

States will have to recognize same-sex relationships

BY ANDREW KOPPELMAN

Like it or not, legalized same-sex relationships are here to stay, and, for the time being, so too is America's division over the issue. So what happens when people in legally recognized same-sex marriages cross state lines?

Can someone who lives with a same-sex spouse in Massachusetts safely run away to Virginia with the family's assets? And what happens when someone from Massachusetts is hospitalized in Virginia and the hospital needs to know who is entitled to make the patient's medical decisions? Can a person with a same-sex spouse in Massachusetts come to Virginia and marry someone else of the opposite sex? If so, would the bigamous spouse be required even to tell the new spouse about the existing marriage?

This is not the first time that Americans have been divided about what kinds of marriages to recognize. Profound moral disagreements about marriage have involved differences in state laws concerning marriages between kin, marriages involving young teenagers, remarriages after divorce, and above all, interracial marriages.

The outcomes almost always turned on a single question: Where did the couple make its home? Take this 1948 case. Pearl Mitchell, who was black, died in Chicago without a will, leaving land that she had owned in Mississippi. A provision in the Mississippi Constitution declared interracial marriages "unlawful and void."

The state Supreme Court nonetheless allowed her white husband to inherit, because the couple had not lived in Mississippi.

The Mississippi courts in 1948

were bulwarks of an evil system of racial subordination. But they understood something important about the problem of moral pluralism in a federal system: that each state must respect the legitimate op-

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eration of other states' laws.

This history can teach us how to respond to our present divisions. This month, those divisions became even further entrenched. Seven states passed constitutional amendments against same-sex marriage.

But only two weeks before that, the New Jersey Supreme Court decided that the state must join California, Connecticut, Vermont and Massachusetts — altogether comprising nearly a fifth of the U.S. population — in giving gay couples all the rights of married couples. And the Republicans' loss of a majority in Congress means that the effort to amend the Constitution to ban same-sex marriage is dead.

There are now 43 states with laws banning same-sex marriage. These laws were passed mainly to guarantee that these states would be able to govern the marriages of their own citizens. But other situations will arise in which a same-sex marriage or civil union will be pertinent.

In order to avoid bizarrely unfair results that nobody has ever intended — such as a deadbeat father running away with all his family's as-

sets and finding a safe haven in another state — states will have to recognize same-sex relationships sometimes, for some purposes.

The hard work lies in figuring out how to map the boundaries of recognition in a way that allows each state to pursue its own deeply felt public policies. It's a complex task, but hardly an insurmountable one. If the Southern racist courts could do it, so can we.

At a minimum, we should not respond to our disagreements in a less civilized and humane way than we managed to do in the shameful days of racial segregation.

Andrew Koppelman, professor at Northwestern University School of Law, is the author of Same Sex, Different States: When Same-Sex Marriages Cross State Lines (Yale University Press).