the Governor as a party. In his decision, Judge Alan C. Kay held that while Hawaii Family Forum could not assert sovereign immunity on behalf of Governor, the plaintiffs' due process claim and equal protection claims were barred by Supreme Court's decision in Baker.

The decision was appealed to the U.S. 9th Circuit Court of Appeals, which had agreed to hear this case together with Nevada's Sevick case. In response to the Windsor decision, Governor Abercrombie called a Special Session of the Hawaii state legislature which began on October 28, 2013. The session resulted in the passage of Hawaii Senate Bill 1, the Hawaii Marriage Equality Act of 2013, on November 8 by the Hawaii House of Representatives and on November 12 by the Hawaii Senate. The bill was signed into

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[46] 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009).
[47] 338 Or. 376, 110 P.3d 91 (Or. 2005).
[48] http://politicalticker.blogs.cnn.com/2014/01/10/breaking-doj-will-recognize-same-sex-marriages-that-were-performed-in-utah/?iref=allsearch
[49] 884 F. Supp.2d 1065 (D. Haw., August 8, 2012)

law by Governor Abercrombie on November 13, becoming effective on December 2, 2013.[50] As a result of the new law, the Jackson case is likely moot.

(e) Ohio

The first post-Perry case to garner public attention was Obergefell et. al. vs. Kasich et al.[51] This was a case involving a temporary restraining order whereby the U.S. District Court of Ohio held that the Ohio statute prohibiting Ohio's recognition of foreign same sex marriages was unconstitutional as a violation of the 14th Amendment Due Process and Equal Protection.

Plaintiffs James Obergefell and John Arthur were male Cincinnati residents who had been living together in a committed and intimate relationship for more than twenty years. John Arthur was a hospice patient, dying of amyotrophic lateral sclerosis ("ALS"). As Arthur was in the final stages of ALS, he and Obergefell traveled on a special plane to Baltimore-Washington International in Baltimore, Maryland, where they were married in the plane on the tarmac and immediately thereafter returned back to Cincinnati. Upon returning to Ohio, Obergefell filed an action seeking a temporary restraining order against the State of Ohio's statute not recognizing the same sex marriage and seeking to have Arthur's eventual death certificate to recite that he was married to Obergefell.

In addressing the Plaintiffs' argument that the non-recognition provisions violated the equal protection clause of the 14th Amendment, Judge Timothy S. Black cited the Loving case in that restrictions on marriage must comply with the Constitution. Judge Black cited the fact that Ohio is required to recognize all other legal marriages from other jurisdictions, even if they violate Ohio's own marriage laws, such as marriages between first cousins and marriages between minors. Judge Black stated that Ohio's distinguishing between foreign opposite-sex and same-sex marriages is a fatal violation of equal protection. Judge Black concluded that there is absolutely no evidence that the State of Ohio or its citizens will be harmed by the issuance of an order temporarily restraining the enforcement of these provisions against the Plaintiffs in this case.

Upon Mr. Arthur's death, a subsequent action was brought to enforce the temporary restraining order and officially list Mr. Arthur as Mr. Obergefell's spouse on Mr. Arthur's death certificate. On December 23, 2013, Judge Black again held in favor of Mr. Obergefell, citing that Ohio's non-recognition laws violated the 14th Amendment

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[50] *Abercrombie Signs Same-Sex Marriage Bill Into Law*, HONOLULU STAR ADVERTISER (November 13, 2013).
[51] D.C. Ohio, Western Division No. 1:13-cv-501 (July 22, 2013).

due process and equal protection clauses.[52] Although the decision is limited to the listing of marital status on a death certificate, Judge Black proceeded to trace through the thorough Constitutional analysis seen in the various federal decisions leading up to Windsor. Applying intermediate scrutiny applicable to a quasi-suspect class, Judge Black held that Ohio had no rational basis connecting its non-recognition statute to a legitimate state interest. Judge Black determined that such purported interests as preserving a traditional concept of marriage and better child adaption when raised by a father and a mother were not sufficient to provide a rational basis for the discrimination set forth in the statute. In a similar manner as the temporary restraining order issued in July 2013, the District Court's opinion is limited to the recognition of the marriage on a death certificate. Ohio Attorney General Mike Dewine indicated this office intends to appeal this decision to the U.S. 6th Circuit Court of Appeals.[53]

Although equal protection may ultimately be the fall of state law DOMA statutes, Judge Black may have skipped a step or two in reaching his conclusion. There are actually two components to the Ohio statute - the anti-marriage provision and the non-recognition provision.[54] The non-recognition issue appears to be more of an Full Faith and Credit issue rather than a direct equal protection argument. Based on the above analysis, the proper argument would potentially be as follows: (a) it must be restated that § 2 of DOMA was not overturned by Windsor, so technically, § 2 of DOMA still applies and states that a state is not required to afford full faith and credit to another state's recognition of same-sex marriage; (b) § 2 of DOMA is a clear violation of Full Faith and Credit and such an argument would likely be successful; (c) with § 2 of DOMA unconstitutional as a violation of Full Faith and Credit, now the argument must progress to whether the non-recognition statute satisfies the Public Policy Exception; and (d) assuming that the particular state statute survives the Public Policy Exception, at this point is when the equal protection argument would be applied to supersede the Public Policy Exception.

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[52] Obergefell et. al. v. Wymyslo et. al., No. 1:13-cv-501, S.D. Ohio December 23, 2013.
[53] Chris Johnson, *Judge Orders Ohio To Recognize Same-Sex Marriages For Death Certificates*, WASHINGTON BLADE (December 23, 2013).
[54] OHIO REVISED CODE § 3101.01(C); the prohibition is in (C)(1) and the non-recognition provision is in (C)(2) and (3).

(f) Michigan

In the Michigan Case of DeBoer v. Snyder, Plaintiffs Jayne Rowse and April DeBoer and three adopted children live under one roof in Hazel Park, Michigan, and wish to adopt each other's children; however, Michigan law bars same-sex adoption. [55]

After commencing a lawsuit in 2012 to overturn the adoption statute, Judge Bernard Friedman of the U.S. District Court for the Eastern District of Michigan (who, interestingly, was a Reagan appointee) suggested that a bigger obstacle was Michigan's DOMA statute, so he invited the plaintiffs to expand their lawsuit to include the DOMA statute. A hearing on Summary Judgment motions was heard on October 16, 2013. If Judge Friedman ruled in favor of the summary judgment request, Michigan's 2004 ban on same-sex marriage would possibly have been lifted, which would have caused Michigan Attorney General Schuette to request a stay while the decision was being appealed to a higher court. However, acknowledging that there were serious issues to be decided, Judge Friedman denied the summary judgment request and set the matter for trial on February 25, 2014.[56]

(g) Illinois

In Illinois, twenty-five plaintiffs filed a lawsuit in Illinois lawsuit seeking to strike down the state's ban on same-sex marriage on the basis of the loss of federal benefits.[57] On July 11, 2013, citing Windsor, the plaintiffs filed a motion for summary judgment. The case was defended not by either Illinois Attorney General Lisa Madigan or Cook County State's Attorney Anita Alvarez, but rather by five county clerks and by attorneys from the Chicago-based Thomas More Society, all of whom were permitted to intervene.

On September 27, 2013, Cook County Circuit Court Judge Sophia Hall granted summary judgment on certain counts and denied summary judgment on others.[58] The counts for which Summary Judgment was granted included that state definition of

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[55] Brian Dickerson, *Michigan Case Could Spell End of Same-Sex Bans in 37 States*, DETROIT FREE PRESS (July 25, 2013); *Federal Judge Will Hear Arguments on Michigan Gay Marriage Ban*, DETROIT FREE PRESS (July 10, 2013).

[56] Tresa Baldas and Jim Schaefer, *Judge Sets February Trial For Challenge To Michigan's Gay Marriage Ban*, DETROIT FREE PRESS (October 16, 2013).

[57] Rex W. Huppke, *Citing U.S. Ruling, Gay Marriage Advocates Ask Court to Swiftly End Illinois Ban*, CHICAGO TRIBUNE (July 11, 2013); Tammy Webber, *Illinois Gay Marriage Lawsuit: Couples Seek Ruling In Case On Heels Of SCOTUS Decision*, HUFFINGTON POST - CHICAGO (July 10, 2013), http://www.huffingtonpost.com/2013/07/10/ illinois-gay-marriage-law_ 0_n_3574708.html

[58] Rex W. Huppke, *Judge: Lawsuit Against Same-Sex Marriage Ban Can Proceed*, CHICAGO TRIBUNE (September 27, 2013).

marriage as being between a man and a woman violates the right to privacy; the state definition of marriage as being between a man and a woman violates the state's equal protection clause on the basis of sex; and the state definition of marriage as being between a man and a woman violates the special legislation clause of the Illinois Constitution, which says "the General Assembly shall pass no special or local law when a general law is or can be made applicable." The two counts for which Summary Judgment was not granted – and which are, perhaps, the most important two counts of the case – are that Illinois's same-sex marriage ban violates the due process rights of gay and lesbian couples and Illinois's same-sex marriage ban is discriminatory under the state's equal protection clause covering sexual orientation.

The status of the case became moot when the Illinois legislature passed legislation legalizing same-sex marriages. The legislation passed the Illinois House and Senate in November 2013,[59] and Governor Pat Quinn signed the legislation into law on November 20, 2013,[60] taking effect on July 1, 2014.[61]

(h) Pennsylvania

Pennsylvania currently has two cases pending.

In the first case, Angela Gillem and Gail Lloyd, and nearly two dozen other plaintiffs filed an action seeing to overturn Pennsylvania's DOMA statute.[62] The suit, announced from the steps of the Capitol Rotunda, alleges that the state's DOMA, along with its refusal to marry same-sex couples or recognize such marriages from other states, violates a fundamental right to marry as well as the Constitution's equal-protection clause. The suit contends the state has no legitimate interest in banning same-sex marriage, and that the ban disparages and injures lesbian and gay couples and their families by denying them a long list of legal and financial protections afforded to heterosexual couples.

In the second case, starting on Wednesday July 24, 2013, Montgomery County's Register of Wills, D. Bruce Hanes, directed his office to issue marriage licenses to same-sex couples notwithstanding Pennsylvania's DOMA statute.[63] The Pennsylvania

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[59] Ill. Gen. Legis. SB0010, 98th General Assembly.
[60] Illinois Public Act 98-0597.
[61] Monique Garcia and Clout Street, *Signed And Sealed: Illinois 16th State To Legalize Gay Marriage*, CHICAGO TRIBUNE (November 21, 2013).
[62] Angela Couloumbis and Jeff Gammage, *Suit Seeks to Overturn Pa.'s Ban on Same-Sex Marriage*, PHILADELPHIA INQUIRER/PHILLY.COM (July 10, 2013).
[63] Chris Palmer, *Gay Marriage Licenses Draw Protesters to Montco*, PHILADELPHIA INQUIRER/PHILLY.COM (July 26, 2013); Carolyn Davis and Jessica Parks, *State Attorneys Amend Complaint Over Same-Sex Marriage*, PHILADELPHIA INQUIRER - MONTCO MEMO/PHILLY.COM (August 5, 2013).

Department of Health filed suit July 30, 2013 to force Hanes to stop issuing such licenses. Montgomery County subsequently filed a response to the lawsuit on August 2, 2013. The Pennsylvania Department of Health amended its original suit to respond to the county's response on August 5, 2013.

(i) New Jersey

In Garden State Equality v. Dow,[64] six same-sex couples filed an action in Mercer County, New Jersey seeing to overturn New Jersey's DOMA statute. Superior Court Judge Linda Feinberg denied a motion to dismiss the lawsuit on May 23, 2013, and oral arguments were heard on August 15, 2013. Lawyers for the couples argued that barring same-sex couples from marrying violates the equal protection clause of the state constitution. Assistant Attorney General Kevin Jesperson argued that since New Jersey treats civil unions and marriages equally, the federal refusal to extend benefits to civil union couples is not a state action so the plaintiffs had "the wrong defendant" - issues of inequality should be argued with the federal government as "there is no state constitutional remedy to cure the conduct of a federal entity."[65]

On September 27, 2013, Judge Mary C. Jacobson of Mercer County ruled that New Jersey must allow same-sex couples to marry, saying that not doing so deprives them of rights that were guaranteed by the United States Supreme Court in June in the Windsor case.[66] New Jersey was ripe for a challenge as a result of Lewis v. Harris,[67] a New Jersey Supreme Court decision from 2006 that held that same-sex couples were entitled to all of the rights and benefits of marriage but stopped short of saying that there was a fundamental right to marry.[68]

On Monday September 30, 2013, New Jersey Acting Attorney General John Hoffman formally asked the New Jersey Supreme Court to take an appeal of the decision, citing "far-reaching implications."[69] Hoffman said he is also asking the judge who issued the decision Friday to grant a stay, delaying the implementation date from October 21, 2013 until the matter can be settled.[70] In a decision rendered by the New

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[64] George Amick, *With Arguments Nearing, Same-Sex Marriage Could Reach NJ Soon*, TIMES OF TRENTON/NJ.COM (July 15, 2013).
[65] Julia Terruso, *N.J. Judge Set to Rule on Same-Sex Marriage Bid*, PHILADELPHIA INQUIRER (April 17, 2013).
[66] Kate Zernike and Marc Santora, *Judge Orders New Jersey to Allow Gay Marriage*, THE NEW YORK TIMES, N.Y./Region Section (September 27, 2013).
[67] 202 N.J. 340, 997 A.2d 227 (N.J. 2010).
[68] Zernike and Santora.
[69] Angela Della Santi and Geoff Mullvihill, *New Jersey Appealing Gay Marriage Ruling to Higher Court*, TIME (September 30, 2013) http://nation.time.com/2013/09/30/nj-appealing-gay-marriage-ruling-to-higher-court/ 10/1/2013.
[70] Id.

Jersey Supreme Court on October 10, 2013, Chief Justice Stuart Rabner signed a two page order putting the issue on the fast track, granting the appeal, mandating that briefs from both sides are due on a schedule that concludes on December 3, 2013 with oral arguments to be heard just after the new year.[71] Further, the State's requested stay on the trial court's ruling was denied, thus allowing, as of October 21, 2013, New Jersey to become the 15th jurisdiction to allow same-sex marriage.[72]

In a surprising move, soon after same-sex marriages became legal, Gov. Chris Christie announced that the state was withdrawing its appeal, stating that although he strongly disagrees with the court substituting its judgment for the constitutional process of the elected branches or a vote of the people, the fact that the court has now spoken clearly as to their view of the New Jersey constitution and, therefore, same-sex marriage is the law, there was no sense to an appeal.[73]

(j) Kentucky

Kentucky has one direct challenge and one indirect challenge to its same-sex marriage prohibition laws. The direct challenge[74] involves plaintiffs Gregory Bourke and Michael Deleon, who filed the suit in federal court against Gov. Steve Beshear, Attorney General Jack Conway and Jefferson County Clerk Bobbie Holsclaw, seeking for the court to issue a permanent injunction that would require same-sex marriages performed in other locations be recognized by the state. In a case similar to the Obergefell case, counsel for the plaintiffs do not seek to legalize same-sex marriages within Kentucky — a step she said that would likely require a separate lawsuit, but only sought to have out-of-state same-sex marriages recognized.

The indirect challenge is actually a collateral issue in murder case.[75] Bobbie Clary is charged in the October 2011 beating death of George Murphy and the prosecution wanted to call her civil union partner, Geneva Case, to the stand. They had entered into a same-sex civil union nine years ago in Vermont. But with heterosexual couples, a spouse can claim spousal privilege and not testify, but Kentucky doesn't recognize them as married. The commonwealth says Case is more than a partner to

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[71] David Madden, *New Jersey Supreme Court To Hear Same-Sex Marriage Case*, CBSPHILLY.COM (October 11, 2013) http://philadelphia.cbslocal.com/2013/10/11/new-jersey-supreme-court-to-hear-same-sex-marriage-case/

[72] Kate Zernike, *Judge Says New Jersey Can Begin Allowing Same-Sex Marriages in Two Weeks*, NEW YORK TIMES, NY/Region (October 10, 2010).

[73] Salvador Rizzo, *Christie Withdraws Appeal Of Gay Marriage Ruling*, NEWARK STAR LEDGER (October 21, 2013).

[74] Jesse Halladay, *Louisville Same-Sex Couple Challenges Kentucky Law Against Gay Marriage*, (LOUISVILLE) COURIER-JOURNAL (July 26, 2013).

[75] *Ky. Same-Sex Marriage Ban At Issue In Connection To Murder Case*, WLKY.COM (July 30, 2013).

Clary. She is also a key witness, whereas the defense said she has legal rights as the spouse of Clary. Although the defendant is not married, the argument is that the same rights should apply; this argument was denied by the judge on September 23, 2013.

(k) New Mexico

In the New Mexico case of Griego & Keil et. al. v. Oliver et. al.,[76] the plaintiffs are same-sex couples who have shared lengthy committed relationships and wished to be married; the defendants are the County Clerks of Bernalillo County and Santa Fe County, New Mexico. No specific prohibition exists within the New Mexico statutes regarding marriage (N.M.S.A. §§ 40-1-1 through 40-1-20); nevertheless, the position of the state is that same-sex marriage is prohibited. Certain statutes regarding marriage, such as N.M.S.A. § 40-1-10, are gender neutral, i.e., "Each couple desiring to marry in New Mexico shall obtain a license from a county clerk…"

The lower court focused on Article II, Section 18 of the New Mexico Constitution which provides that "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under the law shall not be denied on account of the sex of any person." Applying Article II, Section 18, the court could not find any justification for prohibiting a marriage between same-sex individuals. At the hearing, neither the county clerk defendants nor the state Attorney General's office voiced any opposition before the judge issued his order; in fact, the order came after a hearing that was only scheduled to address preliminary issues.[77]

According to Attorney General Gary King, a Democrat, his office took no action because he believed that denying marriage to same-sex couples is unconstitutional despite the language of state law.[78] Gov. Susana Martinez did not approve of Attorney General King's actions, stating that he fell short of his obligation to defend the state's interpretation of marriage laws as New Mexico's top attorney.[79] Martinez said the result of King's inaction is a "patchwork" sanctioning of same-sex marriage in New Mexico in that some counties saying 'yes' and some counties saying 'no,' and that is not

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[76] Bernalillo County (N.M.) Second Judicial District Court, No. D202 CV 2013 2757 (August 26, 2013);
[77] James Monteleone, *Judge: Gay Marriage Bans Unconstitutional*, ALBUQUERQUE JOURNAL (August 27, 2013).
[78] James Monteleone, *Lower Courts Opened The Door to Same-Sex Marriages*, ALBUQUERQUE JOURNAL (August 28, 2013).
[79] Id.

a state law"; in anticipation of such a decision, Martinez had called for the same-sex marriage issue to go to a vote as a constitutional amendment.[80]

On appeal to the New Mexico Supreme Court, on December 19, 2013 the lower court decision was upheld, thus legalizing same-sex marriage in New Mexico. The Court stated that none of New Mexico's marriage statutes specifically prohibits same-gender marriages, but the state's laws as a whole have prevented gay and lesbian couples from marrying. The justices said same-sex couples are a discrete group that has been subjected to a history of discrimination and violence. Accordingly, New Mexico may neither constitutionally deny same-gender couples the right to marry nor deprive them of the rights, protections and responsibilities of marriage laws, unless the proponents of the legislation — the opponents of same-gender marriage — prove that the discrimination caused by the legislation is substantially related to an important government interest.[81]

(l) Virginia

Virginia has two cases currently pending.

The first is a federal class action lawsuit filed on August 1, 2013 by the ACLU and Lambda Legal challenging Virginia law barring same-sex marriage and the state's refusal to recognize same-sex marriages legally performed elsewhere.[82] The suit was filed on behalf of Joanne Harris and Jessica Duff of Staunton and Christy Berghoff and Victoria Kidd of Winchester and seeks to represent all same-sex couples in Virginia who wish to marry here or who have married in other jurisdictions. Virginia's lawsuit seeks to overturn the state constitutional prohibition - according to Brian Gottstein, a spokesman for the Virginia Attorney General's Office, "Virginia has followed the traditional definition of marriage as being between one man and one woman for more than 400 years, and Virginians voted overwhelmingly to add this traditional definition to their constitution.

The second is an individual civil suit in which a gay couple from Norfolk filed in federal court against Gov. Bob McDonnell, Attorney General Ken Cuccinelli and George E. Schaefer, the Norfolk Circuit Court clerk, because they were denied a marriage license.[83] The complaint, filed July 18, 2013 at the U.S. District Court in Norfolk, states

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[80] Id.
[81] Barry Massey and Russell Contreras, *New Mexico Legalizes Same-Sex Marriage*, NBCNews.com (January 9, 2014).
[82] *Class-Action Suit Challenges Va.'s Same-Sex Marriage Ban*, RICHMOND TIMES-DISPATCH (August 1, 2013).
[83] Markus Schmidt, *Gay Couple From Norfolk Challenges State's Same-Sex Marriage Ban In Federal Court*, RICHMOND TIMES-DISPATCH (July 24, 2013).

that Timothy B. Bostic, a professor of humanities at Old Dominion University, and partner Tony C. London, a Navy veteran and real estate agent, sought to obtain a marriage license at the Norfolk Circuit Court but were turned down because of the 2006 amendment to Virginia's constitution that defines marriage as between a man and a woman. Their complaint argues that "unequal treatment of gays and lesbians" denies them "the basic liberties and equal protection under the law that are guaranteed by the Fourteenth Amendment to the United States Constitution." For these reasons, the couple asked the federal court to "enjoin, preliminarily and permanently, all enforcement of statutes that seek to exclude gays and lesbians from access to civil marriage and civil union."

(3) A Future Supreme Court Challenge

Given the plethora of judicial activity, it should be anticipated that the state-law DOMA issue will be re-heard by the Supreme Court within the next three to four years (at most). It is likely that when a case arrives, many of the same arguments made in the briefs and oral arguments from the Perry case will be repeated. For this reason, even though the Supreme Court failed to decide the merits of Perry, it is important to learn the arguments made by the parties.

Petitioner's Arguments:

- The Fourteenth Amendment does not require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people, and the validity of Proposition 8 thus turns not on the fact that California's Supreme Court interpreted the state constitution to require the redefinition of marriage before the people could vote on Proposition 8, but on whether the Equal Protection Clause required California to redefine marriage in the first place.

- The Equal Protection Clause does not require California to redefine marriage to include same-sex couples, as the indisputable biological differences demonstrates the Constitutionality of Proposition 8 as the Constitution only requires that a state treat similarly situated persons similarly, not that it engage in gestures of superficial equality.

- The unique procreative capacity of men and women causes the animated purpose of marriage to increase the likelihood of children being born and raised in stable and enduring family units by their mothers and fathers, something that is not founded in a same sex marriage due to the lack of reproductive capability, and the Equal Protection Clause does not require California to ignore this difference.

- Redefining marriage as a genderless institution would work a profound change in an institution critical to the stable progression of society from generation to generation.

Perry's Arguments:

- Proposition 8 violates the Due Process Clause because it denies gay men and lesbians their fundamental right to marry without furthering a legitimate - let alone a compelling - state interest.
- The Supreme Court has recognized on more than a dozen occasions that the right to marry is one of the liberties protected by the Due Process Clause, and the right to marry is of fundamental importance for all individuals.

- Eliminating the final discriminatory feature of California's marriage law--its prohibition on marriage by individuals of the same sex--thus would not require the recognition of a new right, but would instead afford gay men and lesbians access to the fundamental right to marry guaranteed to all persons.

- Applying the Supreme Court's holding in Romer v. Evans,[84] Proposition 8 violates the Equal Protection Clause because in denying the right to marry on the basis of sexual orientation and the sex of one's chosen spouse, it prevents gay men and lesbians from marrying, thereby making them unequal to everyone else.

- Restrictions like Proposition 8 are subject to heightened equal protection scrutiny because marriage is a fundamental right and because gay men and lesbians are a suspect class.

- Proposition 8 cannot satisfy the requirements of strict scrutiny - or any other standard of constitutional review.

- The absence of any rational basis for Proposition 8 - together with the evidence of anti-gay rhetoric in the "Yes on 8" campaign - leads inexorably to the conclusion that Proposition 8 was enacted solely for the purpose of making gay men and lesbians unequal to everyone else.

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[84] 517 U.S. 620 (1996).

E. Potential Issues for Trustees When a Beneficiary is a Party to a Same-Sex Marriage

While the fight rages on within the judicial system, this does nothing to aid the estate planning attorney when confronted with the same-sex marriage issue when drafting planning documents. Further, what about the trustee of a trust in a Non-Recognition State when a same-sex marriage issue arises. Such trustees of trusts under which a beneficiary is (or will in the future become) a party to a same-sex marriage will continue to experience a number of complications and difficult decisions with respect to the manner in which such trusts are administered. Some of these issues and complications are described in the hypothetical fact pattern below.

Example - Lucille, a Florida resident, is a widowed mother of three children, George Oscar ("GOB"), Lindsay and Michael, and enjoys a warm relationship with each child's spouse. Her revocable trust, which is governed under Florida law, provides that the trust residue is to be divided into equal shares for her children, with each share to be held in further trust for such child's lifetime (the "Child's Trust"). Each Child's Trust provides for such child's spouse. Lucille's daughter, Lindsay, lives in New York with her same-sex spouse, Kitty, whom she married in 2011 after same-sex marriages became legal in New York. Plenty of correspondence exists indicating that Lucille overwhelmingly approved of Lindsay's marriage to Kitty. Lucille dies in 2012 a resident of Florida.[85]

(1) Variation #1 – Trust Remainder

Suppose that as to the disposition upon a child's death, the Child's Trust provides as follows:

> "Upon the death of the child of the grantor, if such child is survived by his or her spouse, the balance of such child's trust shall be held in further trust for such spouse...or, if no such spouse survives such child, shall be divided into shares, per stirpes, for such child's descendants as survive such child, or, in default thereof, for the grantor's

[85] Florida and New York were selected for this example given the polar views on the topic within the laws of each state, with New York acknowledging same-sex marriage and Florida, both statutorily and constitutionally, refusing to acknowledge same-sex marriage. The examples also work in other similar states, i.e., for the state of residency of the beneficiary, any of the other ten previously cited jurisdictions acknowledging same-sex marriage, and for the state of administration and governing law of the trust, any of the states that globally do not recognize same-sex marriage, such as Texas.

> descendants as survive such child, and each share shall be held in further trust…"

Lindsay unexpectedly dies in a car accident in 2013 leaving no children.

Analysis

Barry, the Trustee of the Child's Trust for the benefit of Lindsay ("Lindsay's Trust"), has administered the trust as a Florida trust. While it appears that Lucille intended that the balance of Lindsay's Trust be held in further trust for Kitty, it is unlikely that Barry would be able to do so because Lindsay's Trust is governed by Florida law. Pursuant to Art. 1, Section 27 of the Florida Constitution and Fla. Stat. § 741.212, same-sex marriages are not recognized in Florida. While Kitty is legally Lindsay's surviving spouse in New York, pursuant to constitutional and statutory law, Florida would not recognize Kitty as Lindsay's spouse.

As Trustee, Barry would likely be committing a breach of trust if it were to hold the balance of Lindsay's Trust in further trust for Kitty. Rather, the likely result would be that since Lindsay has no surviving descendants, Barry would divide the balance of Lindsay's Trust into shares for GOB and Michael and hold such shares in further trust. As a safeguard, Barry would probably proceed to the applicable Florida court and ask for a determination of the beneficiaries pursuant to Fla. Stat. § 736.0201(4)(e), where the applicable court would seemingly determine that no share of Lindsay's trust could be created for Kitty because Florida law would not deem Kitty to be a "spouse."

(2) Variation #2 – Limited Power of Appointment

The facts are the same as Variation #1, but the Child's Trust provides as follows:

> "Upon the death of the child of the grantor, the principal shall pass in trust for one or more of the grantor's descendants and such child's spouse, in portions, equal or unequal, and subject to such lawful trusts, terms and conditions, as such child appoints by Will or by any other written instrument executed with the same formalities as a Will. Any principal not so appointed shall be divided into portions, per stirpes, for such child's then living descendants, or, in default thereof, for the grantor's then living descendants, and each portion shall be held in further trust…"

Lindsay's will exercises the special power of appointment granted to her in Lindsay's Trust in favor of Kitty.

Analysis

Although Kitty is Lindsay's surviving spouse for all other aspects of Lindsay's estate, for the same reasons as described above in Variation #1, Kitty is likely not Lindsay's spouse for purposes of Lindsay's Trust because Kitty is not deemed to be a "spouse" under Florida law. Thus, the exercise of the power of appointment in favor of Kitty will likely fail. Barry, as Trustee, would presumably seek confirmation of this by the applicable Florida court.

(3) Variation #3 – Discretionary Distributions to Spouse

The facts are the same as Variation #1, but the income and principal of the Child's Trust are distributable as follows:

> "The Trustees may pay so much of the income therefrom and such sums out of the principal thereof (even to the extent of the whole thereof) to grantor's child, the spouse of such child, and the descendants of such child, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees deem necessary for a particular beneficiary's health, education, maintenance and support in his or her accustomed standard of living.

Assume that Lindsay is alive but is incapacitated as a result of the car accident. Lindsay had been financially supporting Kitty. With Lindsay unable to provide for Kitty, Kitty requests Barry for trust distributions for her support.

Analysis

Under the same analysis as set forth in Variation #1 and #2, even though Kitty is Lindsay's legal spouse in New York, Kitty is not a beneficiary of Lindsay's Trust under Florida law because Kitty is not considered to be Lindsay's spouse. Barry, as Trustee, would likely seek confirmation of this by the applicable Florida court.

(4) Variation #4 – Who are the Descendants?

Assume that Lindsay and Kitty have two children, Buster and Tobias, born to Kitty through artificial insemination and which Lindsay has not adopted. The issues are whether such children are Lindsay's "descendants" for purposes of the provisions of Lindsay's Trust contained in Variations #1, #2 and #3 above.

Analysis

As New York residents, pursuant to New York Dom. Rel. § 24(1), Buster and Tobias would be considered to be Lindsay's children even though neither are Lindsay's biological children. This is because under New York law, children born to legally married parents are considered to be the legitimate children of both spouses.[86] However, since the Lindsay's Trust is governed by Florida law, Florida law would not recognize the New York determination of Lindsay's parentage of Buster and Tobias. Unfortunately the only Florida laws regarding such situations involve the determination of parentage of the genetic parents for children born "out of wedlock."[87] Because Buster and Tobias are genetically related to Kitty and not Lindsay, absent an adoption by Lindsay, Florida law would not consider Buster and Tobias to be Lindsay's descendants. As with the situations presented in Variations #1, #2 and #3, Barry, as Trustee, would be prudent to seek confirmation of this conclusion by the applicable Florida court.

(5) Variation #5 – Spousal Support Obligations

Even without references to a same-sex spouse, discretionary provisions can still cause trouble for a Trustee. Consider the following modification to the facts from Variation #3:

> "The Trustees may pay so much of the income therefrom and such sums out of the principal thereof (even to the

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[86] N.Y. DOM. REL. § 24(1) provides as follows:

"1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void."

The application of this provision as to same-sex married individuals is created by N.Y. DOM. REL. § 10-a(2), which provides, in pertinent part, as follows:

"2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law."

Thus, N.Y. DOM. REL. § 10-a(2) causes N.Y. DOM. REL. § 24(1) to be interpreted as gender-neutral, thus legitimizing the children of a same-sex marriage as to both spouses.

[87] *See generally* FLA. STAT. § 742.10.

> extent of the whole thereof) to grantor's child and the descendants of such child, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees deem necessary for a particular beneficiary's health, education, maintenance and support in his or her accustomed standard of living, after considering such beneficiary's other resources."

The provision does not reference the child's spouse, but requires the Trustee to "consider other resources."

Analysis

Under N.Y. Dom. Rel. § 50, a wife's property is neither "subject to her husband's control or disposal nor liable for his debts." By negative inference, under N.Y. Dom. Rel. § 50, a husband would be liable for the debts of the wife. The question is whether, and how, this applies in a same-sex marriage. As previously cited, N.Y. Dom. Rel. § 10-a(2) provides, "…[w]hen necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law." Applying this statute to N.Y. Dom. Rel. § 50, would this mean that neither woman in a same-sex lesbian marriage would be responsible for the debts of the other? To the contrary, would this have the effect of treating both women as responsible for the other's debts? Similarly, the same questions could be asked of a male same-sex marriage.

Suppose that the answer to the above rhetorical questions is that both Lindsay and Kitty are responsible for the other's debts, and that Kitty has sufficient funds, owns the house in which she and Lindsay reside and Kitty pays for all of their household bills and expenditures. The question becomes whether Barry must take Kitty's support obligations as to Lindsay into consideration when effecting a discretionary distribution to Lindsay. Since the trust is administered under Florida law, Lindsay would not be considered to be Kitty's spouse, and, if there is no spousal relationship, it is questionable as to whether Barry can legally consider Kitty's support obligations. This would definitely be a matter where Barry would request guidance from the applicable Florida court.

(6) Can Some of the Results Be Changed?

Note that it may be possible to circumvent these results by changing the governing law of Lindsay's Trust. If either the applicable governing law of the trust or the trust language itself allows for the governing law to be changed, the Trustees may consider a shift in the governing law to a jurisdiction that recognizes same-sex

marriage. Other factors, such as trustee qualification, federal and state income taxes and creditor's rights, should be weighed before such a move would occur. Further, to effect such a move, Barry may have to notice the other beneficiaries who could possibly object in the event that their interests in Lindsay's Trust are impacted. If such an objection is presented, can evidence of Lucille's intent be admissible? For example, what if Lucille had written letters explaining her extreme homophobia; could this be introduced as evidence that Lucille would have objected to any provisions related to a same-sex relationship? Conversely, what if Lucille were very pro-same-sex marriage – could this be admissible to counter any objections?

Suppose that the Trustee had a power to modify provisions of the trust. Such a power could be exercised so that the provisions regarding the spouse were clarified. The problem with this is that the takers if the spouse is not recognized as a spouse would have an interest in any proceeding and would likely challenge any action.

How, then, can such problems be avoided? For starters, it may be possible to avoid these issues by defining certain terms within the governing instrument. In drafting new trusts where same-sex persons are potential beneficiaries, it may be prudent to define terms such as "spouse" and "descendants." Consider that if terms are defined to include references to same-sex marriages, would this be a violation of the state's public policy if the state is strongly against same-sex marriage? Probably not, but the issue is still ripe for a potential challenge. Consider further the scenario whereby the terms are defined to exclude same-sex marriages, and subsequently, the Supreme Court overturns and holds as unconstitutional all state-law DOMA provisions. In this event, would such a provision then become invalid as a violation of public policy? Again, probably not, but the issue could definitely be raised.

Suppose that a same-sex couple, where one individual is wealthy and the other is not, drafted estate planning documents providing for each other prior to a time when same-sex marriage was accepted in their particular state. Subsequently, the couple marries but never changes the planning documents. Three years later, the couple divorces and the wealthy individual later dies without having changed his or her documents, which provide for the now former spouse. Is the bequest valid? Presumably, yes, because the documents were executed prior to the marriage and do not address the former spouse as a spouse.

Thus, the moral is the same as is learned in every drafting class and by every senior partner mentoring a junior associate: pay attention to every detail.

F. Conclusion

Absent a complete, across-the-board determination that all laws regarding the prohibition of same-sex marriage – both federal and state – are unconstitutional, fiduciaries administering trusts in states where such anti-recognition laws are effective must be cognizant of the issues facing trust beneficiaries who are parties to a same-sex marriage.

With respect to state laws, in seemingly every state that does not recognize same-sex marriages, lawsuits are appearing at a virtual exponential rate. The effect of these cases is that one or more may soon be subject to review by the Supreme Court which may rule, once and for all, whether a state may restrict the concept of marriage to only a man and a woman.

In the meantime, as practitioners, extra caution must be taken with respect to drafting documents for both same-sex married individuals as well as opposite-sex married individuals. As illustrated above, such concerns are not limited to when the same-sex spouse is a potential current or remainder beneficiary, but include the determination of a discretionary distribution to the beneficiary subject to a support obligation.

The safest course of action for any such fiduciary is to turn to the appropriate court for guidance. This way, the fiduciary has the security of following a judicial mandate should a beneficiary question or object to the fiduciary's actions.