

# Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts

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## I. INTRODUCTION

Since marriage regulation is primarily a state matter, it does not initially seem surprising that the spate of recent cases challenging state marriage laws has overwhelmingly been brought in state courts. For a movement that self-consciously identifies itself with civil rights efforts, however, it may seem surprising that the drive to redefine marriage has not followed a more typical pattern of seeking federal constitutional recognition, especially since the Court's decision in *Lawrence v. Texas*.<sup>1</sup> Indeed, on looking into the matter, it becomes clear that the mainstream effort to redefine marriage involves assiduously avoiding any federal constitutional claims. This conscious strategy is hardly secret but has been rarely commented on in the literature.

This brief article examines the strategy of avoiding federal court review and federal constitutional claims for same-sex marriage. It first surveys the history of same-sex marriage litigation in the federal courts. It then turns to the question of why federal courts and claims have been avoided, identifying the most obvious explanation - a conscious strategic aim. The conclusions discussed in that section are exemplified in recent litigation in the Ninth Circuit. The article concludes with some comments on the policy implications of the strategy it describes.

## II. MARRIAGE IN THE FEDERAL COURTS

The earliest cases in which plaintiffs advanced claims of a constitutional mandate for a redefinition of marriage relied on federal constitutional claims. The first three cases, brought by one couple in each case, consisted of federal constitutional claims.

In the first case, a same-sex couple challenged a Minnesota clerk's refusal to issue a marriage license, alleging various federal constitutional violations.<sup>2</sup> The court "dismiss[ed] without discussion" the

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1. 539 U.S. 558 (2003).

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

plaintiffs' claims that the failure to issue a marriage license violated the First and Eighth Amendments to the United States Constitution.<sup>3</sup> Similarly, the court rejected due process and equal protection claims premised on the Ninth and Fourteenth Amendments and distinguished the U.S. Supreme Court's decisions in *Griswold v. Connecticut*<sup>4</sup> (since the marriage statute does not impinge on the choice to procreate) and *Loving v. Virginia*<sup>5</sup> ("there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex").<sup>6</sup>

In the second case, brought in Washington State, plaintiffs' core claim relied on the State Equal Rights Amendment.<sup>7</sup> Additionally, plaintiffs also raised federal claims based on the Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution.<sup>8</sup> Like the Minnesota Supreme Court, the Washington Court of Appeals rejected plaintiffs' Ninth Amendment (privacy) and Fourteenth Amendment (due process) claims in a footnote.<sup>9</sup> In the same note, the plaintiffs' Eighth Amendment (cruel and unusual punishment) claim was dismissed "without merit."<sup>10</sup> The court did address plaintiffs' equal protection claim at some length, rejecting the arguments that (1) the marriage statute constituted sex discrimination and (2) that the sexual orientation discrimination inherent in the statute requires higher scrutiny of the statute.<sup>11</sup> Employing the rational basis standard of review, the court concluded that the state marriage law furthered "the public interest in affording a favorable environment for the growth of children" and was thus constitutional.<sup>12</sup>

In the third case, the Kentucky Court of Appeals addressed some of these same provisions, specifically the due process right to marry and the prohibition of cruel and unusual punishment.<sup>13</sup> Plaintiffs also argued that the Kentucky marriage statute violated the rights of free exercise of religion and association.<sup>14</sup> The court made short work of all of these claims, holding merely that "[i]n our view, however, no

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3. *Id.* at 186 n.2.

4. 381 U.S. 479 (1965).

5. 388 U.S. 1 (1967).

6. *Baker*, 191 N.W.2d at 187.

7. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

8. *Id.* at 1189.

9. *Id.* at 1195 n.11.

10. *Id.*

11. *Id.* at 1196.

12. *Id.* at 1197.

13. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

14. *Id.*

constitutional issue is involved.”<sup>15</sup> Summarily, the court concluded that “the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”<sup>16</sup> In regard to the religious liberty claim, the court said that the doctrine “cannot be extended to make the professed doctrines superior to the law of the land and in effect to permit every citizen to become a law unto himself.”<sup>17</sup> The Eighth Amendment claim was thus disposed of: “We do not consider the refusal to issue the license a punishment.”<sup>18</sup>

The inclusion of federal claims became especially important in the *Baker* case because, on failure in the state courts, plaintiffs appealed to the U.S. Supreme Court under its then mandatory appellate jurisdiction. In their jurisdictional statement, the plaintiffs raised three claims:

1. Whether appellee’s [the State of Minnesota’s] refusal to sanctify appellants’ marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.<sup>19</sup>

The Court summarily dismissed the case for “want of a substantial federal question.”<sup>20</sup> This dismissal constitutes a ruling on the merits and therefore is binding on lower courts on the issues it addressed.<sup>21</sup> Significantly, the decision was made just five years after the Court’s decision in *Loving v. Virginia*, articulating the fundamental right to marry.<sup>22</sup>

It was a number of years before another set of plaintiffs went to court seeking a redefinition of marriage. This time, because the context of their action was an immigration matter, they brought their case

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15. *Id.* at 590.

16. *Id.*

17. *Id.*

18. *Id.*

19. Appellants’ Jurisdictional Statement of Appellants at 3, *Baker v. Nelson*, No. 71-1027, U.S. Supreme Court (filed U.S. Feb. 11, 1971).

20. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

21. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

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

in federal court. The plaintiffs, partners in a same-sex relationship, had participated in a religious marriage ceremony.<sup>23</sup> Subsequently, one of the men who was not a U.S. citizen sought classification as an “immediate relative” of his partner who was a U.S. citizen.<sup>24</sup> The court interpreted the relevant immigration provision as recognizing only opposite-sex partners as spouses for preferential immigration status.<sup>25</sup> The court further concluded that the exclusion of same-sex partners from the legal definition of “spouses” had rational bases, based on the facts that same-sex couples do not procreate, most or all states do not recognize marriages between persons of the same sex, and same-sex marriages violate traditional mores.<sup>26</sup>

When the issue returned to the courts in the 1990s, the relief sought and the supporting theories were largely the same, but the federal claims had vanished. In the cases of the 1990s, the uniqueness of state constitutional provisions was stressed, and arguments based on the Federal Constitution were disclaimed.<sup>27</sup> There have been exceptions, but these too are instructive. For instance, a lesser-known case brought in the District of Columbia courts raised federal claims during the early-1990s transitional period after which federal claims largely disappeared.<sup>28</sup> The case resulted in three separate opinions. All three judges joined in an opinion rejecting plaintiffs’ due process claims which noted, “we cannot overlook the fact that the Supreme Court has deemed marriage a fundamental right substantially because of its relationship to procreation. Thus, in recognizing a fundamental right to marry, the Court has only contemplated marriages between persons of

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23. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1980).

24. *Id.*

25. *Id.* at 1040.

26. *Id.* at 1042-43.

27. See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Deane v. Conaway*, 2006 WL 148145 (Md. Cir. Ct. 2006); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff’d* 2006 N.Y. Slip Op. 05239 (N.Y. 2006); *Samuels v. New York Dep’t of Pub. Health*, 29 A.D.3d 9 (N.Y. App. Div. 2006), *aff’d* 2006 N.Y. Slip Op. 05239 (N.Y. 2006); *Li v. State*, 2004 WL 1258167 (Or. Cir. Ct. 2004), *rev’d* 110 P.3d 91 (Or. 2005); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Andersen v. King County*, 2004 WL 1738447 (Wash. Super. Ct. 2004), *rev’d* 138 P.3d 963 (Wash. 2006); *Castle v. Washington*, 2004 WL 1985215 (Wash. Super. Ct. 2004), *rev’d* 138 P.3d 963 (Wash. 2006).

28. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995).

opposite sexes.”<sup>29</sup> Two judges also rejected the federal equal protection claims.<sup>30</sup>

After the U.S. Supreme Court’s decision in *Lawrence v. Texas*, a same-sex couple in Arizona brought an action seeking invalidation of the state’s marriage law, based on the *Lawrence* decision.<sup>31</sup> The Court rejected plaintiffs’ due process claim, stating that no case has held that the fundamental right to marry involves same-sex couples and distinguished *Lawrence*.<sup>32</sup> The court also rejected federal equal protection claims, specifically distinguishing *Romer v. Evans*,<sup>33</sup> and concluding that Arizona’s marriage law was “not so exceptional and unduly broad” as to be explainable only by animus against a particular class.<sup>34</sup>

Three other cases also arose somewhat spontaneously in Washington, Florida and California.<sup>35</sup> The first arose in the context of a bankruptcy petition.<sup>36</sup> The Debtor sought to petition jointly with a same-sex partner to whom she had been married in Canada and argued that the Federal Defense of Marriage Act’s (DOMA) definition of marriage as the union of a man and a woman was unconstitutional.<sup>37</sup> Specifically, the Debtor raised four federal claims: (1) a Tenth Amendment claim that DOMA’s definition of marriage interfered with state control of domestic relations; (2) a Fourth Amendment claim that DOMA “seizes” rights and benefits from same-sex couples; (3) a Fifth Amendment claim sounding in Due Process; and (4) a Fifth Amendment claim sounding in Equal Protection.<sup>38</sup> The court found that DOMA’s marriage definition is not binding on states,<sup>39</sup> that the Debtor did not have a “possessory interest” in marriage benefits,<sup>40</sup> that there is no fundamental right to same-sex marriage,<sup>41</sup> and that marriage is not a form of sex or sexual orientation discrimination.<sup>42</sup>

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29. *Id.* at 333.

30. *Id.* at 362-64 (Steadman, J., concurring).

31. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003).

32. *Id.* at 460.

33. 517 U.S. 620 (1996).

34. *Standhardt*, 77 P.3d at 465.

35. These cases will be discussed in a later section of this article.

36. *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

37. *Id.* at 131.

38. *Id.* at 131.

39. *Id.* at 132.

40. *Id.* at 135.

41. *Id.* at 139.

42. *Id.* at 143.

The Florida case was a more typical challenge to a state marriage law, with an additional attack on the Federal DOMA.<sup>43</sup> Plaintiffs invoked five Federal Constitutional provisions: Full Faith and Credit, Equal Protection, Due Process, Privileges and Immunities, and Commerce Clauses.<sup>44</sup> The court held that DOMA's marriage recognition provision was within Congress' power to regulate the effects of one state's laws in another state.<sup>45</sup> As had previous courts, the Florida court held that there was no fundamental right to same-sex marriage and that *Lawrence* did not create one.<sup>46</sup> Like the court in the Washington bankruptcy case, the Florida court found that DOMA and Florida's marriage law did not discriminate on the basis of sex or sexual orientation.<sup>47</sup> In a footnote, the court said the plaintiffs' Commerce Clause and Privileges and Immunities claims were "without merit."<sup>48</sup>

The *Kandu* and *Ake* cases cited the significance of the U.S. Supreme Court's summary dismissal of the *Baker* case noted above.<sup>49</sup> In *Kandu*, the Washington Bankruptcy Court distinguished *Baker*, noting that: (1) it involved a challenge to a state licensing statute (as opposed to the benefits scheme here); and (2) the claims in *Baker* relied on the Fourteenth (rather than the Fifth) Amendment.<sup>50</sup> The court also suggested that the U.S. Supreme Court's decision in *Lawrence v. Texas*<sup>51</sup> might constitute a subsequent doctrinal development that would call into question the continued applicability of the *Baker* decision.<sup>52</sup> In *Ake*, the Florida case, the court found the *Baker* dismissal binding despite arguments by plaintiffs that the long period of time that had elapsed suggested the dismissal should no longer be relied on.<sup>53</sup> The court responded that the U.S. Supreme Court had never questioned its earlier dismissal and specifically registered disagreement with this aspect of the *Kandu* decision.<sup>54</sup>

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43. *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

44. *Id.* at 1302.

45. *Id.* at 1303.

46. *Id.* at 1307.

47. *Id.* at 1307-08.

48. *Id.* at 1309 n.13.

49. See William C. Duncan, *Has the U.S. Supreme Court Already Decided the Same-Sex Marriage Question?*, SAME-SEX PARTNERSHIP LAW REPORT 3 (Oct. 2005).

50. *In re Kandu*, 315 B.R. at 123, 137-38 (Bankr. W.D. Wash. 2004).

51. 539 U.S. 558 (2003).

52. *In re Kandu*, 315 B.R. at 138.

53. *Wilson*, 354 F. Supp. 2d at 1304-05.

54. *Id.*

## III. STRATEGIC LITIGATION

So, what accounts for the change in strategy in favor of purely state claims? There are a number of possible explanations, varying in their plausibility: (1) a commitment to the principles of federalism; (2) failure to establish standing in federal courts; (3) a lack of well-developed federal theories; and (4) strategic decisions to avoid federal courts and federal issues. Even a cursory examination of each possibility makes clear that the strategic decision is the most plausible explanation for the dearth of federal cases.

A strong case can be made that marriage is appropriately a matter for state jurisdiction. Indeed, there is a domestic relations exception to federal court jurisdiction.<sup>55</sup> The principle of federalism in federal law has a long and respectable history in the United States and is a bulwark of our ordered liberty.<sup>56</sup> It would be nice to think that the reticence to make federal claims for same-sex marriage reflects a respect for this principle of federalism on family law issues. This supposition would seem to find support in the fact that the vast majority of cases strictly confine their arguments to state constitutional claims.<sup>57</sup>

On the other hand, there are convincing reasons to suspect that a principled commitment to federalism is not the key determinant. For instance, despite the expressed reliance only on state constitutional theories, courts mandating a redefinition of marriage rely heavily on federal precedent. An example is *Goodridge v. Dept. of Pub. Health*, where the Massachusetts Supreme Judicial Court redefined marriage, specifically confining its holding to the state constitution, but relying heavily on quotations from federal cases like *Lawrence v. Texas*.<sup>58</sup> Another is the decision of the Manhattan trial court declaring New York's marriage law unconstitutional.<sup>59</sup> That case also relied on federal precedent in making a decision confined to state claims.<sup>60</sup>

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55. See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

56. See Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 *YALE J. L. & FEMINISM* 221 (2005).

57. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Deane v. Conaway*, 2006 WL 148145 (Md. Cir. Ct. 2005); *Samuels v. New York Dep't of Pub. Health*, 811 N.Y.S.2d 136 (N.Y. App. Div. 2006).

58. *Goodridge*, 798 N.E.2d at 941 (containing at least 38 citations to federal cases throughout the opinion).

59. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005), *rev'd and vacated*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

60. *Id.* (containing at least 56 citations to federal cases, about 10 fewer than the number of citations to New York cases).

In addition, the organizations bringing the lawsuits premised only on state claims are not as hesitant to invoke federal claims in other areas of state policy. For instance, when Nebraska enacted an amendment to the state constitution defining marriage, any possible support for federalism was disregarded when the ACLU and Lambda Legal Defense and Education Fund attacked the amendment in federal court.<sup>61</sup> In a challenge to another state family law matter, the ACLU's suit against Florida's adoption law was also brought in federal court, raised federal claims, and was appealed to the U.S. Supreme Court.<sup>62</sup> As noted elsewhere, "advocates of the redefinition of marriage want a constitution that can't say 'no,'" and if the state constitution won't oblige, they will pursue a federal claim.<sup>63</sup> This is because their view of state constitutions is instrumental - they are useful to the degree they can "secure the greatest possible recognition of individual autonomy and the most radically egalitarian outcome possible."<sup>64</sup> In fact, when Hawaii and Alaska enacted state constitutional amendments to prevent a redefinition of marriage, some activists attacked these amendments on federal constitutional grounds. "The attraction of federalism began to fade when state constitutional law cut the other way."<sup>65</sup>

Perhaps, then, the plaintiffs seeking a redefinition of marriage lack standing to bring their claims in federal court. It is true that certain cases involving the definition of marriage could present standing problems. For instance, a challenge to the provision of the Federal Defense of Marriage Act which allows one state to refuse recognition of a same-sex marriage performed in another state would raise the issue. One would arguably need to have contracted a valid marriage in one state and then moved to another state where the marriage was not recognized to have standing to challenge this aspect of the law. There is no reason, however, that a challenge to a state marriage law could not rely on federal constitutional claims in the same way as plaintiffs did in the marriage cases of the 1970s and 1980s.

Another possibility is that plaintiffs lack federal constitutional arguments for a mandated redefinition of marriage. After all, a com-

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61. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

62. *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

63. William C. Duncan, *Imposing the Same-Sex Marriage Template on State Constitutional Law: The Implications for Marriage, Constitutional Theory and Democracy*, in *MARRIAGE AND SAME-SEX UNIONS: A DEBATE* 297, 303 (Lynn D. Wardle et al. eds., 2003).

64. *Id.* at 304.

65. *Id.*

mon argument in recent litigation is that the state constitutions invoked in the particular case provide broader protection than does the Federal Constitution.<sup>66</sup> This could be understood as a frank admission that no federal constitutional provision can be read as creating a mandate for a redefinition of marriage. Even the most cursory examination of the law review literature, however, dispels the notion that plaintiffs seeking to invoke Federal Constitutional provisions would have any available theories to support such claims. For example, one could note the report of the Association of the Bar of the City of New York Committee on Lesbian and Gay Rights, Committee on Sex and Law, and Committee on Civil Rights which argues that the Equal Protection Clause of the Federal Constitution mandates a redefinition of marriage.<sup>67</sup> Respected academic commentators have argued that this same result could be reached by reliance on federal provisions regarding Due Process,<sup>68</sup> the Right to Travel,<sup>69</sup> Establishment of Religion,<sup>70</sup> Bills of Attainder,<sup>71</sup> and others.<sup>72</sup> The articles noted, it must be stressed, are just a very small sampling of the commentary arguing for a Federal Constitutional redefinition of marriage. Cataloging all such articles would create a list of hundreds, especially if student notes are included, and new ones would have to be added constantly.

The most plausible and obvious explanation, acknowledged by its adherents, for the avoidance of federal claims and federal courts is that

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66. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d at 941, 948-49 (Mass. 2003); *Hernandez v. Robles*, 794 N.Y.S.2d at 579, 591 (N.Y. Sup. 2005), *rev'd and vacated in part*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

67. Ass'n of the Bar of the City of N.Y. Comm. on Lesbian and Gay Rights, Comm. on Sex and Law, and Comm. on Civil Rights, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 70 (2004).

68. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretations and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003 (2004).

69. See Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407 (1998); Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

70. James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianism*, 4 MICH. J. GENDER & L. 335 (1997).

71. See Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998).

72. See David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001) (free speech); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men in Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (sex discrimination).

it is a conscious decision made for strategic reasons. In examining the differences between the early marriage cases in which federal claims were made and the later cases in which they have been assiduously avoided, among other distinctions, in the vast majority of these later cases plaintiffs were represented by professional advocacy organizations. We may assume these organizations are more sensitive to strategic considerations since their *raison d'être* is to make an impact on the law, rather than merely settling a particular case. Public statements by prominent advocates of redefinition confirm this motivation. For instance, some advocates openly express concerns about losing cases brought in federal courts. As an early article noted:

Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades.<sup>73</sup>

Thus, the strategy was to pursue litigation in sympathetic states with the level of sympathy determined by looking at things like the nonexistence of state sodomy laws, certain state constitutional provisions, “the political climate in the state; and, perhaps most important, the composition of the state judiciary.”<sup>74</sup> An attorney with the Lambda Legal Defense and Education Fund notes: “The lawsuits we have done that have succeeded have been carefully planned and brought in states where we have already had the legal building blocks by doing work on other issues.”<sup>75</sup> Another dimension of the strategy employed by Lambda includes “focus[ing] on states where public attitudes toward same-sex unions seem particularly friendly and where amending the state constitution to counter any ruling for same-sex marriage would be difficult.”<sup>76</sup> This strategy has not always been followed, as noted above, but as an ACLU attorney points out, “[m]any of the cases making their way through the courts were filed by individuals not affiliated with leading gay rights organizations.”<sup>77</sup>

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73. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 (1994).

74. *Id.* at 611 n.194.

75. Wyatt Buchanan, *Profound Issues in Seattle Lawsuit*, S.F. CHRONICLE, Jan. 3, 2006, at A1 (quoting Lambda senior counsel Jennifer Pizer).

76. Joan Biskupic, *Wave of Lawsuits Targets Bans on Same-Sex Marriage*, USA TODAY, Mar. 24, 2006, at 4A (quoting Lambda attorney David Buckel).

77. David Espo, *Ban on Same-Sex Marriage*, NEWSDAY, Dec. 29, 2004, at A22 (summarizing comments of Matt Coles, director of the ACLU's Lesbian and Gay Rights Project).

For instance, the Florida case *Wilson v. Ake* was brought by a local attorney unaffiliated with any major advocacy organization. A news report explained that “[m]ajor gay rights legal organizations had opposed Rubin [the Florida attorney] because they felt pursuing the issue in federal courts was unwise, especially in a state known for conservative judges.”<sup>78</sup> After losing at the district court, “Rubin decided to step back from the fight after a lengthy discussion with [Matt] Coles [of the ACLU’s Lesbian and Gay Rights Project]. Rubin said he sought out Coles after hearing that national gay rights organizations opposed a federal court strategy.”<sup>79</sup> The decision in *Wilson* was a relief to mainstream legal activists, one of whom said, “[a]t least now, that precedent will be limited to the district court level.”<sup>80</sup>

The lead attorney in the Massachusetts litigation summarized the strategy that has been followed by these groups and noted another possible motivation for it:

“I think that what it boils down to is avoiding the federal piece” for as long as possible. “I have tried to plead with lawyers not to get overly ambitious about going into court and challenging the federal Defense of Marriage Act,” she says. “I think a lot of times these cases would arise as tax cases by wealthy individuals” who pay disproportionate sums because of the unavailability of marriage. “I can’t think of a less sympathetic prospect,” Bonauto says. “I would like the opportunity for states to wrestle with this before we have to go into federal court.”<sup>81</sup>

Whatever the exact concerns may be, worry over federal precedent, fear of unsympathetic federal plaintiffs, or some other reason, the underlying motivation is strategic: keeping the marriage cases out of federal courts until a win there seems more likely. “Overall, the gay rights groups’ strategy seeks to win state court rulings that could help change public attitudes and help prompt the U.S. Supreme Court to guarantee a right to gay marriage.”<sup>82</sup>

#### IV. “PLEASE DON’T DECIDE THIS CASE”

A pending case is illustrative of this strategy at work. While the media event occasioned by the Mayor of San Francisco’s decision to offer marriage licenses to same-sex couples was ongoing, a same-sex

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78. Elaine Silvestrini, *Appeals Dropped on Gay Marriage*, TAMPA TRIBUNE, Jan. 26, 2005, at 1.

79. *Id.*

80. *Id.* (quoting David Buckel, Lambda Legal Defense and Education Fund).

81. David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES, May 9, 2004, § 6 (Magazine), at 52 (quoting Mary Bonauto).

82. Biskupic, *supra* note 76.

couple in southern California sought a marriage license from Orange County. They were denied.<sup>83</sup> The couple then sued in the Central District of California, alleging violations of the California and Federal Constitutions.<sup>84</sup> In its opinion, the court first addressed jurisdictional matters. First was the question of whether the court should abstain from ruling on the challenges to California's marriage law, since California's marriage law was the subject of an ongoing state constitutional challenge. The court noted that the pending state case could resolve the state law issues plaintiffs raised and thus abstained from ruling on the claims arising out of the California Constitution.<sup>85</sup> Because plaintiffs were not married to one another, were not seeking recognition of the marriage across state borders, and had no definite plans to marry and seek recognition of the marriage, the court also held that plaintiffs lacked standing to challenge the inter-jurisdictional recognition portion of the Federal DOMA.<sup>86</sup> However, the court concluded that plaintiffs did have standing to challenge the marriage definition provision of DOMA because they had contractually formed a domestic partnership which would not be treated as a marriage under Act.<sup>87</sup>

When the court addressed the substantive claims, it first held that the U.S. Supreme Court's dismissal of *Baker v. Nelson* did not control since it addressed state marriage licensing rather than federal benefits.<sup>88</sup> In addition, cases like *Romer* and *Lawrence* suggested to the court that the U.S. Supreme Court had begun to take claims by homosexuals more seriously than had previously been true, evidenced by the application of the doctrine of heightened scrutiny since *Baker* was decided.<sup>89</sup>

The court then turned to the Equal Protection claims concluding that DOMA created a sexual orientation classification manifested in its disparate impact on homosexuals.<sup>90</sup> It rejected, however, the claim that DOMA discriminated on the basis of sex since the law had no disparate impact on either men or women.<sup>91</sup> The sexual orientation

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83. Wyatt Buchanan, *Going for Broke in Battle Over Gay Vows*, S.F. CHRONICLE, Jan. 23, 2006, at A1.

84. *Smelt v. Orange County*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir. 2006).

85. *Id.* at 870.

86. *Id.* at 871.

87. *Id.*

88. *Id.* at 872-74.

89. *Id.* at 873-74.

90. *Id.* at 875.

91. *Id.* at 875-76.

classification identified by the court was supported by a rational basis in “encourag[ing] the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents.”<sup>92</sup> To the court, it was unimportant that same sex couples may not harm children since that question is properly legislative.<sup>93</sup> In regards to plaintiffs’ Due Process claims, the court noted that *Loving v. Virginia* recognized, rather than created, a fundamental right and held that the fundamental right to marry was not a fundamental right to same-sex marriage.<sup>94</sup>

Unlike the Florida attorney described in the last section, the attorney in *Smelt* appealed to the Ninth Circuit. In a unique move, a major advocacy organization Equality California, represented by attorneys with the National Center for Lesbian Rights and the Lambda Legal Defense Fund, then sought to intervene, but not to help the plaintiffs secure a redefinition of marriage. Rather, the organization’s intent was to prevent a ruling on the merits.<sup>95</sup> The attorneys for Equality California publicly expressed concerns, strategic in nature, about the appeal. An attorney for Lambda explained: “The understanding we have, having done this for a long time, is that some steps lead well to other steps, and if you try to bite off too much all at once then you choke.”<sup>96</sup> She further stated: “Our carefully considered view is that it’s important to be taking steps in the jurisdictions where we can succeed and have a series of successes . . . before calling the ultimate question for the entire country.”<sup>97</sup> Another report noted that attorneys at Lambda and the National Center for Lesbian Rights “said they are concerned the case will set a national precedent that will hurt efforts to secure marriage rights for gay couples at the state level.”<sup>98</sup>

In its proposed intervenor brief, Equality California argued that the district court should have abstained not only from ruling on plaintiffs’ state constitutional claims, but from the whole proceeding.<sup>99</sup> They additionally argued that plaintiffs lacked standing to challenge

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92. *Id.* at 880.

93. *Id.*

94. *Id.* at 879.

95. Opening Brief of Proposed Intervenor Equality California at 3, *Smelt v. County of Orange*, No. 05-56040 (9th Cir. Aug. 29, 2005).

96. Buchanan, *supra* note 83 (quoting Jennifer Pizer).

97. *Id.*

98. Phil LaPadula, *Gay Groups Ask Court to Throw Out Suit Against Defense of Marriage Act*, N.Y. BLADE, Jan. 25, 2006, available at <http://www.nyblade.com/2006/1-27/news/national/efforts.cfm>.

99. Opening Brief of Proposed Intervenor Equality California at 3, *Smelt v. County of Orange*, No. 05-56040 (9th Cir. Aug. 29, 2005).

the definitional portion of DOMA because the plaintiffs had terminated their domestic partnership registration before filing for summary judgment.<sup>100</sup> The brief made it very clear that Equality California did not want the Ninth Circuit to decide the case. The brief, however, also made clear that Equality California did not disagree with the plaintiffs' underlying constitutional claims (although it believed they could be made in a better way) and was not opposed in principle to a federal court challenge. In two footnotes, Equality California says:

While appellants lack standing to challenge section 3 of DOMA, it is Equality California's position that DOMA is, in fact, unconstitutional and eventually should be held so if an appropriate case is brought by a legally married couple.

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It is Equality California's position, for example, that sexual orientation is a suspect classification and that discrimination based on sexual orientation is properly subject to heightened scrutiny; that Section 3 of DOMA classifies and discriminates on the basis of both sexual orientation *and* sex; that same-sex couples equally are entitled to the same fundamental right to marry that belongs to other couples and that Section 3 of DOMA violates the rights of same-sex couples to due process of law under the United States Constitution; and that Section 3 of DOMA cannot survive even rational basis review under the Fifth Amendment's equal protection guarantee. Equality California believes, however, that the District Court should not have reached any of these issues in this case.<sup>101</sup>

Any resemblance of these passages to a complaint brought in federal court is, of course, purely coincidental.

Equality California's strategy was successful, at any rate. In May 2006, a panel of the Ninth Circuit ruled in the case.<sup>102</sup> The court noted that federal court abstention is appropriate where (1) there is a sensitive public policy issue, (2) a state ruling would end the controversy, and (3) the outcome of a state decision is in doubt.<sup>103</sup> In regards to the first issue, the court said "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative."<sup>104</sup> The court noted that the case did not raise a free speech issue that militated against abstention.<sup>105</sup> On the second part of the absten-

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100. *Id.* at 4.

101. *Id.* at 18-20 nn.7-8.

102. *Smelt v. Orange County*, 447 F.3d 673 (9th Cir. 2006).

103. *Id.* at 679.

104. *Id.* at 681.

105. *Id.* at 681 n.22.

tion test the court noted that an ongoing California case could decide the issue under the California's state constitution.<sup>106</sup> On point three, the court concluded that it could not determine how the California Supreme Court would rule on the issue.<sup>107</sup> Thus, the district court was right to abstain from the challenge to the state marriage statute.<sup>108</sup>

On the matter of standing to challenge the marriage recognition portion of DOMA, the court noted that plaintiffs had not been legally married in any state.<sup>109</sup> Thus, they have not been affected by a denial of recognition of such a marriage allowable under DOMA and therefore lack standing to challenge that part of the law.<sup>110</sup>

The court noted that section three of DOMA defines marriage; “[i]t does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition.”<sup>111</sup> Since plaintiffs were not married, the panel concluded it could “not see how they can claim standing to object to Congress’s definition of marriage for federal statutory and regulatory purposes.”<sup>112</sup> Particularly since “[i]t certainly is not a question of Congress’s refusal to recognize *their* status.”<sup>113</sup> That plaintiffs might someday marry and be denied federal benefits was not enough to establish standing.<sup>114</sup> A California domestic partnership also would not provide standing since it is not a marriage.<sup>115</sup> The court further noted that prudential considerations (specifically, the extremely general nature of the harm alleged by plaintiffs) also suggested the wisdom of avoiding a finding of standing here.<sup>116</sup> Thus, the avoidance strategy survived.

## V. POLICY IMPLICATIONS

Parents will be familiar with the dynamic at work here. When a child is denied something by one parent, that child will then go to the other parent with the same request, hoping for a different response. Eventually, an enterprising child will learn which parent is likely to give the answer the child wants on certain subjects and forego asking

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106. *Id.* at 681.

107. *Id.*

108. *Id.* at 682.

109. *Id.*

110. *Id.* at 683.

111. *Id.*

112. *Id.*

113. *Id.* at 683-84.

114. *Id.* at 684.

115. *Id.*

116. *Id.*

the non-receptive parent at all. On the other hand, the child may try to use one parent's permission as a way of convincing the other to concur. Here, having been denied success in the federal courts, plaintiffs are hoping their request will meet with sympathy in states carefully selected for their permissiveness. Having achieved the objective at the state level, they can use that leverage in the federal system.<sup>117</sup>

The advocates of a redefinition of marriage seem intent on creating a constitutional law version of Madison County, Illinois, the preferred forum for bringing asbestos claims due to its juries being more receptive to plaintiffs' cases than juries in other jurisdictions.<sup>118</sup> It may be a canny strategy, but is it good policy?

We can begin assessing that question by noting the portrayal of constitutional principles implicit in the strategy. The strategy assumes that the judicial process is purely political. For instance, its proponents believe that they can break down public opposition to redefining marriage through a series of successful court battles. Thus, changing public attitudes is conflated with amending a given jurisdiction's constitution.<sup>119</sup> Another assumption is that the law has no fixed meaning. It can only mean what judges are willing to assert it means.<sup>120</sup> Thus, the judges who will decide the case become the key factor in deciding whether and where the case will be brought. More than that, they become the key factor in understanding what the constitutions mean. This looks distressingly like a "government of men" rather than of laws.<sup>121</sup>

This strategy is an attempt to game the system in two ways. First, the strategy cuts out the legislative branches and the public completely, in favor of judicial creation of law. In contravention of the specific state and federal constitutional provisions for amending those documents, advocates who employ the avoidance strategy would rather effect change through "evolving" understandings of constitutional provisions on the part of judges and, when fearing that these

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117. This is perhaps analogous to a technique commonly used by children when one parent denies them permission to do something, i.e., they often attempt to coerce the non-obliging parent by arguing, "But mom (or dad) lets me do that."

118. Paul Hampel, *Madison County: Where Asbestos Rules*, ST. LOUIS POST DISPATCH, Sep. 18, 2004, at A1.

119. It is hard to see, though, how a judicial decision would or should be indicative of public attitudes. Perhaps in terms of what a court can get away with without igniting a public backlash? This is hardly an encouraging view of the court system.

120. Think of the time the Framers of these documents could have saved.

121. See generally William C. Duncan, *Goodridge and the Rule of Law*, 14 B.U. PUB. INT. L.J. 42 (2004).

new attitudes are not fully hatched, will wait until they do before asking.

Second, the strategy attempts to turn federalism into an inflated version of forum shopping. Although advocates vaunt the independent nature of each state's constitution, the *Smelt* case makes clear that they believe that all constitutions will have the same result - requiring a redefinition of marriage - so any differences between documents are mere surplusage. They may affect the form of the arguments to be made but not the result sought. It is hardly implausible that advocates will lose patience with the supposed superiority of state constitutions when unique provisions of those constitutions are used to reject a mandate for redefinition. In fact, this very thing has already happened in the challenge to Nebraska's marriage amendment where the ACLU and Lambda brought a federal case to invalidate a state amendment.<sup>122</sup> The public discussion of the avoidance strategy has already included frank admissions that a national decision that marriage is unconstitutional is the only appropriate outcome for this legal debate.

In addition, advocates of a marriage redefinition seem to be planning to bring a federal case when the chances for success have increased (because of successes in state courts) and then use that leverage to cow the resisting states into submission. If the strategy is successful, it would turn federalism on its head by using the states to secure a federal result which will then be used to get results in the other states (not by persuasion, but by fiat).

## VI. CONCLUSION

It is clear that the strategy of federal court avoidance is central to the work of advocates of a marriage redefinition. Perhaps it is meant as a way of "softening the beachhead."<sup>123</sup> Here, the advocates of redefinition want to break down the resistance to their projects through attacks from a relatively safe vantage point before attempting an offensive in the federal system that could result in a nationwide redefinition of marriage. This is likely part of the import of the oft-invoked analogy to the anti-miscegenation cases, the argument being that although only one state court struck down an interracial marriage ban initially,<sup>124</sup> the U.S. Supreme Court extended this holding to the whole country just less than two decades later.<sup>125</sup>

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122. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

123. "Softening the beachhead" refers to the practice of bombing a possible landing site before launching a military invasion.

124. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

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

This analogy breaks down quickly, though.<sup>126</sup> The California Supreme Court invalidated that state's anti-miscegenation law on Federal Constitutional grounds. There was no attempt in that case to avoid the federal issue. The unconstitutionality of interracial marriage bans was clear and the process of repealing such laws began in earnest after that California decision.<sup>127</sup> In contrast, since the first major court decision questioning the definition of marriage, there has been an unprecedented effort to enact state statutes and constitutional amendments to reaffirm the definition of marriage as the union of a man and a woman.<sup>128</sup> Unlike the acceptance of the clearly correct decision in *Loving v. Virginia*, there seems to be no similar consensus in favor of redefining marriage to include same-sex couples.

The federal avoidance strategy may or may not be successful in accomplishing its aim. It seems clear, however, that employing this strategy may have ramifications beyond the marriage debate, such as weakening principles of federalism and the rule of law, that will not be salutary. If other groups are persuaded to cynically choose this course of action for purposes of circumventing the normal legal process, the strategy will have left a sorry legacy, not only for marriage, but also for the law.

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126. There are many reasons the analogy doesn't work, but only one will be focused on here. See Monte N. Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555 (2005).

127. Brief of Amici Curiae New Jersey Coalition to Preserve and Protect Marriage, et al. at 47-53, *Lewis v. Harris*, No. 58,389 (N.J. Dec. 21, 2005).

128. See William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. 233 (2005).