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ESSAY

STATE DOMAS, NEUTRAL PRINCIPLES, AND THE MÖBIUS OF STATE ACTION

*Darrell A.H. Miller**

I. INTRODUCTION

The Möbius strip¹—that darling of mathematicians and amateur magicians—is a conceit that captures the twist caused when state action doctrine of a half-century ago intersects with modern so-called defense of marriage amendments (“DOMAs”).² Mathematicians define a Möbius strip as a chiral surface with only one side and one edge.³ In lay terms, it is the product of taking a narrow paper strip, giving it a half-twist in the middle, and then fixing the ends together to form one continuous loop. Features of the Möbius strip make it an

* Assistant Professor of Law, University of Cincinnati College of Law. J.D., Harvard Law School; B.A., M.A., Oxford University; B.A., Anderson University. Thanks to James Brudney, Chris Bryant, Ruth Colker, Emily Houh, Marc Spindelman, Mark Strasser, and Verna Williams for comments and suggestions for this Essay. Thanks also to the Schott Fund and the University of Cincinnati College of Law, which provided financial support for this project.

1. See *infra* Appendix Figure A for an example of a Möbius strip. See generally The Möbius Strip, http://www.math.hmc.edu/~gu/curves_and_surfaces/surfaces/moebius.html (last visited May 29, 2009).

2. I refer to these amendments as DOMAs throughout this Essay for the sake of convenience and because they are called such in many jurisdictions. By doing so, I do not intend to signal agreement with DOMAs’ advocates or suggest in any way that DOMA is a politically neutral term. Additionally, when I refer to DOMAs, I refer exclusively to state defense of marriage amendments, not to the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

3. Clifford A. Pickover, THE MÖBIUS STRIP 8 (2006); Isaac M. McPhee, *The Möbius Strip: Topology of a Mathematical Paradox*, SUITE101.COM, Apr. 12, 2008, http://mathchaostheory.suite101.com/article.cfm/making_the_mathematical_wonder_kno.

appropriate metaphor for the bending of state action doctrine by state DOMAs. One feature is that the Möbius strip is, in mathematical parlance, nonorientable.⁴ That is, it has neither a front nor a back, and only by tearing the strip can it be made to have a front or back. The other feature is that one can trace a line from a single point on the surface of the Möbius strip along the length of its contours and end up on the flip side of the strip at the starting point, all without picking up the pencil.

Like the magician's paper band, *Shelley v. Kraemer*,⁵ the Supreme Court's sixty-year-old landmark case on state action, can be twisted into a Möbius strip. First, take the core holding of *Shelley*: a state court that enforces a private racially restrictive covenant is a state actor for purposes of the Fourteenth Amendment. Then give *Shelley*'s state action doctrine a half-twist of state constitutionalism: over half of the states have amended their constitutions to forbid marriage between same-sex couples; approximately a dozen of these states forbid even state *recognition* of legal relationships that are intended to or do confer marriage-like benefits to same-sex couples.⁶ So, now *Shelley*'s state action principle—state judicial enforcement of racially discriminatory private agreements is state action that violates the Fourteenth Amendment—can be

4. McPhee, *supra* note 3.

5. 334 U.S. 1 (1948).

6. *See, e.g.*, ALA. CONST. art. I, § 36.03(g) (“A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.”); GA. CONST. art. I, § 4, ¶ I(b) (“No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such relationship.”); KAN. CONST. art. 15, § 16(b) (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”); KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); LA. CONST. art. 12, § 15 (“Marriage in the state . . . shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.”); VA. CONST. art. I, § 15-A (“That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”). Of course, the counterpoint to these amendments is the success of marriage equality movements in the New England states, which recently have successfully lobbied for same-sex marriage in the Maine, New Hampshire, and Vermont legislatures.

turned by state courts into a rule that forbids state judicial enforcement of private agreements between same-sex couples because such enforcement is “state action”⁷ that violates DOMA.

Then, reseal the strip at the end, and you discover the flip side of *Shelley*. In *Romer v. Evans*⁸ the Supreme Court held that a state constitutional amendment that denied homosexuals legal redress available to everyone else is a form of discriminatory state action forbidden by equal protection. In the words of Justice Kennedy, “[a] law declaring that . . . it shall be more difficult for one group of citizens than for all others to seek aid from the government is . . . a denial of equal protection of the laws in the most literal sense.”⁹ Therefore, a state cannot deny gays and lesbians the benefit of general laws of private contract that are enforceable by every other person.¹⁰

Now we have a Möbius strip. *Shelley* begins with a general legal proposition: state judicial officers are state actors for purposes of the federal constitution; they cannot enforce certain private agreements when doing so contravenes equal protection. Then we come to the state constitutional twist: state judicial officers are state actors for purposes of the *state* constitution; they cannot enforce private agreements when doing so contravenes *state* constitutional imperatives like DOMA. Then, with *Romer*, we get to the flip side of *Shelley*: state judicial officers are state actors for purposes of the *federal* constitution; they cannot *refuse* to enforce private agreements when doing so contravenes equal protection. As explored below, the resulting doctrinal contortion is at once a testament to the law of unintended consequences, a cautionary tale about state experimentalism, and a comment on the aspiration and limits of neutral principles of adjudication.

In using the trope of the Möbius strip, I do not suggest that law, fraught with human frailty, can be reduced to a set of mathematical principles.¹¹ Instead, this Essay is an exercise in what the Russian formalists called *ostranenie*: to “make strange” or “defamiliarize” that which has become routine or habitual in order to better understand its nature.¹² Or, as Professor Tribe puts it, a

7. In this sense I use “state action” not as a term of art in federal Fourteenth Amendment jurisprudence, but more broadly to indicate when any action can be attributed to the state for purposes of state constitutional law.

8. 517 U.S. 620 (1996).

9. *Romer*, 517 U.S. at 633.

10. I concede that my application of *Romer* to state DOMAs is complicated by the fact that several state DOMAs are written so broadly as to sweep in any unmarried relationship, including heterosexual relationships. However, such a construction that would stretch a state DOMA to agreements between unmarried heterosexual couples may simply make the resulting broad application of DOMA even *more* irrational.

11. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 1–2 (1989) (counseling caution when using mathematics to explain legal precepts).

12. Viktor Shklovsky, *Art as Technique*, in CONTEMPORARY LITERARY CRITICISM: MODERNISM THROUGH POST-STRUCTURALISM 52, 55 (Robert Con Davis ed., 1986); see also Nouri Gana, *Beyond the Pale: Toward an Exemplary Relationship Between the Judge and the Literary Critic*, 15 LAW & LITERATURE 313, 323 (2003) (discussing writers’ need to defamiliarize routine).

mathematical metaphor “brings greater awareness of [our] preconceptions” in legal analysis and “creates the possibility of choice and intellectual progress.”¹³

The piece progresses as follows: Part II briefly summarizes the *Shelley* decision and its impact on state action doctrine. Part III discusses *Shelley*'s role in sparking debates about neutral principles of adjudication. It simultaneously explores how state courts have used *Shelley* and related federal cases to resolve state action questions posed by their own state constitutions. Part IV discusses the history of state DOMAs, the breadth of some of their provisions, and how courts have interpreted some of their terms. In doing so, this Part explains how *Shelley* is a necessary conceptual antecedent for state court application of DOMAs to private agreements that benefit same-sex couples. It also suggests that *Shelley*'s state action principle, when twisted by state DOMAs, is a latent threat to judicial enforcement of private ordering between same-sex couples. Part V closes the Möbius loop, discussing how state court invalidation of private agreements between same-sex couples under DOMA could itself violate federal equal protection guarantees after *Romer v. Evans*. Part VI distills from this process of *ostranenie* three lessons respecting neutral principles, constitutional avoidance, and the risks of state constitutional experimentalism.

II. *SHELLEY V. KRAEMER* AND STATE ACTION

State action is the key that unlocks the keep of equal protection jurisprudence. The *Civil Rights Cases*,¹⁴ now over one hundred twenty-five years old, limited the Fourteenth Amendment's remedial targets to government actors, not purely private ones.¹⁵

13. Tribe, *supra* note 11, at 3. Moreover, to the extent that the Supreme Court of the United States has already allowed mathematical metaphors such as “congruence” and “proportionality” to creep into its constitutional lexicon, my approach is not all that idiosyncratic. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (holding that requirements that Age Discrimination in Employment Act places on states are not congruent and proportional to constitutional violations it seeks to prevent); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (noting that congressional Fourteenth Amendment enforcement authority must be “congruen[t]” and “proportional[]” to potential injury to be prevented or remedied).

14. 109 U.S. 3 (1883). The Civil Rights Act of 1875 required “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement” regardless of color, and provided for civil and criminal penalties for its violation. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336. The *Civil Rights Cases* invalidated civil and criminal actions against individuals who had discriminated against blacks in violation of the Act. 109 U.S. at 3–4. The *Civil Rights Cases* remain good law and are still cited for the proposition that the Fourteenth Amendment requires state action. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 621–22 (2000) (emphasizing continued strength of decision in *Civil Rights Cases* and citing recent applications).

15. *Civil Rights Cases*, 109 U.S. at 17 (“[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . .”).

Before *Shelley v. Kraemer*,¹⁶ courts had narrowly circumscribed the types of activity that qualified as “state action.”¹⁷ Legislation was certainly state action, as was exercise of executive power. But a wide swath of government and government-sanctioned behavior lay outside the boundaries of state action doctrine. *Shelley* represented a substantial expansion, if not the apogee, of the sphere of government activity that fell within the “state action” rubric.

Shelley consolidated two cases, one arising from the Missouri Supreme Court, the other from the Michigan Supreme Court. In both, white landowners asked the state courts to enjoin African-American families who wanted to occupy homes that were subject to racially restrictive covenants.¹⁸ The buyers appealed through the state systems to the United States Supreme Court. In a unanimous decision, with three Justices abstaining,¹⁹ the Court held that state court enforcement of private racially restrictive covenants violated the Equal Protection Clause of the federal Constitution.²⁰

The Court stated, “state action in violation of the [Fourteenth] Amendment’s provisions is equally repugnant . . . whether directed by state statute or taken by a judicial official in the absence of statute.”²¹ The fact that the state courts of Missouri and Michigan had enforced a “pattern of discrimination . . . defined initially by the terms of a private agreement” was inconsequential.²² “State action . . . refers to exertions of state power in all forms,” including the judicial power.²³

As Wendell Pritchett has observed, the Court did not declare that racially restrictive agreements *themselves* were illegal.²⁴ Instead, the Court took a superficially more restrained approach. The agreements could be honored if

16. 334 U.S. 1 (1948).

17. Cf. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 125 n.9 (1999) (discussing narrowness of “state action” doctrine before the early 1960s).

18. In the Missouri case, the restrictive language operated upon “any person not of the Caucasian race” and specifically against “people of the Negro or Mongolian Race.” *Shelley*, 334 U.S. at 5. In the Michigan case, the covenant restricted use or occupancy to “any person or persons except those of the Caucasian race.” *Id.* at 6.

19. Justices Reed, Jackson, and Rutledge took no part in the decision. *Id.* at 23.

20. *Id.* at 20–21.

21. *Id.* at 16.

22. *Shelley*, 334 U.S. at 20.

23. *Id.*

24. Wendell E. Pritchett, *Shelley v. Kraemer: Racial Liberalism and the U.S. Supreme Court*, in CIVIL RIGHTS STORIES 5, 20 (Myriam E. Gilles & Risa L. Goluboff eds., 2007). The Chief Justice would clarify his position in a later restrictive covenant case:

[T]hese racial restrictive covenants, whatever we may think of them, are not legal nullities so far as any doctrine of federal law is concerned; it is not unlawful to make them; it is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or a federal statute.

Barrows v. Jackson, 346 U.S. 249, 261 (1953) (Vinson, C.J., dissenting). Indeed, unlike his brethren, Chief Justice Vinson may have permitted a suit for monetary damages against white landowners who breached the covenant. *Id.* at 269.

voluntarily followed, but they could not be enforced by the state.²⁵ In other words, a group of persons may agree to exclude blacks from their neighborhood, but no one of them can summon the coercive power of the government to punish a member if the member chooses to breach the agreement.²⁶ The Equal Protection Clause simply does not allow a landowner to enlist the state court's help to police a private racial zoning scheme. State courts are state actors when they enforce these private agreements.

Shelley, as Laurence Tribe has suggested, exposed the “*geometry* of the state’s common law,” a geometry in which state judges had drawn common law rules so that racially restrictive covenants fell to the enforceable side of the enforceability divide, and other restraints on alienation (such as perpetuities) fell to the nonenforceable side.²⁷ Before *Shelley*, a state judge could rest comfortably in the belief that her decision merely arranged entitlements according to the individual parties’ predetermined wishes. After *Shelley*, a state judge had to consider whether the parties’ wishes, and her own choices of whether and how to enforce those wishes, implicated the state for purposes of constitutional law.

The problem with *Shelley*—as noted even by those who agreed with its result—was the potentially intolerable breadth of the reasoning.²⁸ If the enforcement of a contract can trigger state action, what private agreement *did not* involve state action? And if that was the case, what was the meaning of the private/public distinction at all?

Shelley helped ignite a still-smoldering debate over the role of “neutral principles” in constitutional adjudication. Its first spokesperson was the late Herbert Wechsler, who in 1959 cited *Shelley* as among those cases that “hardest test . . . my belief in principled adjudication.”²⁹ Wechsler largely approved of *Shelley*’s result. But he questioned whether its reasoning could be defended on grounds other than an “*ad hoc* determination[]”³⁰ of its narrow issue, a determination that “yield[s] no neutral principles for [its] extension or

25. *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

26. *Barrows*, 346 U.S. at 260; *Shelley*, 334 U.S. at 13, 20.

27. Tribe, *supra* note 11, at 25–26.

28. See, e.g., Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 473 (1962) (asserting that *Shelley* could extend concepts of state action, enlarge sphere of federal jurisdiction, and realign how private citizens and their government relate); Richard G. Huber, *Revolution in Private Law?*, 6 S.C. L.Q. 8, 13 (1953) (predicting that “[a]reas traditionally considered purely private will now have to be scanned for constitutional objections never before faced in those areas”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29–30 (1959) (asking rhetorically whether racially discriminatory wills or racially motivated trespassing suits are forbidden under the equal protection clause); Donald M. Cahen, Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CAL. L. REV. 718, 733 (1956) (raising question whether “[u]nder the guise of protecting civil rights by ‘strengthening’ due process and the equal protection of the laws . . . *Shelley* creates a means of *restricting* civil liberties, making possible far greater government control of individual activity than desired”).

29. Wechsler, *supra* note 28, at 26. The other cases that troubled Wechsler were the “white primary” case, *Smith v. Allwright*, 321 U.S. 649 (1944), and the “school segregation” case, *Brown v. Board of Education*, 347 U.S. 483 (1954). Wechsler, *supra* note 28, at 26.

30. Wechsler, *supra* note 28, at 31.

support.”³¹ To Wechsler, *Shelley* suffered from the lack of “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.”³² *Shelley* seemed to betoken a Court acting as a “naked power organ” rather than as a “court[] of law.”³³ According to Wechsler, courts should strive to “rest[] [their decisions] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”³⁴

But contrary to Wechsler’s criticism, Chief Justice Vinson’s reliance on the Fourteenth Amendment was in fact a faltering attempt to fashion the type of neutral principle that Wechsler championed.³⁵ In this sense, Wechsler failed to grasp that a seemingly more active—but jurisprudentially defensible—decision in *Shelley* would have been to rule that private racially restrictive covenants are themselves illegal because they violate the Civil Rights Act of 1866.³⁶

Instead of directly striking down agreements themselves, the Justices attempted to background the private agreements by characterizing the constitutional issue as one of *enforceability* rather than *legality*. But by doing so, they brought into relief a set of underlying questions about state action, the public/private distinction, and neutral principles.

These questions remain largely unanswered.³⁷ It has been sixty years since *Shelley* and the Supreme Court still has not clarified its scope.³⁸ Consequently,

31. *Id.*

32. *Id.* at 11.

33. *Id.* at 19.

34. *Id.* Wechsler’s canonical piece, *Toward Neutral Principles of Constitutional Law*, where he explored these reservations, has been variously embraced, modified, criticized, and derided by dozens of scholars over the past half-century. See, e.g., Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 513 (1997) (noting that Wechsler conceded difficulty of deciding *Brown* based on neutral principles); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1474–77 (2007) (examining conflict between Wechsler’s neutrality principle and other important social ideals); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 605–06 (1963) (arguing neutrality principle fails to take into account political realities of jurisprudence); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805–14 (1983) (arguing that success of neutrality principle will come at cost of constitutional theory based on individualism).

35. As Professor Shapiro notes, Wechsler’s support for neutral principles “was designed to provide some basis for judicial activism in the face of a long-term, concerted effort by Judge [Learned] Hand, Justice [Felix] Frankfurter, and their allies to limit severely or even eliminate the Supreme Court’s power to declare statutes unconstitutional.” Shapiro, *supra* note 34, at 598.

36. See *supra* notes 19–26 and accompanying text for the Court’s rationale in *Shelley*. For a fuller discussion of this approach, see Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 470–83 (2007). Indeed, the Court used the Act to strike down racially restrictive covenants in the District of Columbia. See *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (noting that District of Columbia is included in statutory language “every State and Territory”).

37. One commentator has famously described *Shelley* as “constitutional law’s *Finnegan’s Wake*.” Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 148 (1964).

38. Louis Henkin lamented as early as the late 1960s that the Court “has not seized opportunities to reconsider or clarify” *Shelley*, and that, doctrinally, “the case has become a citation for inadequacy

when state courts directly confront the issue of state action involving private agreements, they often precipitously and unpersuasively confine *Shelley* to its facts.³⁹ However, state courts have been fickle in this regard, occasionally citing the case for broader propositions of law.⁴⁰ Further, state judges regularly look to federal state action cases for analytical guidance when resolving state action questions posed by their own constitutions, often casually citing *Shelley* in the process.⁴¹ Hence, while *Shelley* remains quiescent in state DOMA adjudication, it nevertheless lies just beneath the surface of any future litigation regarding same-sex private arrangements.⁴² This is especially true in light of how ambiguously some state DOMAs are drafted.

in the exercise of the judicial function in constitutional cases.” Henkin, *supra* note 28, at 474 (citing Wechsler, *supra* note 28, at 29).

39. *See, e.g.*, *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423, 434–35 (Conn. 2005) (concluding that judicial confirmation of private arbitration award of punitive damages is not state action); *People v. Brown*, 660 N.E.2d 964, 970 (Ill. 1995) (finding no state action where prosecution unknowingly uses perjured testimony in a criminal conviction). One justice of the Washington Supreme Court even suggested that *Shelley* has been overruled sub silentio by subsequent decisions. *King v. King*, 174 P.3d 659, 671 (Wash. 2007) (Sanders, J., concurring) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982)).

40. *Compare In re Adoption of K.L.P.*, 763 N.E.2d 741, 750–51 (Ill. 2002) (stating in dicta that “[t]here is . . . some precedent for viewing the utilization of the judicial process by a private party to affect the constitutional rights of another as ‘state action.’ . . . In the adoption context, the claim of state action when the court system is utilized to terminate parental rights is, perhaps, even stronger than in *Shelley*.”); *State v. Rideau*, 943 So. 2d 559, 569–70 (La. Ct. App. 2006) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (reasoning that state court could not require convicted felon to pay costs out of future movie or book rights, as this would be judicial abridgement of his right to free speech); *In re Crichfield Trust*, 426 A.2d 88, 90 (N.J. Super. Ct. Ch. Div. 1980) (stating that enforcement of charitable trust by court is state action and citing *Shelley* in support); *State v. Cardenas-Alvarez*, 25 P.3d 225, 243 (N.M. 2001) (Baca, J., concurring) (stating that judicial admission of false evidence obtained from federal agents is state action for purposes of state constitution); *People v. Kern*, 554 N.E.2d 1235, 1245–46 (N.Y. 1990) (citing *Shelley* in support of conclusion that judicial enforcement of defense attorney’s racially discriminatory peremptory challenges during jury selection can be attributed to state); *Nussenzeig v. diCorcia*, 38 A.D.3d 339, 348 (N.Y. App. Div. 2007) (Tom, J., concurring) (observing that although “members of the community are not prohibited, by agreement, from restricting their own freedom to dispose of their property, the courts are prohibited from lending the state’s power to enforce any such restriction to the extent that it infringes on the constitutional rights of others”), *with MedValUSA*, 872 A.2d at 434–35 (declining to extend *Shelley* to judicial confirmation of private arbitration award); *Meisner v. Potlatch Corp.*, 954 P.2d 676, 680–81 (Idaho 1998) (finding *Shelley* inapplicable to judicial grant of summary judgment).

41. *See, e.g.*, *Cardenas-Alvarez*, 25 P.3d at 243 (explaining that “[s]tate action . . . refers to exertions of state power in all forms” (quoting *Shelley*, 334 U.S. at 20)); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 88 n.2, 91 (Tex. 1997) (stating that federal decisions provide “a wealth of guidance in our resolution of state action issues” for purposes of the Texas state constitution).

42. Popularly elected judges in a number of jurisdictions are under direct political pressure to take positions on gay marriage and homosexuality in general. *See, e.g.*, Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 99–100 (2008) (discussing recent use of judicial campaign questionnaires to inquire about candidates’ positions on homosexuality and same-sex marriage). *Shelley* provides intellectual grist for opponents of private ordering among homosexuals and jurisprudential grounds to hold agreements between same-sex partners invalid.

III. STATE DEFENSE OF MARRIAGE AMENDMENTS AND PRIVATE ORDERING

Without a right to marry or to obtain other state recognition for their relationships, gay and lesbian couples have spent the last several decades patching together sundry methods of private ordering to ensure that their wishes are given some type of legitimacy. For example, gay couples have used powers of attorney, domestic partnership agreements, cohabitation agreements, custody and shared parenting agreements, insurance benefit designations, and other forms of traditional contract to secure benefits for themselves and their loved ones.⁴³ However, with passage of very broadly worded DOMA regulations, and with the expansive interpretation of other DOMAs, the enforceability of these contracts is now in doubt.⁴⁴

In 2004, 2006, and 2008 various states placed DOMAs on the November ballot through direct referenda or initiative processes. A number of these proposed amendments were jarring in their scope. Virginia's DOMA, for example, states:

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.⁴⁵

Ohio's DOMA is similarly broad:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁴⁶

Other states employed alternative language, refusing to recognize relationships that confer the "incidents" of marriage or unions that "replicat[e] marriage."⁴⁷ Each of these states have laid textual snares to squelch a range of

43. For a survey of some of these methods, see Maureen B. Cohon, *Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania*, 41 DUQ. L. REV. 495, 497-98, 503-04, 509-10 (2003). For some empirical work on the topic, see Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 435-56 (1999).

44. For a discussion of the difference in breadth of these amendments, and their effect on unmarried heterosexual couples, see Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59, 77-81 (2007).

45. VA. CONST. art. I, § 15-A (emphasis added).

46. OHIO CONST. art. XV, § 11 (emphasis added).

47. See, e.g., ALA. CONST. art. I, § 36.03(g) (invalidating any "union replicating marriage"); KAN. CONST. art. 15, § 16(b) (declaring that state cannot recognize any "relationship" other than marriage as entitling parties to "incidents" of marriage); KY. CONST., § 233A (prohibiting state from recognizing "legal status identical or substantially similar to that of marriage"); LA. CONST. art. XII, § 15 (forbidding state law from requiring "marriage or the legal incidents thereof" to be conferred on any

same-sex legal relationships. Nevertheless, voters approved these amendments by substantial margins.⁴⁸

According to DOMA activists, this broad language was designed to prevent the state from creating or recognizing same-sex marriages, state civil unions, or domestic partnership registries, whether by legislative, executive, administrative, or judicial action. DOMA supporters particularly chafed at civil unions and other forms of same-sex domestic relationships, which they disparagingly termed “fake” or “counterfeit” marriages.⁴⁹

State DOMA activists publicly disclaimed an intent to invalidate purely private contractual relationships between same-sex partners. During the 2006 campaigns, these DOMA activists dismissed as alarmist opponents’ claims that DOMA threatened private agreements.⁵⁰ But the breadth of some DOMA language itself, as well as the positions of some DOMA advocates, belies those assurances. A recent decision from the Michigan Supreme Court may be a bellwether.

“union other than the union of one man and one woman”); OKLA. CONST. art. II, § 35 (forbidding any provision of law to “require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”). A recent addition is the Florida constitution, which now forbids unions that are the “substantial equivalent” of marriage. FLA. CONST. art. I, § 27. The amendment passed by a 62% to 38% margin. Emanuella Grinberg, *Mixed Results on Measures Banning Same-Sex Marriage*, CNN.COM, Nov. 5, 2008, <http://edition.cnn.com/2008/POLITICS/11/04/state.laws/index.html>.

48. According to Christian Life Resources, DOMA amendments had the following passage percentages: Kentucky (75%), Georgia (77%), Ohio (62%), Arkansas (75%), Oklahoma (76%), Mississippi (86%), Montana (66%), North Dakota (73%), Utah (66%). Christian Life Resources, *Homosexuality and Same-Sex Marriage Timeline*, <http://www.christianliferesources.com/?library/view.php&articleid=915> (last visited May 29, 2009). For additional results, see CNN.com, *Election 2004 – Ballot Measures*, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (last visited June 30, 2009).

49. Jerry Cox, of the Arkansas Marriage Amendment Committee, voiced the sentiments of many of his fellows: “It’s a counterfeit marriage. A civil union undermines the value of a real marriage the same way counterfeit money would undermine the value of real money.” Laura Kellams, *Fair Play, Family Fuse Amendment Altercation*, ARK. DEMOCRAT-GAZETTE, Sept. 5, 2004, at A1. Randy Thomasson, executive director of Campaign for California Families, called civil unions “homosexual marriage by another name” and urged President Bush to “resist counterfeit marriages with all his might.” *Election 2004: Campaign Watch*, ATLANTA J.-CONST., Oct. 27, 2004, at 8A. For a general criticism of the constitutionalization of marriage, see J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What’s a Constitution For?*, 56 DUKE L.J. 545, 550–53 (2006). For a discussion of the rhetoric of “counterfeiting” in the marriage debates, see generally Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393 (2007).

50. See, e.g., Rebecca Mowbray, *La. Voting on Gay Marriage Ban*, BOSTON GLOBE, Sept. 18, 2004, at A3 (quoting one Louisiana legislator as saying Louisiana’s DOMA would not “affect private relationships between individuals or businesses. It doesn’t affect private contracts at all.”); William C. Duncan, *Friends with Benefits?*, NAT’L REV. ONLINE, Oct. 17, 2006, <http://article.nationalreview.com/?q=YWU5NmQxMdc2NGZiNTM0YTc0NmZjZTBmMmUwNDYzNjc=> (denying that marriage amendments, in practice, would eliminate existing rights of unmarried couples). But see Mowbray, *supra* (quoting study by Public Affairs Research Council of Louisiana which noted “legal analysts are split on the potential impact of the amendment on private contracts”).

*National Pride at Work, Inc. v. Governor of Michigan*⁵¹ concerned whether Michigan, through its municipalities and public universities, could offer benefits to its employees' same-sex partners. National Pride at Work, Inc. (a nonprofit affiliate of the AFL-CIO) as well as employees of the city of Kalamazoo, Michigan, the University of Michigan, Wayne State University, and other state subdivisions and entities, asked the state court to declare that the college and municipal benefit plans did not violate Michigan's DOMA.⁵² The benefit plans varied in some particulars, but each allowed employees to cover their domestic partners so long as the partner was at least eighteen years old, not a blood relative, of the same sex as the employee, and the employee's exclusive domestic partner for at least six months prior to enrollment.⁵³ After winning at the trial level, the plaintiffs lost their suit in the Michigan Court of Appeals.⁵⁴ The Michigan Supreme Court granted leave to appeal and affirmed the intermediate court in a five to two decision.⁵⁵

The court's opinion followed a close textual exegesis of Michigan's DOMA amendment.⁵⁶ Michigan's DOMA states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."⁵⁷

The court first outlined its constitutional methodology. According to the majority, the court's obligation is to "determine the original meaning of the provision to the ratifiers."⁵⁸ The original meaning is "the sense most obvious to the common understanding";⁵⁹ in other words, the "plain meaning at the time of ratification."⁶⁰

The court then delved into two key words from the amendment, "similar" and "union." Plaintiffs argued that the city and universities' benefit plans did not recognize a "same-sex" partner as a married spouse, because none of the benefit plans characterized these relationships as marriage.⁶¹ The majority quickly dismissed this argument. The constitutional language forbade state recognition

51. 748 N.W.2d 524 (Mich. 2008).

52. *Nat'l Pride at Work*, 748 N.W.2d at 529–30. The plaintiffs' resort to litigation was forced by the fact that the local United Auto Workers and state labor officials had reached a tentative agreement to include same-sex domestic partner benefits in its contract. *Id.* at 529.

53. *Id.* at 531–32.

54. *Id.* at 530.

55. *Id.* at 531, 543.

56. Textualism is commonly used by state courts as a sort of default methodology. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 195 (1998) (citing William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 593 (1971)).

57. MICH. CONST. art. I, § 25.

58. *Nat'l Pride at Work*, 748 N.W.2d at 533.

59. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 66 (1868)).

60. *Id.* Compare this to the methodology used by lower Ohio courts as discussed in Strasser, *supra* note 44, at 93–95.

61. *Nat'l Pride at Work*, 748 N.W.2d at 533. In fact, one of the plans acknowledged that Michigan law prohibited marriage between same-sex couples. *Id.* at 532.

of nonmarital relationships “as a marriage *or similar union*.”⁶² Referring to Webster’s Dictionary, the court stated that “union” meant a “combination . . . joined or associated together for some common purpose.”⁶³ “Similar” meant “having a likeness or resemblance . . . having qualities in common.”⁶⁴ Simply because the entire panoply of legal rights did not flow from a domestic partnership as from marriage did not mean that the domestic partnership was not a union “similar” to marriage.⁶⁵

“Recognize,” according to the court, meant “to perceive or acknowledge as existing, true, or valid.”⁶⁶ The court reasoned that “[w]hen a public employer attaches legal consequence to a relationship, that employer is clearly ‘recognizing’ that relationship.”⁶⁷ Similarly, the court concluded that the “only agreement” language in the amendment meant that marriage, as defined as a union between a man and a woman, was the sole domestic arrangement between two persons that could be recognized “for any purpose”—explicitly excluding domestic partnerships from recognition, even if the partnership was entered into not to simulate “marriage” but solely for purposes of obtaining benefits from an employer.⁶⁸ The court continued to stick close to the text, dismissing the plaintiffs’ argument that public provision of health-care benefits to same-sex couples was not a “benefit of marriage.”⁶⁹ The court concluded that the voters of Michigan had decided to achieve the objective of “secur[ing] and preserv[ing] the benefits of marriage” by forbidding public recognition of any domestic unit that was not a heterosexual marriage.⁷⁰ Whether the people of Michigan had voted for a wise or effective way to regulate marriage was not for the justices to decide.⁷¹

Although DOMA advocates had assured voters in the press and in a public hearing that Michigan’s DOMA would not affect the health-insurance benefits of domestic partners,⁷² the court regarded these extrinsic statements as

62. *Id.* at 533 (quoting MICH. CONST. art. I, § 25).

63. *Id.* (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1991)).

64. *Id.* at 534 (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY).

65. *Nat’l Pride at Work*, 748 N.W.2d at 534.

66. *Id.* at 537 (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY).

67. *Id.*

68. *Id.* at 538–39.

69. *Id.*

70. *Nat’l Pride at Work*, 748 N.W.2d at 539 (quoting MICH. CONST. art. I, § 25).

71. *Id.*

72. Marlene Elwell, the campaign director for Citizens for the Protection of Marriage (“CPM”), told *USA Today* that “[t]his [amendment] has nothing to do with taking benefits away. This is about marriage between a man and a woman.” *Id.* at 547 (Kelly, J., dissenting) (citing Charisese Jones, *Gay Marriage on Ballot in 11 States*, USA TODAY, Oct. 15, 2004, at A3) (first alteration in original). Two weeks later, Kristina Hemphill, CPM’s communications director, told the Holland [Michigan] Sentinel that the gay couples’ benefits would not be affected and that “[t]his Amendment has nothing to do with benefits.” *Id.* (citing John Burdick, *Marriage Issue Splits Voters*, HOLLAND SENTINEL, Oct. 30, 2004). Finally, counsel for CPM told the Michigan State Board of Canvassers during a hearing that there would be “nothing to preclude [a] public employer from extending [health-care] benefits . . . as a

immaterial. First, the majority noted that advocates both for and against the amendment had argued that Michigan's DOMA *would* in fact prohibit partnership benefits.⁷³ Second, the extrinsic evidence merely reinforced the majority's textual approach: "[b]ecause we cannot read voters' minds to determine whose views they relied on and whose they ignored . . . we must look to the actual language of the amendment."⁷⁴ The plain text of Michigan's DOMA unambiguously "prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners."⁷⁵

The Michigan Supreme Court refused to speculate whether its ruling would affect private employers and private agreements, stating tersely: "[T]his opinion does not address whether private employers can provide health-insurance benefits to their employees' same-sex domestic partners."⁷⁶ However, that thin clause will not long secure private agreements from the weight of the court's textualist reasoning. The very arguments that the court accepted to strike down public *provision* of benefits for same-sex partners are easily used to challenge public *enforcement* of benefits for same-sex partners provided in the private sector. That is particularly true if the Michigan Supreme Court accepts a *Shelley*-type analysis of its own role in adjudicating private same-sex agreements.

As *Shelley*'s commentators have recognized, all private agreements operate against a backdrop of government enforcement. Indeed, scholars of the first generation of legal realists characterized private ordering as nothing more than an *ex ante* capacity to enlist the government to come to your aid.⁷⁷ Given this reality, the textualist reasoning of *National Pride at Work*—coupled with *Shelley*'s insight that a court can be a state actor when it enforces private agreements—implicates enforcement of private domestic partnership arrangements.

The linchpin of *National Pride at Work* is the court's definition of "recognize." The court said that Michigan recognizes a domestic partnership anytime it "'perceive[s]" or "'acknowledge[s]" that partnership as "existing, true, or valid."⁷⁸ Assuming that gay and lesbian couples form contracts to confer

matter of contract between employer and employee." *Id.* at 546 (first and second alterations in original).

73. *Nat'l Pride at Work*, 748 N.W.2d at 540–42 & n.22. A look at the actual language cited by the majority is not so clear cut. The position of Gary Glenn, President of the American Family Association of Michigan, stated simply that same-sex partnerships could not be granted special legal treatment akin to that of marriage, as contrasted with an open policy that allowed employees to designate whomever they wished as beneficiaries. Brief of Amicus Curiae American Family Association of Michigan at 6–8, *Nat'l Pride at Work*, 748 N.W.2d 524 (No. 133554).

74. *Nat'l Pride at Work*, 748 N.W.2d at 541 n.23.

75. *Id.* at 543.

76. *Id.* at 529–30 n.1.

77. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–72 (1923) (discussing government enforcement of property rights); Louis L. Jaffee, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 217–18 (1937) (discussing enforcement of contracts by state in context of property).

78. *Nat'l Pride at Work*, 748 N.W.2d at 537 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1991)).

benefits to their partners, benefits that they would enjoy but for the fact that they cannot marry, then the entire edifice of their private ordering assumes a state court may “recognize” those legal relationships. However, lashed to the Michigan Supreme Court’s text-bound reasoning, if “recognize” includes any government perception or acknowledgment of the legal relationship as “existing, true, or valid” then how may a court enforce such agreements without “recognizing” the union behind them? If, as the court states, public employers “recognize” a same-sex relationship by “attach[ing] legal consequence to a relationship,” then why isn’t *any* state judicial enforcement of same-sex partnership arrangements a species of impermissible “recognition”? And if that is the case, then the test for the enforceability of agreements between same-sex couples in Michigan is not whether the agreement is “public” or “private,” but simply whether the agreement confers benefits that simulate a marriage or “similar union.”⁷⁹ For example, if the Episcopal Diocese of Michigan were to offer benefits to the same-sex partners of its employees upon the same terms as those that were offered by the University of Michigan, *National Pride at Work* suggests that a state court could not adjudicate any dispute over that beneficiary agreement, because to do so would “recognize” the domestic partnership of the couple—a “union” “similar” to marriage.⁸⁰

Further, a state court could only conclude that its enforcement of a private agreement is a “recognition” of such a union if it adopts—explicitly or implicitly—*Shelley*’s proposition that state judicial enforcement of a private agreement can be state action. This is because, prior to *Shelley*, state judges had no framework in which to understand their enforcement of private agreements as implicating the state at all.⁸¹ Only after *Shelley* did the state judge’s very choice whether to enforce a private agreement acquire constitutional significance.

Although *National Pride at Work* is the most recent and fully developed opinion on DOMA and domestic partnership arrangements, it is not alone.

79. In this sense, even the question of intent becomes irrelevant. The touchstone is not whether the relationship was formed expressly to mirror marriage; the touchstone is whether the legal relationship in some sense “looks like” an aspect of marriage.

80. I have chosen the Episcopal Diocese because church organization benefit plans are exempt from the Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26, 29, and 42 U.S.C.). ERISA would presumably preempt any contrary state law, including the state constitution. See *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 676 n.4 (3d Cir. 2000) (noting lower court’s conclusion that ERISA preempted action under state constitution). A more detailed discussion of which disputes over private benefit plans would be governed by state law and which would be governed by ERISA is beyond the scope of this Essay.

81. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (stating that enforcement of private racially restrictive covenants does not raise any constitutional issues); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 124 n.98 (2000) (noting that *Shelley* captured a political awareness that “the state was responsible for the effects brought about by private law mechanisms”); Shelley Ross Saxer, *Shelley v. Kraemer’s Fiftieth Anniversary: “A Time for Keeping; A Time for Throwing Away”?*, 47 U. KAN. L. REV. 61, 80 (1998) (noting that racially restrictive covenants were generally upheld in years prior to *Shelley v. Kraemer*).

Other cases that address the effect of DOMA on private ordering between same-sex couples continue to percolate through the state courts. In Ohio, for instance, a state legislator sued Miami University in Oxford, Ohio, a state institution, on the ground that the university's extension of benefits to same-sex partners violated Ohio's DOMA.⁸² Miami University's benefit plan mirrored those struck down in *National Pride at Work*. Miami University required domestic partners to file a sworn affidavit regarding their cohabitation arrangements, purposes, duration, and consanguinity.⁸³ The plaintiff claimed that through Miami University's policy, Ohio had "use[d] . . . its singular position and powers to publicly affirm, validate and support a nonmarital, marriage-mimicking relationship that has been historically suspect and impugned."⁸⁴ This affirmation "inescapably carries with it an implicit negative commentary on [marriage] and diminishes the legally unique status accorded the socially fundamental institution of marriage."⁸⁵

The Court of Common Pleas found the plaintiff had no standing and granted summary judgment to the university, but not without opining in dicta:

Arguably, the state of Ohio, through its instrumentality or arm, Miami University, has done that which is constitutionally proscribed. It has seemingly created a category of persons, same-sex domestic partners of its employees, to whom the state extends the same kind of medical-insurance benefits, and perhaps other benefits, that the state has traditionally reserved for spouses of employees. It is obvious that . . . to qualify for benefits, the relationship between the cohabiting persons must be virtually the same as that of spouses.⁸⁶

In the United States District Court for the District of Nebraska, the court held that Nebraska's DOMA violated the federal constitution.⁸⁷ Nebraska's DOMA stated: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."⁸⁸

The district court ruled the amendment unconstitutional in part because a strict textualist definition of "civil union" and "domestic partnership" could sweep in "real estate transactions, prenuptial agreements and business agreements in Nebraska."⁸⁹ Even ordinary cohabitation agreements between roommates of the same sex could be invalid, depending on whether the state was

82. *Brinkman v. Miami Univ.*, 861 N.E.2d 925, 926, 930 (Ohio Ct. Com. Pl. 2005) (granting summary judgment to defendant due to lack of plaintiff standing), *aff'd*, No. CA2006-12-313, 2007 WL 2410390, at *14 (Ohio Ct. App. Aug. 27, 2007).

83. *Id.* at 928.

84. Complaint at ¶ 14, *Brinkman*, 861 N.E.2d 925 (No. CV 2005-11-3736).

85. *Id.*

86. *Brinkman*, 861 N.E.2d at 933.

87. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 995, 1005, 1008 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

88. NEB. CONST. art. I, § 29.

89. *Citizens for Equal Protection*, 368 F. Supp. 2d at 1005.

willing to conduct a demeaning investigation into the “intimate sexual practices of its citizens.”⁹⁰ The Eighth Circuit reversed, finding Nebraska’s DOMA survived rational basis review.⁹¹ These cases are but a sample of litigation that opponents of same-sex marriage have either commenced or participated in as interveners or amici in various states.⁹²

Private ordering between same-sex couples is threatened because the very breadth of some state DOMAs supports a blanket prohibition of private agreements between or benefiting homosexual partners. First, most DOMAs contain few textual guidelines as to what types of agreements, beyond marriage, are prohibited.⁹³ The broader DOMAs lapse into loose language that sweep in agreements that are “similar” to or “approximate” marriage, or that confer the “incidents” or “qualities” of marriage.⁹⁴ This laxity compels a judge to determine, quality by quality, incident by incident, what actually constitutes a marriage.⁹⁵ Only then may the judge determine whether a nonmarital agreement is intended to or does confer that quality.⁹⁶ Second, the pre- and postenactment activity of state DOMA proponents betrays a marked hostility to any recognition of same-sex relationships, public or private. State DOMA supporters have sponsored numerous economic campaigns against private entities that offer

90. *Id.*

91. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006).

92. An ironic twist in DOMA litigation are the cases in which an individual attempts to use a state DOMA to invalidate an agreement with an estranged same-sex partner. For example, in *Hobbs v. Van Stavern*, Julie Hobbs, the biological parent of a child identified as “T.L.H.,” conducted a nine-year relationship with Janet Kathleen Van Stavern. 249 S.W.3d 1, 2–3 (Tex. Ct. App. 2006). Van Stavern subsequently adopted T.L.H. *Id.* at 3. After dissolution of their relationship, Van Stavern asked the court to declare that she and Hobbs were joint conservators of T.L.H. *Id.* Hobbs argued in response that Van Stavern’s adoption was void on grounds of public policy and for the legal reason that her adoption was void ab initio because “the trial court’s [e]ntertainment and resolution’ of Kathleen’s [lawsuit] was . . . ‘tantamount’ to a ‘proclamation’ validating same-sex relationships.” *Id.* at 5 (quoting brief of appellant Hobbs); see also *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 824–25 (Va. 2008) (referring to lesbian mother’s argument that Virginia’s DOMA invalidated her former partner’s visitation rights for their child).

93. One of the few states that has clarified the effect of its DOMA on private contract is South Carolina, which expressly protected private agreements in its DOMA. See S.C. CONST. art. XVII, § 15 (“This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.”). Although some states, like Ohio, have passed legislation aimed at preserving private contracts, the text of these statutes cannot be squared easily with the breadth of the Ohio constitutional amendment. Compare OHIO CONST. art. XV, § 11 (prohibiting recognition of any legal status of unmarried individuals approximating marriage), with OHIO REV. CODE ANN. § 3101.01(C)(3)(b) (2003) (specifically excepting “private agreements that are otherwise valid under the laws of this state”).

94. See *supra* note 6 for the text of several such state constitutions.

95. For example, is cohabitation a “quality” of marriage? What about cohabitation for a specific duration? Cohabitation with sexual relations? Cohabitation with sexual relations and adoption?

96. Judge Harvie Wilkinson notes the irony in this situation. Wilkinson, *supra* note 49, at 549–50. Advocates pushed these amendments by lashing out at “judicial tyrants,” and judges “redefining marriage” by “legislating from the bench.” But, by their ambiguous wording, these same advocates have handed back to the courts the ability to atomize marriage by stripping it to its legal essentials. *Id.* at 577–80.

same-sex benefits or advertise in predominantly gay and lesbian publications.⁹⁷ They have declared same-sex domestic partnership registries unconstitutional.⁹⁸ Recently, an Ohio-based group filed an amicus brief arguing that an Ohio law criminalizing domestic violence between unmarried couples was unconstitutional under Ohio's DOMA.⁹⁹ Legislatively, Virginia passed the Affirmation of Marriage Act, which prohibits "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage."¹⁰⁰ The Act further states that "[a]ny such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable."¹⁰¹

These efforts suggest that at least some anti-gay marriage groups may follow a strategy of "incrementalism" designed to eventually deny homosexuals protections or benefits under either public or private auspices.¹⁰² But even if the assurances of DOMAs' proponents can be taken at face value, the constitutionalization of broad and untethered language effectively takes the issue out of their hands.¹⁰³ It has become a matter for the courts. Ohio, for example, has sent signals that it will construe its broadly worded DOMA narrowly, while Michigan has signaled that it will construe its relatively narrowly drawn

97. For example, the American Family Association, which claims to have over 700,000 members, conducted a three-year boycott against Ford for, among other things, "mak[ing] corporate donations to homosexual organizations that . . . promote civil unions or same-sex marriage," supporting gay pride parades, and "advertising on homosexual Web sites and through homosexual media outlets." American Family Association, Ford Meets Conditions; AFA Suspends Boycott, http://www.afa.net/emails/transform.asp?x=ford_031008&s=browser&y=2008&m=03 (last visited June 30, 2009). The group also conducted an unsuccessful nine-year boycott of Disney for extending benefits to same sex-partners. *Christian Conservatives Push U.S. Companies on Gay Rights*, ASSOCIATED PRESS, Dec. 6, 2005, available at http://www.usatoday.com/money/industries/banking/005-12-06-christian-conservatives_x.htm.

98. See, e.g., Robert Vitale, *City Slow to Add Registry for Gay Couples*, COLUMBUS DISPATCH, June 29, 2008, at 1B (noting that a prominent DOMA advocate believes domestic registries are unconstitutional).

99. Brief Amicus Curiae of Citizens for Community Values Urging Reversal at 1–2, *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (No. 06-151). Professor Marc Spindelman notes that Citizens for Community Values submitted this brief even though its key spokesperson had publicly derided the notion that Ohio's DOMA would invalidate the domestic battery laws. Marc Spindelman, *State v. Carswell: The Whipsaws of Backlash*, 24 WASH. U. J.L. & POL'Y 165, 174 (2007).

100. VA. CODE ANN. § 20-45.3 (2008).

101. *Id.* When asked whether the Act would prohibit a contract that conferred some, but not all, of the rights associated with marriage, one of its sponsors demurred: "I guess we don't know that yet . . . That's what the courts are for; they'll figure that out." Julian Sanchez, *Not for Lovers: Banning Same-Sex Contracts*, REASON, Aug. 1, 2004, at 12.

102. Cf. Janet Hook, *Conservative Social Agenda a GOP Challenge*, L.A. TIMES, Jan. 19, 2003, at 21 (noting antiabortion activists have adopted "mostly incremental measures that do not strike directly at abortion rights").

103. See Wilkinson, *supra* note 49, at 576–77 (discussing irony of giving "ultimate interpretive authority" of DOMAs to judges).

amendment broadly.¹⁰⁴ Other state courts have yet to decide how to apply DOMAs to the public and private contractual sphere.¹⁰⁵ The uncertainty alone has left same-sex couples in doubt about the validity of their legal instruments.¹⁰⁶

IV. FEDERAL STATE ACTION CHALLENGES TO DOMAS

The breadth of these state DOMAs leads to the flip side of our Möbius strip. *Shelley v. Kraemer*¹⁰⁷ concluded that state judges cannot enforce racially discriminatory private covenants because the very act of enforcement by the state judge violates the Equal Protection Clause.¹⁰⁸ *National Pride at Work, Inc. v. Governor of Michigan*¹⁰⁹ supports the proposition that Michigan's DOMA forbids state judges from enforcing private agreements between same-sex couples when those agreements require "recognition" of "marriage-like" relationships.¹¹⁰ Ironically, however, to the extent that a DOMA purports to leave homosexual couples bereft of the benefits of generally applicable state contract law, that construction of DOMA may itself be a species of "state action" forbidden by the Equal Protection Clause of the Fourteenth Amendment. Specifically, if a DOMA is read to render certain private agreements between homosexuals unenforceable, and those agreements would be enforceable for any other group of persons, such construction would almost certainly violate the equal protection holding of *Romer v. Evans*.¹¹¹

In *Romer*, Colorado voters approved a statewide referendum, Amendment 2, that forbade state or municipal protection for homosexuals in any public or private arena.¹¹² Amendment 2 supporters designed this amendment to repeal several Colorado municipal and administrative regulations that prohibited

104. See *Carswell*, 871 N.E.2d at 554 (holding that Ohio's DOMA does not abrogate state domestic violence statute). *But see Nat'l Pride at Work v. Gov. of Mich.*, 748 N.W.2d 524, 542-43 (Mich. 2008) (calling *Carswell* unpersuasive authority).

105. *E.g.*, *Nat'l Pride at Work*, 748 N.W.2d at 529 n.1 (noting that opinion does not address ability of private employers to provide benefits to same-sex partners).

106. See *Mowbray*, *supra* note 50 (noting concern of same-sex couples in Louisiana that DOMA could invalidate private contracts related to property and medical decisions).

107. 334 U.S. 1 (1948).

108. *Shelley*, 334 U.S. at 20.

109. 748 N.W.2d 524 (Mich. 2008).

110. *Nat'l Pride at Work*, 748 N.W.2d at 543.

111. 517 U.S. 620 (1996). I will leave aside the thornier issue of whether DOMAs construed to preclude any private domestic agreement—homosexual or heterosexual—are similarly unconstitutional.

112. The precise language of the amendment was as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b, *invalidated by Romer v. Evans*, 517 U.S. 620 (1996).

discrimination based on sexual orientation.¹¹³ To Amendment 2 supporters, these antidiscrimination regulations were an affront to their rights of association and religious and familial liberty, and their sense of good public policy.

The Colorado Supreme Court first interpreted the terms of Amendment 2. Although it demurred on the precise scope of the amendment, the court held that Amendment 2's stated aim, prohibiting homosexuals "from obtaining legislative, executive, and judicial protection or redress from discrimination absent . . . adoption of a constitutional amendment," was broad enough to trigger constitutional review and to warrant a preliminary injunction barring its enforcement.¹¹⁴ After trial and a subsequent appeal, the court switched its analysis from the scope of the amendment under the state constitution to its constitutionality under the United States Constitution. The state court concluded that Amendment 2 violated the federal guarantee of equal protection.¹¹⁵ The Colorado court reviewed the amendment under a strict scrutiny standard, finding that Amendment 2 burdened homosexuals' fundamental right to participate in the electoral process.¹¹⁶ Under this standard, Amendment 2 was unconstitutional because it did not further any compelling interest, nor was it narrowly tailored to advance those interests, even if they were compelling.¹¹⁷

The United States Supreme Court affirmed, albeit suggesting a different level of constitutional scrutiny.¹¹⁸ Justice Kennedy, writing for the majority, acknowledged that Amendment 2 targeted municipal and administrative protections for homosexuals.¹¹⁹ However, as the Court noted, "Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect [homosexuals]."¹²⁰ The amendment was so broadly written that it effectively "nullif[ied]" regulations designed to protect this "class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment,"¹²¹ and barred homosexuals from securing any protection from discrimination except through the extraordinary effort of "enlisting the citizenry of Colorado to amend the State Constitution or perhaps . . . by trying to pass helpful laws of general applicability."¹²²

113. *Romer*, 517 U.S. at 623–24.

114. *Evans v. Romer (Evans I)*, 854 P.2d 1270, 1285–86 (Colo. 1993).

115. *See Evans v. Romer (Evans II)*, 882 P.2d 1335, 1341, 1350 (Colo. 1994) (finding that Amendment 2 was not narrowly tailored to serve compelling governmental interest).

116. *Id.*

117. *Id.* at 1342–48. Among the "compelling state" interests that Amendment 2 supporters offered were "(1) deterring factionalism; (2) preserving the integrity of the state's political functions; (3) preserving the ability of the state to remedy discrimination against suspect classes; (4) preventing the government from interfering with personal, familial, and religious privacy; [and] (5) preventing [the] government from subsidizing the political objectives of a special interest group." *Id.* at 1339.

118. *Romer*, 517 U.S. at 631–32.

119. *Id.* at 623–24.

120. *Id.* at 624.

121. *Id.* at 629.

122. *Id.* at 631.

The result was that

[h]omosexuals, by state decree, [were] put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it [forbade] reinstatement of these [antidiscrimination] laws and policies.¹²³

In essence, Amendment 2 made homosexuals in Colorado “stranger[s] to its laws.”¹²⁴

Even assuming Amendment 2 enjoyed rational basis review, the lowest level of judicial scrutiny for equal protection,¹²⁵ it still foundered. “First,” Justice Kennedy began, “the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second,”¹²⁶ the Justice continued, Amendment 2’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”¹²⁷ Consequently, “it lacks a rational relationship to legitimate state interests.”¹²⁸

Romer implies that a constitution construed to prohibit enforcement of private agreements between homosexuals would, in and of itself, violate equal protection under the Fourteenth Amendment. Following the winding path of state action, we begin with *Shelley*, which held that the Fourteenth Amendment forbids state court enforcement of certain private agreements. Then we arrive at the twist of state DOMAs, which hold that state courts cannot enforce certain private agreements. With *Romer* we end up at the same point on the flip side of the Möbius strip. After *Romer*, the Fourteenth Amendment *requires* that certain private agreements between same-sex couples be enforced because a state court’s decision to *refuse* to enforce these contracts under state DOMA is itself a violation of federal equal protection. As with *Shelley*, *Romer* suggests that states cannot configure their constitution to place private agreements involving same-sex partners on the unenforceable side, and all other private agreements on the enforceable side.¹²⁹ Such a state rule is incongruent with the Fourteenth Amendment.

123. *Romer*, 517 U.S. at 627.

124. *Id.* at 635.

125. Laws that neither burden fundamental rights (such as the right to parent children) nor discriminate based on a narrow list of suspect classes (such as race) are generally constitutional so long as the “legislative classification . . . bears a rational relation to some legitimate end.” *Id.* at 631 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

126. *Id.* at 632.

127. *Id.*

128. *Romer*, 517 U.S. at 632.

129. Professor Spindelman would go further and maintain that a state may not distinguish between married and unmarried couples when the only basis for doing so is traditional morality. Spindelman, *supra* note 99, at 179–80. While I do not necessarily agree with him on this specific point, I am thankful for his insight as to the division between the constitutional and the unconstitutional.

V. THREE LESSONS

So what does this flight into topology have to say about the law in general or constitutional interpretation in particular? At the most general, this Möbius strip conceit helps us recognize that even measured constitutional interpretive efforts can become contorted. In angling for a neutral principle in *Shelley v. Kraemer*,¹³⁰ the Supreme Court has unwittingly given state judges a jurisprudential hook to hold private agreements unenforceable under their state constitutions, a construction that itself may run afoul of federal equal protection. The complexity of this doctrinal twist is good for legal academics, but generally bad for the law itself. At best it makes constitutional adjudication seem unnecessarily baroque; at worst it makes it seem like an elaborate parlor trick.

This is not to say that the goal of neutral principles of adjudication should be discarded. Far from it. Even if neutral principles are not in some platonic sense possible,¹³¹ the aspiration to and appearance of neutral legal rules acts as a professional and psychological check on judges and helps ensure confidence in the judicial system.¹³² Instead, there are at least three lessons to be derived from this exercise. All three lessons aim to reduce the risk of unanticipated and unconstitutional state bending of federal Supreme Court doctrine, while still regarding the quest for neutral principles as an admirable enterprise, if an occasionally quixotic one.

First, the Supreme Court of the United States should be cautious when it articulates neutral principles, because the states are watching. Second, the Supreme Court should avoid constitutional questions that require neutral principles when legislative rules provide grounds for decision. Third, state courts, legislators, administrators, and activists must inform themselves of and anticipate their highest court's interpretive methodology, especially with respect to direct democracy, which too often produces ill-considered and poorly worded constitutional innovations.

A. *Neutral Principles and State Constitutionalism*

The United States Supreme Court must be mindful, not only of how subordinate federal courts will construe its decisions, but of how the wildcard of state judiciaries will implement its decisions. It is well documented that state supreme courts often take cues from the United States Supreme Court.¹³³ This "lockstep" approach applies not only to state court interpretation of state analogues to the federal constitution, but also to the very interpretive

130. 334 U.S. 1 (1948).

131. Because, after all, justice is administered by human beings, not biblical sages or computers.

132. See Shapiro, *supra* note 34, at 600 (arguing that political realities of judicial review demand "the traditional myth of the impersonal, non-political, law-finding judge whose decisions are the result of the inexorable logic of the law and not his own preferences and discretion").

133. See TARR, *supra* note 56, at 200 (noting that "state judges regularly inquire into how sister courts, both state and federal, have interpreted similar [constitutional] provisions"); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788 (1992) (noting state constitutional decisions incorporate federal interpretations of key principles).

methodology that state courts use to examine their respective foundational documents.¹³⁴ This is not to say that state supreme courts should ignore compelling Supreme Court precedent when it is applicable and analytically useful. Nor does it suggest that the United States Supreme Court should or even could predetermine how fifty state courts, with their own agendas and constitutional imperatives, will apply a Supreme Court interpretive principle to their own constitutions. But it does counsel a greater degree of circumspection when the Supreme Court decides to cast new tools of constitutional jurisprudence.

As we have seen, *Shelley's* state action doctrine, when applied to state judicial acts under state DOMAs, has the potential to render even private agreements between same-sex couples unenforceable. But the torque state judiciaries can exert on federal constitutional principles is not limited to equal protection or state action. For example, the Thirteenth Amendment applies not only to slavery itself, but, in some interpretations, to forbid the "incidents" of slavery as well.¹³⁵ Kansas, Louisiana, and Oklahoma all have DOMAs that forbid state recognition of agreements that confer the "incidents" of marriage. To the extent the Supreme Court crafts a methodology to define "incidents," it can have an effect on the methodology states use to define "incidents" in these constitutions.¹³⁶

Elsewhere in the constitution, the Supreme Court recently held that restrictions on handguns in the District of Columbia violated a Second Amendment right to self-defense.¹³⁷ Key to that decision was the Court's belief that the Second Amendment's framers contemplated a cadre of armed yeoman who could be called to defend against invasion or suppress armed rebellion at a moment's notice.¹³⁸ The Idaho Constitution provides that all able-bodied men between eighteen and forty-five must be enrolled in the militia.¹³⁹ Idaho could conceivably pass a law making it a criminal offense for any adult *not* to own a gun.¹⁴⁰

134. Gardner, *supra* note 133, at 791 (noting that state judges use federal decisions as "a generous source of off-the-shelf standards and analyses for application to state constitutional problems").

135. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (noting Court's agreement that Thirteenth Amendment forbids "incidents of slavery," as well as slavery itself).

136. See Strasser, *supra* note 44, at 69-73 (discussing various interpretations of "incidents of marriage").

137. District of Columbia v. Heller, 128 S. Ct. 2783, 2801 (2008). For a full treatment of this case, see generally Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. (forthcoming 2009).

138. *Heller*, 128 S. Ct. at 2799-2803.

139. IDAHO CONST. art. XIV, § 1. This provision is subject to some exceptions for those with religious objections to bearing weapons.

140. Lest one think this is a straw man, both Greenleaf, Idaho and Kennesaw, Georgia have passed municipal ordinances requiring each "head of household" in their respective communities to own a firearm and ammunition. KENNESAW, GA., CODE OF ORDINANCES § 34-1 (2008); see also Glenn Reynolds, *A Rifle in Every Pot*, N.Y. TIMES, Jan. 16, 2007, at A21 (noting Greenleaf's Ordinance 208).

B. *Neutral Principles and Constitutional Avoidance*

The second lesson is that the unpredictability of state constitutionalism supports the doctrine of constitutional avoidance. The Supreme Court should interpret the Constitution only when a more specific directive is unavailable or inadequate. A state court's adoption of *Shelley* to hold that a state court cannot enforce a private agreement under a state DOMA would not be possible if the Supreme Court had rested its *Shelley* decision on other grounds.

Shelley's companion case suggested an answer—one found in affirmative congressional legislation rather than in the broad strokes of equal protection. In *Hurd v. Hodge*,¹⁴¹ decided on the same day as *Shelley*, white residents of the District of Columbia brought suit to eject blacks who had purchased homes subject to a racially restrictive covenant.¹⁴² Chief Justice Vinson, writing for the majority, held that the Civil Rights Act of 1866, rather than the Fifth Amendment Due Process clause, forbade federal courts from enforcing racially restrictive covenants—much in the same way the Fourteenth Amendment prevents state courts from enforcing racially restrictive covenants.¹⁴³ While the Chief Justice avoided the constitutional issue, his solution was wanting in this respect: rather than find that the Civil Rights Act of 1866 voided the racially restrictive covenants themselves,¹⁴⁴ he held that the Act was merely a restriction on their enforceability in federal court.¹⁴⁵ This was an error that was not corrected until twenty years later in *Jones v. Alfred H. Mayer Co.*¹⁴⁶

This second lesson dovetails with the first, as one way to minimize problematic state application of Supreme Court principles is to avoid interpreting the federal constitution until it is necessary.

C. *Neutral Principles and State Experimentalism*

Finally, states must be less cavalier and more deliberative when they amend their foundational documents. While Justice Brandeis celebrated states as the “laborator[ies]” of democracy,¹⁴⁷ he also cautioned that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹⁴⁸ Too often, the amendments proposed and ratified by

141. 334 U.S. 24 (1948).

142. *Hurd*, 334 U.S. at 27.

143. *Id.* at 33–34.

144. *See id.* at 31 (“[T]he statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms.”).

145. *Id.* at 34–35; *see also* Rosen, *supra* note 36, at 483–98 (detailing alternative proposal for resolving *Shelley*).

146. 392 U.S. 409 (1968). For a further discussion of this issue and the history of the *Jones* decision, *see generally* Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999 (2008); Rosen, *supra* note 36, at 487, 490.

147. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

148. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled in part* by *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967). I do not mean to suggest that all antigay marriage advocates are “well-meaning.” Some, in fact, are simply

direct democracy are poorly written, badly considered, and heedless of how they will be analyzed by state courts or interact with other state laws. And, because they are written into the state constitution, they do not lend themselves to legislative adjustment. Nevertheless, direct amendment of the state constitution is revered in popular political culture and enshrined in many state constitutions.¹⁴⁹ Hence, the solution must lie in judicious use of this procedure. State legislators, administrators, and electors must be much more cognizant of the interpretive methodologies their courts use to interpret their founding charters.¹⁵⁰

The experience of Arizona in the 2006 midterm elections is an object lesson. The proposed language to be added to the Arizona constitution read as follows:

To preserve and protect marriage in this state, only a union between one man and one woman shall be valid or recognized as a marriage by this state or its political subdivisions and no legal status for unmarried persons shall be created or recognized by this state or its political subdivisions that is similar to that of marriage.¹⁵¹

When proposed, initiative backers predicted widespread popular support.¹⁵² However, a well-financed opposition backed by, among others, elderly retirees, recognized that its broad provisions could threaten their own benefits.¹⁵³ Key to its defeat was a concerted effort to educate the populace of the potential legal consequences of the Amendment.¹⁵⁴ A far simpler version of the amendment passed in November 2008.¹⁵⁵

bigoted. However, I would venture a larger proportion of them are not bigoted, but are instead simply ignorant, unreflective, or lack empathy.

149. I know of no state that has amended its constitution to make it *harder* to amend the constitution by direct initiative in the current century, although an effort may be taking place, sub silentio, to place checks on the process, either judicially through the “one issue” rule or by legislatively raising the numerical requirement for signatures. My thanks to Professor David Barron for this information.

150. In this respect, I would agree that state judicial candidates should be permitted to answer general questions about judicial philosophy. I do not, however, subscribe to the belief that judges should be permitted to answer questions on discrete topics likely to come before the court. *Cf.* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that state statute prohibiting judicial candidates from giving their views on disputed issues violated First Amendment).

151. An Initiative Measure: Proposing an Amendment to the Constitution of Arizona; Amending the Constitution of Arizona; By Adding Article XXX; Relating to the Protection of Marriage, available at [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2010X%20\(C-02-2006\).pdf](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2010X%20(C-02-2006).pdf).

152. See Elvia Diaz, *State Vote Urged on Same-Sex Marriage*, ARIZ. REPUBLIC, Nov. 9, 2004, at A1 (quoting one initiative backer as saying proposal “has widespread appeal”).

153. See Amanda J. Crawford, *Consistent Message Doomed Prop. 107*, ARIZ. REPUBLIC, Nov. 9, 2006, at A21 (noting that opponents of 2006 amendment emphasized ban would “cost some people health insurance benefits, including straight people”); Amanda J. Crawford, *Legislators Push Ban on Gay Marriage*, ARIZ. REPUBLIC, Feb. 12, 2008, at A1 (noting that 2006 amendment proposed “block[ing] governments from recognizing any similar relationship to marriage”).

154. This effort failed to persuade voters in both Virginia and Ohio.

155. That amendment read: “Only a union of one man and one woman shall be valid or recognized as a marriage in this state.” ARIZ. CONST. art. XXX, § 1.

In California, attempts to restrain the marriage-defining activities of courts and legislatures reached the level of the absurd. A proposed California amendment (subsequently withdrawn from circulation) actually went to the chromosomal level. The proposed amendment stated:

Only marriage between one man and one woman is valid or recognized in California, whether contracted in this state or elsewhere. *A man is an adult male human being who possesses at least one inherited Y chromosome, and a woman is an adult female human being who does not possess an inherited Y chromosome.* Neither the Legislature nor any court, government institution, government agency, initiative statute, local government, or government official shall abolish the civil institution of marriage between one man and one woman, or decrease statutory rights, incidents, or employee benefits of marriage shared by one man and one woman, or require private entities to offer or provide rights, incidents, or benefits of marriage to unmarried individuals, or bestow statutory rights, incidents, or employee benefits of marriage on unmarried individuals. Any public act, record, or judicial proceeding, from within this state or another jurisdiction, that violates this section is void and unenforceable.¹⁵⁶

This version of California's DOMA ultimately failed to reach the ballot. Instead, Proposition 8, a much simpler amendment, passed in California by relatively narrow margins.¹⁵⁷

Recently, in Colorado, the efforts of a twenty-year-old law school student resulted in a proposed amendment to the Colorado constitution that would have defined a fertilized embryo (no matter where its location) as a "person" for purposes of the due process, equal protection, and "inalienable rights" sections of the state constitution.¹⁵⁸ Notwithstanding the electoral failure of the so-called human life amendment, the placement of this measure on the November 2008 ballot seemed utterly heedless of its consequences.¹⁵⁹ For example, could in vitro fertilization clinics have continued to make multiple embryos for implantation? Would each of these embryos have claim to all the due process rights accorded

156. Letter from Larry Bowler and Randy Thomasson, VoteYesMarriage.com, to Toni Melton, Initiative Sec'y, Office of the Attorney Gen., Cal., (Dec. 10, 2007) (on file with author) (emphasis added). As a couple of my colleagues noted, this proposed definition would have the unintended consequence of allowing, for example, marriage between a postoperative male-female transsexual and her female lover. Similarly, some persons who have a condition known as complete androgen insensitivity carry XY chromosomes, but due to a genetic abnormality, do not process hormones that create secondary male sex characteristics. These persons have all the physical traits of a female, including external genitalia, but male chromosomes.

157. Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, available at <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05.0.4876367.full.story> (stating margin of fifty-two percent to forty-eight percent). This proposition was subsequently upheld as constitutional in *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

158. Ashley Surdin, *Colorado Voters Will Be Asked When 'Personhood' Begins*, WASH. POST, July 13, 2008, at A4.

159. The key spokeswoman for the effort was quoted as saying, "[w]e try not to focus on some of the issues that will be taken care of later on." Surdin, *supra* note 158.

other persons? Would each embryo have been entitled to a guardian ad litem to decide which one goes into the uterus and which one goes into the freezer?

The breadth of these and similar proposals, enacted by direct initiative with little of the deliberation or legislative history that we find with the Federal Constitution, should be a warning to activists, state legislators, state judiciaries, and the administrative bodies. Each of these entities are stakeholders in the actual wording of the constitutional amendments and should be more temperate when called upon to amend and to construe their own constitutional documents.

VI. CONCLUSION

State DOMAs' latent threat to private ordering may never materialize. It could be, for instance, that when confronted with the question of whether judicial enforcement of an agreement between a same-sex couple is state action, the state court will follow a predictable pattern of precipitously sheering *Shelley* off at its facts.¹⁶⁰ In this sense, then, Wechsler's fear that *Shelley* is really a case about results rather than reason arguably will have been confirmed.

Or, it could be that state courts will read their state DOMAs as requiring a *Shelley* application, but then, like the Colorado Supreme Court did with Amendment 2, hold that their very own construction of the scope of the state DOMA is a violation of equal protection; thus completing in one court the circuit from *Shelley* to its reverse in *Romer*.

But, it is equally possible that the state court will use a *Shelley*-type analysis to invalidate a private agreement, but hold that *Romer* does not command an opposite result—potentially leaving scores of same-sex couples in a legal bind between private ordering and public enforcement.

And that will be a knot only the United States Supreme Court can cut.

160. See, e.g., *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423, 431 (Conn. 2005) (noting that “many commentators speculate that the holding of *Shelley* has been effectively confined to its facts”).

APPENDIX

Figure A. Möbius strip



