

**Same-Sex Unions
Across the United States**

Same-Sex Unions Across the United States

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To George, Emma, and Nathan

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Acknowledgments

I have discussed these subjects in various law reviews:

Equal Protection, Same-Sex Marriage, and Classifying on the Basis of Sex, 38 **Pepperdine Law Review** (2011)

Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience, 12 **Florida Coastal Law Review** (2010)

Same-Sex Marriage and the Right to Privacy, 13 **Journal of Law and Family Studies** (2011)

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Introduction

Public opinion polls indicate a greater acceptance of members of the lesbian, gay, bisexual, and transgender (LGBT) community, and an increasing number of states offer some sort of legal recognition of same-sex couples and their families. Nonetheless, many states have constitutional amendments prohibiting the recognition of same-sex marriage, which means that one state may recognize same-sex marriage while a neighboring state prohibits the recognition of such unions under any circumstances. Further, the Federal Defense of Marriage Act (DOMA), which defines marriage for federal purposes and which permits states not to recognize marriages validly celebrated elsewhere, is still the law of the land, although the Federal DOMA has not yet been authoritatively construed so some of its effects are still unclear.

To make matters even more complicated, our society is extremely mobile, whether because individuals are crossing state lines to go on vacation or in search of employment. The great mobility of the population increases the importance of establishing the conditions, if any, under which one state may or must recognize a family relationship that was formed in another state.

Whether one state will recognize a family relationship established elsewhere will depend upon a number of factors, including the interpretations of various state and federal statutes and constitutional provisions. For example, were the United States Supreme Court to hold that the fundamental right to marry protected by the United States Constitution includes the right to marry a same-sex partner or were the Court to hold that equal protection guarantees preclude the states from denying same-sex couples access to marriage, the analysis would be pretty straightforward with respect

to whether certain families would be recognized, because no state could refuse to recognize same-sex marriages. However, the Court has not given any indication that it is willing to take such a step, and this book offers an account of the legal landscape in the United States that is not predicated upon the Court's finding that equal protection or privacy guarantees protect the right to marry a same-sex partner.

Several state supreme courts have found that their respective state constitutions protect the right to marry someone of the same sex. However, those analyses are not binding on other states, because both the language of and the case law interpreting the respective state constitutional provisions may differ. It thus should not be surprising that different state supreme courts have reached differing conclusions about the protections included within their respective foundational documents for LGBT families, although some of the differences in the state supreme court decisions regarding constitutional protection of the right to marry a same-sex partner cannot be accounted for by appealing to subtle differences in text or interpretation.

Historically, there have been many cases in which states had to decide whether to recognize marriages validly celebrated in other jurisdictions even if those marriages could not be celebrated locally, and those cases provide guidance with respect to how same-sex marriages should be treated. A separate issue is whether the United States Constitution requires each state to recognize a marriage validly celebrated in a sister state domicile. Thus, even if the United States Constitution does not require each state to permit its own citizens to marry someone of the same-sex, that would not preclude the Constitution from requiring states to recognize same-sex marriages validly celebrated elsewhere under certain conditions.

Many couples, whether composed of adults of the same sex or of different sexes, have children to raise, and it is a matter of great importance for all concerned whether the rights and obligations of parenthood will be recognized across the states. As a matter of constitutional obligation, states must recognize certain parent-child relationships established in other states, even if the former states are not required to recognize adult relationships that have been estab-

lished elsewhere. However, precisely because only certain parent-child relationships must be recognized throughout the United States, other parent-child relationships are legally more tenuous. Some parents who have been awarded child custody or visitation and are considering whether to change their domiciles may need to take a variety of factors into account before making such a move.

This book attempts to clarify a number of issues regarding LGBT partners and their families. For example, while two chapters discuss federal equal protection and privacy guarantees and argue that the United States Constitution, properly understood, requires all states to recognize same-sex marriage, the rest of the book assumes that those guarantees do not impose such a requirement. One chapter discusses the Federal DOMA, offering different constructions of it and discussing the implications of that Act's being struck down or repealed. Even were the Federal DOMA repealed, the state DOMAs would remain and would require interpretation. It seems likely that while some of the state DOMAs would be affected by a repeal of the Federal DOMA, others would not.

The last chapter discusses an issue that will likely gain greater prominence as more states recognize same-sex relationships, namely, the kinds of exemptions that should be built into law for those public officials who have religious objections to dealing with LGBT families. While religious beliefs should be respected, this chapter argues that neither public officials nor those businesses open to the general public should be afforded an exemption entitling them to refuse to deal with LGBT families. Such an exemption would implicate constitutional concerns if targeting LGBT families in particular and would lead to increased balkanization in this country if written more generally, a result that would be detrimental not only to the individuals affected but to society as a whole.