

Sanders on Due Process and the Recognition of Same-Sex Marriages

Steve Sanders, who is a Visiting Assistant Professor at the University of Michigan Law School, has posted *The Constitutional Right to (Keep Your) Same-sex Marriage: Why the Due Process Clause Protects Marriages that Cross State Lines, Even if Conflict of Laws Cannot* on SSRN. Here is the abstract:

Same-sex marriage is legal in six states, and nearly 50,000 same-sex couples have already married. Yet 43 states have adopted statutes or constitutional amendments banning same-sex marriage (typically called mini defense of marriage acts, or “mini-DOMAs”), and the vast majority of these measures not only forbid the creation of same-sex marriages, they also purport to void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal. These non-recognition laws effectively transform the marital parties into complete legal strangers to each other, with none of the customary rights or incidents of marriage.

In this paper I argue that an individual who legally marries in her state of domicile, then migrates to another state, has a significant liberty interest under the 14th Amendment’s Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law. This right to marriage recognition is conceptually and doctrinally distinguishable from the constitutional “right to marry.” It is a neutral principle, grounded in core Due Process Clause values: protection of reasonable expectations and of marital and family privacy; respect for established legal and social practices; and rejection of the idea that a state can sever a legal family relationship merely by operation of law. A mini-DOMA state will, of course, have interests to be considered in refusing to recognize certain marriages. But under the intermediate form of scrutiny I explain is appropriate, those interests do not rise to a sufficiently important level to justify the nullification of a migratory same-sex marriage.