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INTRODUCTION TO SYMPOSIUM ON DOMA AND ISSUES CONCERNING FEDERALISM AND INTERSTATE RECOGNITION OF SAME-SEX RELATIONSHIPS

On March 19-20, 2010, California Western School of Law and the J. Reuben Clark Law School at Brigham Young University co-sponsored a symposium at CWSL in San Diego entitled “*DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex Relationships.*” The purpose of the symposium was to analyze the federalism and full faith and credit issues concerning inter-jurisdictional recognition (or non-recognition) of same-sex couples’ relationships under the federal Defense of Marriage Act (DOMA). The symposium speakers explored this issue from a variety of perspectives, both ideological and legal, including conflict of laws, full faith and credit, federalism, and other public policy perspectives, including both the horizontal and vertical aspects of these issues. The papers include perspectives ranging from theoretical to doctrinal to pragmatic.

Twelve experts in conflict of laws and constitutional law participated in the symposium, and eight of them submitted papers for publication in this issue of the California Western International Law Journal. (Conference presenters who did not submit papers are Mary Bonauto, Gay and Lesbian Advocates and Defenders; Andrew Koppelman, Northwestern University; W. Sherman Rogers, Howard University School of Law; and Monte Neil Stewart, Belnap Law PLLC.) One invitee who could not attend the symposium, Michael E. Solimine, and one CWSL student, Dan J. Bulfer, also contributed papers to this issue.

2 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

This issue is organized similarly to the symposium and is divided into three sections.

DOMA AND CONSTITUTIONAL ANALYSES

Mark D. Rosen, Professor, Chicago-Kent College of Law.

Gary J. Simson, Dean and Macon Chair in Law, Mercer University School of Law.

Dan J. Bulfer, Executive Notes and Comments Editor and Third-Year student, California Western School of Law.

DOMA AND CONFLICT OF LAWS

Hillel Levin, Professor, University of Georgia School of Law.

Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law.

Lynn D. Wardle, Bruce C. Hafen Professor of Law, J. Reuben Clark Law School at Brigham Young University.

DOMA AND FAMILIES

Barbara J. Cox, Clara Shortridge Foltz Professor of Law, California Western School of Law

L. Lynn Hogue, Professor, Georgia State University School of Law.

Mark Strasser, Trustees Professor, Capital University Law School.

Rhonda S. Wasserman, Professor, University of Pittsburgh School of Law.

In Section I, DOMA and Constitutional Analyses, the authors discuss various aspects of DOMA and its constitutionality. Professor Mark Rosen's article, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, recognizes that the Supreme Court, in *Lawrence v. Texas*, left undecided the question of whether substantive due process renders the state bans preventing marriages of same-sex couples unconstitutional. Rosen assesses DOMA in light of the latitude that non-judicial institutions, such as states, Congress, and the President, have to identify and act

upon their own views as to what, if anything, the Constitution requires in relation to same-sex marriage. Dean Gary J. Simson's article, *Religion, Same-Sex Marriage, and the Defense of Marriage Act*, focuses on opponents to same-sex marriage who base their opposition on their beliefs that their religion prohibits such marriages. Simson considers Establishment Clause challenges to state refusals to legalize same-sex marriage and the federal government's enactment of DOMA to limit the repercussions of state legalization. He questions whether same-sex marriages can include all of the usual incidents of marriage without overstepping the bounds of the Free Exercise Clause. Executive Notes and Comments Editor and Third-Year student Dan J. Bulfer's comment, *How California Got it Right: Mining In re Marriage Cases for the Seeds of a Viable Federal Challenge to Same-Sex Marriage Bans*, proposes that the petitioners' argument in *In re Marriage Cases* can be adapted to work a viable federal challenge to California's Proposition 8. Bulfer explores important differences between California's equal protection doctrine and its federal counterpart, and identifies how Proposition 8 likely violates federal substantive due process guarantees.

In Section II, DOMA and Conflict of Laws, the authors discuss DOMA in light of various conflict of laws principles. Professor Hillel Levin's essay, *Conflicts and the Shifting Landscape Around Same-Sex Relationships*, focuses on states that offer "marriage-like" alternatives such as civil unions and domestic partnerships. Levin discusses how states with marriage-like alternatives deal with interstate conflicts issues and the possibility these conflicts issues may be dispositive on whether the courts should require those states to recognize same-sex marriage. Professor Michael E. Solimine's article, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, discusses states that have enacted statutes or constitutional amendments prohibiting same-sex marriages and purporting to forbid the enforceability of marriages celebrated in other states without expressly doing so. Solimine argues that the juridical origin of state DOMAs, against the backdrop of long-standing state practices, should inform the interpretation of state DOMAs. This approach to interpretation leaves most choice of law issues to common law resolution by judges, not to legislative or constitutional determination. Professor Lynn D. Wardle's article,

Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition, analyzes whether DOMA reflects and respects principles of federalism in both its horizontal and vertical sections. Wardle explains that Congress enacted DOMA to protect “who decides” the same-sex marriage recognition issue, and preserve marriage recognition choice of law principles in the face of an attempt to force states to change their choice of law rules to require them to recognize same-sex marriage. He concludes that DOMA reflects established, mainstream domestic and international choice of law principles.

In Section III, DOMA and Families, the authors discuss a myriad of issues raised by DOMA’s impact on families based on same-sex relationships. Professor Barbara J. Cox’s article, *Why Appellate Courts Have Rejected the Argument that the Defense of Marriage Act Trumps the Parental Kidnapping Prevention Act*, considers the seeming conflict between DOMA and the Parental Kidnapping Prevention Act (PKPA) and explores two cases raising these issues. Cox then discusses the implications for future PKPA-litigation and broader judgment recognition in the U.S. if DOMA is interpreted as eliminating PKPA protections for same-sex relationships. Professor L. Lynn Hogue’s article, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships Prolegomenon to a Brief*, examines several recent cases that have refused to dissolve same-sex relationships from other states that conflict with forum law. He discusses the ways that *Hughes v. Fetter*, *Williams v. North Carolina*, *Boddie v. Connecticut*, and DOMA speak to these issues. Professor Mark Strasser’s article, *What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, starts by recognizing DOMA’s constitutional vulnerability and the President’s support for its repeal. He addresses some of the likely effects and non-effects of DOMA’s repeal or invalidation, concluding that even if DOMA is repealed, LGBT families will still have far to go before their families are afforded the same protections that other families take for granted. Professor Rhonda S. Wasserman’s article, *DOMA and the Happy Family: A Lesson in Irony*, analyzes the risk that DOMA undermines the security of the parent-child relationship when a gay or lesbian parent and

his/her child travel interstate. She discusses the threat that DOMA poses to the security of the parent-child relationship against a backdrop of state choice of law and federal constitutional law, whether interstate recognition issues arise in the context of an intact family's move to another state or a child custody dispute between former partners now living in different states.

As co-convenors of this symposium, Professors Cox and Wardle (with help from Dean Simson) would like to thank California Western and Brigham Young for sponsoring this important discussion. They would also like to thank the editors of the California Western International Law Journal for agreeing to publish the symposium papers and their assistance in editing them. Professors Cox and Wardle, and all other authors, expect that this symposium issue will make an important contribution to the conversation on these important issues.

