

## RELIGION, SAME-SEX MARRIAGE, AND THE DEFENSE OF MARRIAGE ACT

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Several years ago, I wrote an article on same-sex marriage entitled *Beyond Interstate Recognition in the Same-Sex Marriage Debate*.<sup>1</sup> I began by addressing the significance of the provision in the Defense of Marriage Act (“DOMA”) that purports to relieve states of any obligation under the Full Faith and Credit Clause of the Constitution<sup>2</sup> to recognize a same-sex marriage performed in a state that permits such marriages.<sup>3</sup> I maintained that the provision is far less significant than it may appear. I then focused on the choice of law question that the provision sought to preserve for each state to decide on its own. In particular, I considered the question foremost on the minds of most legislators and ordinary citizens: if two State *A* residents of the same sex get married in State *B* and later return to State *A* to live, should a State *A* court decide the validity of the marriage by applying the law of State *B*, which authorizes same-sex marriage, or the law of State *A*, which prohibits it?

As a vehicle for analyzing that question, I examined a legendary New York Court of Appeals decision, *In re May's Estate*,<sup>4</sup> involving the validity of a marriage that a New York uncle and niece had entered into many years earlier in Rhode Island. New York had long prohibited uncle-niece marriages. Rhode Island was one of only two states to permit them, and rather remarkably, it limited such permission to

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1. Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313 (2006).

2. U.S. CONST. art. IV, § 1.

3. 28 U.S.C. § 1738C (2006).

4. 114 N.E.2d 4 (N.Y. 1953).

instances of Jewish uncle-niece marriages (of which the Mays' marriage was one).<sup>5</sup> The New York high court held that Rhode Island law should apply and upheld the marriage.

Because the New York Court of Appeals has long been regarded as a leading court in choice of law matters,<sup>6</sup> *May's Estate* would appear to be weighty precedent for proponents of same-sex marriage to cite in support of a State *A* court's upholding under State *B* law the marriage in State *B* of two same-sex State *A* residents. Appearances, however, can be deceptive. After analyzing the court's choice of law in *May's Estate* from a variety of perspectives, I concluded that the court's choice of Rhode Island law to uphold the uncle-niece marriage of two New York citizens was indefensible under any sensible approach to choice of law.

Reasoning by analogy, I then suggested that as a matter of choice of law policy, a State *A* court would only sensibly choose to apply State *A*'s prohibition on same-sex marriage, rather than the permissive State *B* law, to decide the validity of two State *A* residents' same-sex marriage in State *B*. Reasoning by analogy, however, and treating the same-sex marriage recognition issue as no less purely a matter of choice of law policy than the recognition issue in *May's Estate* is not as uncontroversial as it may at first appear. In particular, it is out of place if prohibitions on same-sex marriage present constitutional difficulties that prohibitions on uncle-niece marriage do not. After explaining briefly why prohibitions on uncle-niece marriage are plainly not constitutionally problematic, I then turned to the implications of the Due Process,<sup>7</sup> Equal Protection,<sup>8</sup> and Establishment<sup>9</sup> Clauses for the constitutionality of prohibitions on same-sex marriage. I suggested that the validity of such prohibitions under each of those clauses is seriously in doubt.

In planning my speech for the present Symposium, I resolved to return to, and expand upon, the Establishment Clause analysis of my earlier article.<sup>10</sup> When I wrote that portion of the article, I recognized

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5. For discussion of the formidable Establishment Clause difficulties presented by the Rhode Island exception for Jewish uncle-niece marriages, see Simson, *supra* note 1, at 335-37. As to the origins of the exception, see *id.* at 340-42.

6. See *id.* at 319-20.

7. U.S. CONST. amend. XIV, § 1.

8. *Id.*

9. U.S. CONST. amend. I.

10. Simson, *supra* note 1, at 375-82.

that I was painting with a broad brush. I knew that to be fully persuasive, I would need to make certain points at greater length and to raise and address a number of possible objections to my arguments. However, out of regard for the total length of the article and its overall balance, I decided that leaving a more expansive analysis to another day would be best.

In preparing for this Symposium, which makes special mention of DOMA in its title,<sup>11</sup> I also resolved to clarify the relevance of my Establishment Clause analysis to a provision in DOMA that I had previously only briefly discussed. That provision defines “marriage” and “spouse” as limited to marriages of opposite-sex couples and spouses of the opposite sex, and it applies to the many instances in which those terms appear in federal statutory and administrative law.<sup>12</sup>

As I outlined my remarks for the live Symposium, I began to realize that the more expansive Establishment Clause analysis that I had deferred to another day needed to be considerably more expansive than I had supposed. After delivering the remarks and fielding a variety of interesting and thoughtful questions, my estimate of the project’s scope and complexity continued to grow. As I got well into drafting my fuller analysis for publication, it grew further still.

In the spirit of the example set by the great and, in my view, unrivalled conflicts scholar, Brainerd Currie, whose alma mater recently did me the honor of hiring me as dean, I must acknowledge that my previously published analysis of the implications of the Establishment Clause for prohibitions on same-sex marriage was much more incomplete than I understood at the time. In an article published in 1960, *Change of Venue and the Conflict of Laws: A Retraction*,<sup>13</sup> Currie confessed error in as disarming a fashion as one could imagine. Over the course of several years, Currie had become persuaded that his article in 1955 on the choice of law problems created by a federal statutory change-of-venue provision<sup>14</sup> reached an untenable conclusion.<sup>15</sup> Not

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11. The title is “Symposium on DOMA and Issues Concerning Federalism and Interstate Recognition of Same-Sex Relationships.”

12. 1 U.S.C. § 7 (2006).

13. Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960), reprinted in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 431 (1963).

14. Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955).

content simply to point out where his earlier analysis had gone astray, Currie in his 1960 piece took himself to task with a barrage of verbal grenades that no critic would dare duplicate. Thus, for example: “The conclusion reached,” Currie wrote, “was wrong—not just plain wrong, but fundamentally and impossibly wrong.”<sup>16</sup> Similarly, commenting on a particular concept that he had advocated in the 1955 article, Currie observed: “A series of studies has convinced me of [its] complete unsoundness and futility . . . .”<sup>17</sup>

Unlike Currie, I do not believe that my earlier analysis reached the wrong conclusion. Also, whether or not warranted, I am not inclined to criticize my earlier effort as unsparingly as Currie criticized his. I do wish to concede, however, that my analysis fell substantially short of doing justice to arguments for and against the conclusion that I reached. As such, it not only was unpersuasive, but also did a disservice to the important conclusion that it urged.

Ultimately, it has become clear to me that to do the project properly would require far exceeding the very sensible page limits to which I and the other contributors to this Symposium long ago agreed. With those limits in mind, I would like to focus in this piece on outlining the basic ingredients of the larger project that I have gotten under way. In particular, I will highlight the ways in which it differs from the analysis that I published several years ago. I also will comment briefly on the applicability of my analysis to DOMA.

#### I. THE ESTABLISHMENT CLAUSE AND PROHIBITIONS ON SAME-SEX MARRIAGE

Laws prohibiting same-sex marriage typically say nothing on their face implicating religion. However, under the “endorsement test” that has long been a part of the Supreme Court’s Establishment Clause doctrine, such a law may be challenged successfully if the challenger can show that the law is either (1) based entirely or nearly entirely on a purpose of endorsing religion or (2) likely to be perceived by a reasonable observer as sending a message of government endorsement

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15. CURRIE, *supra* note 13, at 431.

16. *Id.*

17. *Id.* at 434.

of religion.<sup>18</sup> Absent a smoking gun in the law's legislative history, a challenger will rarely, if ever, be able to provide the showing required to secure invalidation under the first of these prongs of the endorsement test. As a practical matter, invalidation therefore will almost certainly turn on whether a challenger can make the showing of an impermissible effect of endorsement required under the test's second prong.

In my earlier article, I maintained that the question posed by a challenge under the second prong to prohibitions on same-sex marriage is one readily answered in a manner to require invalidation:

Reasonable people may often disagree [in thinking about laws of various sorts] as to what message the Court's hypothetical reasonable observer is apt to perceive. Realistically understood, however, laws prohibiting same-sex marriage are not the kind that should stimulate such debate. Indeed, it is hard to comprehend how a reasonable observer could *avoid* perceiving such laws as communicating a substantial endorsement of religion. A reasonable observer even moderately knowledgeable about the history of same-sex marriage prohibitions and other laws disadvantaging gays and lesbians would recognize that the teachings of various religions that homosexuality is abnormal and that homosexual conduct is a grievous sin played a vital role in the adoption of such laws.<sup>19</sup>

I then buttressed that conclusion by considering whether a reasonable observer would be likely to perceive a prohibition on same-sex marriage as substantially rooted in one or more nonreligious purposes. More specifically, I addressed and discounted the likelihood that a reasonable observer would see such a prohibition as significantly serving either a purpose of encouraging procreation or a purpose of enforcing a societal judgment that same-sex marriage is immoral.

I continue to believe that laws prohibiting same-sex marriage should be struck down based on an impermissible effect of endorsing religion, but I have come to see the question of whether such laws have an impermissible effect as calling for much broader and much more detailed discussion than I provided in my earlier piece. I recognized at

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18. See *Allegheny Cnty. v. ACLU*, 492 U.S. 573, 592-94, 599-600 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985). On the evolution of the test, see Simson, *supra* note 1, at 375 n.204.

19. Simson, *supra* note 1, at 378.

the time that I was only providing the basic ingredients of an argument that, to be truly cogent, needed to be set forth more fully at a later time. I failed to appreciate, however, how much of importance my analysis was leaving out. If, as I maintained and as I continue to believe, prohibitions on same-sex marriage violate the Court's endorsement test, a substantially more detailed and nuanced analysis is needed to explain why.

Most importantly, the article fails to address a number of purposes that may be thought to underlie prohibitions on same-sex marriage. These include promoting children's welfare, safeguarding the institution of marriage, preserving social order, and protecting the ability of religious institutions and individuals to act consistently with their religious missions and beliefs. If prohibiting same-sex marriage is a good means of serving one or more of those purposes, it becomes much harder to claim that a reasonable observer is apt to perceive a prohibition on same-sex marriage as an endorsement of religion. I believe that, upon close examination, none of those purposes is well-served by prohibitions on same-sex marriage. However, that is a conclusion that requires careful analytical support, which my larger project will aim to provide.

Another major omission in my earlier article is a discussion of the costs of prohibiting same-sex marriage. Even if I am correct in arguing that the reasons for prohibiting same-sex marriage are not weighty, a reasonable observer could not conclude *without more* that in enacting a prohibition, legislators must be giving substantial weight to a purpose of endorsing religion. After all, it is one thing to claim that the reasons for prohibition are not weighty; it is quite another to claim that they are so entirely devoid of substance that the only possible way to understand a legislature's objective in prohibiting same-sex marriage is in terms of endorsing religion. Accordingly, it is essential to consider the cost side of the cost-benefit balance that responsible lawmakers would perform in deciding whether to prohibit same-sex marriage. It is only when the very significant costs of prohibiting same-sex marriage—or, to put it in a more positive vein, the very significant benefits of authorizing same-sex marriage—are taken into account that a legislative decision to prohibit becomes incomprehensible unless one assumes that a purpose of endorsing religion must have played a crucial role.

In fact, even demonstrating a sizable disparity between the costs and benefits of prohibiting same-sex marriage does not necessarily establish the existence of a substantial covert purpose of endorsing religion. At

least in theory, it is conceivable that (1) in enacting a prohibition, the legislators covertly factored into their decision one or more other substantial impermissible purposes and (2) such other purpose or purposes explain why the legislators were willing to prohibit same-sex marriage despite the lopsided cost-benefit balance in terms of permissible considerations. One such impermissible purpose might be expressing animus toward gays and lesbians; another might be helping to minimize sexual relations between persons of the same sex. An analysis of endorsement that seeks to remedy the deficiencies of my earlier analysis would examine those impermissible purposes more closely. It also would explain why a reasonable observer, in trying to reconstruct in his or her mind the ingredients of the cost-benefit balance that resulted in a legislative decision to prohibit same-sex marriage, would be more likely to regard the impermissible purpose of endorsing religion as the missing piece of the puzzle.

Even if careful analysis of the various factors discussed thus far would appear to support a conclusion that prohibitions on same-sex marriage should be struck down as violations of the endorsement test, further possible objections to that conclusion remain. One is that my rendition of a reasonable observer's perceptions takes an unduly positive view of the care and thought that legislators are likely to devote to a decision whether to prohibit same-sex marriage. I neglected to consider this possible objection in my earlier article. I do not believe that it is ultimately a winning objection, but I recognize the importance of explaining in my broader project why it is not.

A second objection that warranted, but did not receive, discussion in my prior article pertains to timing. In particular, should the endorsement inquiry vary depending on whether a prohibition was adopted before *Lawrence v. Texas*<sup>20</sup> or after? The question arises because the Court's decision in 2003 in *Lawrence* made impermissible, as a matter of the liberty interest protected by the Due Process Clause, a purpose that the Supreme Court previously had treated as constitutionally unproblematic: deterring persons of the same sex from engaging in sexual relations.<sup>21</sup> I am persuaded that a prohibition's adoption before or after *Lawrence* should not materially affect the endorsement inquiry, but the matter is deserving of careful explanation.

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20. 539 U.S. 558 (2003).

21. *See id.* at 577-78, *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

A third objection is one that I did address in my earlier article: even if the Supreme Court were persuaded that prohibitions on same-sex marriage have an effect of endorsing religion, the Court might decide that it is time to abandon the endorsement test and that an effect of endorsing religion is therefore of no significance.<sup>22</sup> As I pointed out in my earlier discussion, the Court has been sharply divided for a number of years on the question of whether to retain the endorsement test.<sup>23</sup> It is quite conceivable that, with Justice O'Connor's retirement and replacement by Justice Alito in 2006, five Justices now favor replacing the endorsement test with a test that focuses on whether the state is coercing anyone to act in conformity with a religion or religious belief.<sup>24</sup> In my prior article, I maintained that although coercion is typically more difficult to prove than endorsement, prohibitions on same-sex marriage are unconstitutional under either a coercion or endorsement test. In so arguing, I suggested that Justice Kennedy's conception of coercion would almost certainly be decisive, and I elaborated somewhat on the apparent ingredients of that conception.<sup>25</sup>

I continue to believe that prohibitions on same-sex marriage should be struck down under the Kennedy coercion test. I recognize, however, the importance of amplifying my earlier analysis. Most notably, I need to address the fact that prohibitions on same-sex marriage present a rather different analytical problem than the type of governmental action addressed in *Lee v. Weisman*,<sup>26</sup> the leading Supreme Court case dealing with coercion. Writing the opinion of the Court in *Lee*, Justice Kennedy applied his conception of coercion to decide the constitutionality of a public secondary school's having a member of the clergy deliver an invocation and benediction at graduation. Without reaching the question of whether a coercion test should supplant the endorsement test, Justice Kennedy, joined by four Justices who made clear in concurring opinions their continued allegiance to the endorsement test,<sup>27</sup> characterized a

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22. Simson, *supra* note 1, at 379-82.

23. *See id.* at 379-81.

24. *See id.* at 379-80 & n.215.

25. *Id.* at 380-82.

26. 505 U.S. 577 (1992).

27. *Id.* at 604 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring), 618 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).



coercion test as a constitutional “minimum”<sup>28</sup> and held that the prayer practice at issue violated the test.<sup>29</sup>

## II. THE ESTABLISHMENT CLAUSE AND THE DEFENSE OF MARRIAGE ACT

The Defense of Marriage Act is not a prohibition of same-sex marriage. However, one would need to be myopic in the extreme not to recognize that DOMA comes down strongly against same-sex marriage.

Realistically understood, DOMA’s provision purporting to liberate states opposed to same-sex marriage from the burden of complying with the requirements of the Full Faith and Credit Clause is a virtual announcement of congressional opposition to same-sex marriage. First of all, it is noteworthy that although states’ marriage laws often differ significantly in terms of matters such as minimum age to marry and types of family relations regarded as incestuous and preclusive of marriage, Congress leaves the obligations imposed by full faith and credit untouched except with regard to same-sex marriage. In essence, Congress is tacitly saying two things: on the one hand, if State *A* is required to respect a marriage performed in State *B* that would be invalid under State *A* law, that is something that in general State *A*, as a member of the federal union that the Full Faith and Credit Clause was intended to help unify, can reasonably be expected to do; on the other hand, State *A* may reasonably regard same-sex marriage as so objectionable that the unifying purpose of the Full Faith and Credit Clause sensibly must give way to State *A*’s interest in refusing recognition of a same-sex marriage lawfully performed in State *B*.<sup>30</sup>

Second, Congress’s willingness, in creating this state right of nonrecognition, to proceed virtually oblivious of constitutional bounds offers further evidence of the strength of its opposition to same-sex marriage. As I argued in my earlier article,<sup>31</sup> Congress in DOMA sought to remedy a perceived problem that simply was not there. As interpreted

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28. *Id.* at 587.

29. *Id.* at 599.

30. With regard to the intended unifying function of the Full Faith and Credit Clause, see *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935); Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 68 (1978).

31. Simson, *supra* note 1, at 325-26.

by the Supreme Court for many years, the Full Faith and Credit Clause imposes limitations on choice of law that are so marginal as to verge on nonexistent. If State *A* wishes to decide the validity of a marriage performed in State *B* by referring to the law of State *A* rather than the law of State *B*, it has virtually unfettered freedom to do so. Although the hearings on DOMA included testimony that the contemplated nonrecognition provision was addressing a non-issue, Congress was apparently so transfixed by the specter of a state's being required to recognize a same-sex marriage that could not be performed under its own laws that Congress decided to err wildly on the side of ensuring a state's right of nonrecognition.

Furthermore, in enacting the nonrecognition provision, Congress not only sought to remedy an imaginary problem; it also seized upon a remedy that it had no good reason to believe respected constitutional bounds. As authority for relieving State *A* of any obligation imposed by the Full Faith and Credit Clause to recognize a same-sex marriage performed in State *B*, Congress relied upon the implementation power that the drafters of Article IV conferred upon Congress immediately after stating the general full faith and credit obligation itself.<sup>32</sup> As I discussed in my earlier article, however, the notion that the second sentence of Article IV, Section 1 authorizes Congress to nullify when it wishes the command of the first sentence is highly dubious at best.<sup>33</sup> Not only is there nothing in prior Supreme Court interpretation of that sentence to support such a power, but the seemingly analogous provision in the Fourteenth Amendment<sup>34</sup> has been interpreted in precisely the opposite way.<sup>35</sup> In addition, although the text of Article IV, Section 1, standing alone, does not definitively resolve the matter, it almost certainly is read more easily as contrary to, rather than in support of, any

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32. Article IV, Section 1 reads in full: "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." U.S. CONST. art. IV, § 1.

33. Simson, *supra* note 1, at 323-24.

34. U.S. CONST. amend. XIV, § 5.

35. See Simson, *supra* note 1, at 324 (discussing *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n.10 (1966), and *City of Boerne v. Flores*, 521 U.S. 507, 519, 529 (1997)).

ostensible congressional nullification power. By the same token, the historic purpose of Article IV, Section 1 of helping to unify the various states of the union may not be utterly irreconcilable with a reading of the second sentence as authority for a nullification power, but at a minimum it militates strongly against such a reading.

To the extent that an examination of DOMA's interstate recognition provision leaves any doubt about Congress's opposition to same-sex marriage, attention to DOMA's provision defining "marriage" and "spouse" for federal purposes surely removes it. In one stroke, the definitional provision ensures that same-sex married couples are ineligible for countless federal benefits and protections that opposite-sex married couples may enjoy. The sweeping and devastating effect of the provision could not have been lost on those who enacted DOMA.

Under the above understanding of DOMA, I believe it raises Establishment Clause problems much the same as those raised by state prohibitions on same-sex marriage. Drawing heavily on my analysis of state prohibitions, I would argue that DOMA, like the state prohibitions, violates both the endorsement and coercion tests.

### III. CONCLUSION: A FINAL WORD ON DOMA AND STATE PROHIBITIONS

In closing, I would like to address a possible objection to my treating DOMA as essentially equivalent, for purposes of an Establishment Clause challenge, to state prohibitions on same-sex marriage. More specifically, does any such equation of DOMA with state prohibitions wrongly exaggerate the nature of Congress's opposition to same-sex marriage? After all, whatever Congress did in DOMA to undermine same-sex marriage, it did not go so far as to prohibit it. For a few reasons, however, the fact that Congress in DOMA stopped short of prohibiting same-sex marriage does not indicate that Congress is materially less opposed to same-sex marriage than the state legislatures that enacted prohibitions.

First, Congress had to have grave doubts as to whether it had constitutional authority to enact a prohibition. The congressional power in Article IV, Section 1 would not conceivably provide authority, and the existence elsewhere in the Constitution of a source of authority for enacting a prohibition is not at all apparent.

Second, at the time that Congress enacted DOMA, it could not have

helped but be concerned about the judicial response to a measure that would legislate a federal solution to a controversial question in an area—family law—traditionally governed to a very high degree by state, rather than federal, law. In 1995, a year prior to DOMA’s enactment, the Supreme Court in *United States v. Lopez*<sup>36</sup> had shown special solicitude for state autonomy and areas of traditional state authority in interpreting the scope of federal authority under the Commerce Clause more restrictively than it had been interpreted in decades. The Congress that enacted DOMA had to be worried that the Supreme Court might strike down as unconstitutional an exercise of federal authority that interfered with state prerogatives in an area as traditionally local as family law. If nothing else, DOMA’s interstate recognition provision, which is framed in terms highly deferential to state authority, is notable as an illustration of Congress’s substantial sensitivity at the time to considerations of state autonomy.

Third and lastly, the Congress that enacted DOMA also may have anticipated an adverse public reaction to an attempt by Congress to nationalize a prohibition, whether by enacting legislation or by sending a proposed constitutional amendment to the states.<sup>37</sup> Opinion polls have shown that the percentage of people supporting state prohibition is significantly higher than the percentage supporting federal prohibition.<sup>38</sup>

In short, in enacting DOMA rather than attacking same-sex marriage more directly and forcefully with a nationwide prohibition, Congress almost certainly was responding to perceived constitutional and political constraints. There is little reason to interpret Congress’s opting for DOMA over a flat prohibition as indicating that it felt significantly less hostile to same-sex marriage than the various state legislatures that adopted bans. In all likelihood, it did not.

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36. 514 U.S. 549 (1995).

37. See U.S. CONST. art. V (requiring a two-thirds vote of both the House and Senate to “propose” an amendment to the states, three-fourths of which must ratify the proposed amendment for it to become law).

38. See Simson, *supra* note 1, at 367 & n.177.



