

Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate

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I. INTRODUCTION

After years of failed lawsuits¹ and vehement law review articles,² proponents of same-sex marriage can finally chalk up two victories. First, in 1993, the Hawaii Supreme Court held that denial of marriage to same-sex couples is gender discrimination, and is therefore subject to strict scrutiny.³ Second, the Hawaii trial court recently decided on remand that the ban on same-sex marriage is unconstitutional. The court held that the state did not demonstrate a compelling interest in denying the benefits, privileges, and responsibilities of marriage to same-sex couples.⁴ The state's appeal is not expected to be heard until late 1997 or early 1998, and the trial court's order will likely be stayed until then,⁵ but by most accounts it is likely that the Hawaii Supreme Court will uphold the validity

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1. See e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); see also Jonathan Deitrich, Comment, *The Lessons of the Law: Same-Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 134-36 (1994) (discussing several of these cases and the judicial justifications for the opinions).

2. See, e.g., William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); John Dwight Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—Or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984); Deborah Gray, Note, *Marriage: Homosexual Couples Need Not Apply*, 23 NEW ENG. L. REV. 515 (1988); Arthur J. Silverstein, Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 J. FAM. L. 607 (1972); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

3. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). When an equal protection challenge is made, a court will apply *strict scrutiny* to laws that discriminate against suspect categories. The court will strike down the law unless the state proves that it has a compelling reason for the classification and the law is narrowly tailored to serve the purpose for which it was passed. See *id.* at 63-64.

4. See *Baehr v. Miike*, Civil No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

5. See Cindy Moy, *Reactions Run Along Philosophical Lines After Hawaii Recognizes Same-Sex Marriages*, WEST'S LEGAL NEWS, Dec. 6, 1996, at 1, available in 1996 WL 694924.

of same-sex marriages.⁶ Because the plaintiffs' claim was brought solely under Hawaii's constitution, there will be no appeal to the U.S. Supreme Court.⁷

Within a year or two, this nation may be faced with a novel situation: the recognition in one state of marriages joining lesbians with lesbians and gay men with gay men. And the debate has already begun as to what effect Hawaii's decision will have on the rest of the states and the federal government. Proponents on both sides of the issue argue in sweeping terms, one saying that recognition will end the institution of marriage as we know it, the other claiming that recognition will benefit the American family and, in any event, is compelled by the Constitution. The arguments as to whether such marriages, once recognized in Hawaii, are to be recognized in the remaining states are heated. Interestingly, both sides claim the Full Faith and Credit Clause supports their conclusion.

The passage into law of the Defense of Marriage Act ("DOMA")⁸ has intensified the battle. The act provides that each state is free not to recognize same-sex marriage, and already states have introduced and passed bills denying it.⁹ This Note discusses, as background, the same-sex marriage debate, including the constitutional arguments, and the validity and effect of DOMA. If gays and lesbians win the right to marry in Hawaii, the validity of their marriages outside of Hawaii will be at issue. In light of this, this Note will next discuss the meaning of a valid same-sex marriage, given the Full Faith and Credit Clause and conflict-of-laws doctrines, for the rest of the country. Finally, this Note will consider the likelihood, given Indiana law and policy, that a same-sex marriage legally celebrated in Hawaii will be recognized in the State of Indiana.

6. Because the Hawaii Constitution treats gender as a suspect classification, strict scrutiny is applied to laws that discriminate on the basis of gender.

Because the strict scrutiny test is a demanding standard—at the United States Supreme Court level, for example, it has been met in the context of racial discrimination only in the case in which it was developed [i.e., *Korematsu v. United States*, 323 U.S. 214 (1944)]—it is possible that *Baehr*, ultimately, will make Hawaii the first state to marry same-sex couples.

Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 508 (1994) (footnote omitted).

7. See Henry J. Resky, *A Matter of Full Faith*, A.B.A. J., July 1996, at 32, 34.

8. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C.A. § 7 (West 1997), and 28 U.S.C.A. § 1738C (West Supp. 1997)).

9. Utah and Idaho have passed same-sex marriage bans and several other state legislatures are considering similar measures. See Jim Christie, *Same-Sex Marriages: A Legislative Priority?*, WASH. J., July 11, 1996, at 1; cf. Jon Kerr, *Colorado Governor Vetoes Ban on Single-Sex Marriages*, WEST'S LEGAL NEWS, Mar. 29, 1996, at 1, available in 1996 WL 259450.

II. THE CASE FOR AND AGAINST SAME-SEX MARRIAGE

U.S. Representative Gerry E. Studds, one of three openly gay members of Congress, characterized the debate on same-sex marriage and the DOMA as “the last unfinished chapter of civil rights in this country.”¹⁰ Indeed, it seems difficult to imagine, with *Loving v. Virginia*¹¹ now thirty years old, that interracial marriage was once prohibited in as many as thirty-eight states.¹² Despite the high level of racial discrimination that African Americans faced then and continue to face,¹³ the Supreme Court spoke with such vehemence¹⁴ that the decision has endured without question. Conversely, gays and lesbians have not received similar protection from the Supreme Court.¹⁵ For example, gays and lesbians suffer discrimination in the public sphere¹⁶ except where ordinances have been passed to prohibit it.¹⁷ Moreover, sexual orientation discrimination has been overt in the military setting (the Supreme Court recently denied certiorari to an appeal by a serviceman challenging as a free-speech infringement the “don’t ask, don’t tell” policy now employed by the military).¹⁸ In the area of relationships

10. John E. Yang, *House Votes to Curb Gay Marriages*, WASH. POST, July 13, 1996, at A1 (quoting Rep. Studds). See also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 1 (1994), for the author’s remark that “discrimination on the basis of sexual orientation has become one of the most important equality issues of the 1990’s.”

11. 388 U.S. 1 (1967) (holding that Virginia’s prohibition of interracial marriage unconstitutionally deprived the plaintiffs, an interracial married couple, of equal protection under the law and the fundamental right to marry).

12. See James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U.L. REV. 93, 93, 97 (1993).

13. See, e.g., *id.* at 93 n.2 (citing a 1991 Gallup Poll finding that 45% of white Americans disapprove of interracial marriage, while only 44% approve).

14. The decision in *Loving* was unanimous. See *Loving*, 388 U.S. at 1.

15. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that homosexuals do not have a fundamental right to engage in sodomy).

16. “Even today, homosexuals must often keep their orientation secret in order to be free from discrimination and even violence. In many sectors of the economy, homosexuals cannot easily obtain jobs if their sexual orientation is disclosed.” Sunstein, *supra* note 10, at 8.

17. According to the L.P. Cookingham Institute of Public Affairs, 15 states have laws or executive orders that prohibit employment discrimination based on sexual orientation, and 142 cities and counties will enforce the civil rights of gays and lesbians via ordinance, executive order, or government policy. See Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, AM. REV. PUB. ADMIN., June 1996, at 175; see also Anthony Dominic D’Amato, Note, *Conflict of Law Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 936 nn.162-63 (listing communities with domestic partnership laws, communities that have granted benefits to employees’ same-sex partners, and communities with gay rights laws).

18. See *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (holding that Navy Officer Thomasson’s rights to free speech were not violated though he was honorably discharged from military duty after writing “I am gay” in a letter to his superiors), *cert. denied*, 117 S. Ct. 358

and intimacy, gays and lesbians are derided for their orientation, their practices, and often for their very existence. Though many live in monogamous, committed, long-term relationships, they are denied the incidents of marriage. Though bans on miscegenation and bans on same-sex marriage cannot be equated, they are analogous. It would be presumptuous to claim that homosexuals have suffered equally with African Americans in this country. But while the costs of racism have been more overt, discrimination against gays and lesbians runs deeper, a prejudice that members of different races and ethnic groups share.¹⁹ To be sure, unlike overt racial characteristics, one's homosexuality can be hidden, but this feature does not completely undermine the analogy between miscegenation statutes and prohibition of same-sex marriage: "To individuals denied their right to marry, their injury is the same, regardless of whether the denial is based on their race or their sexual orientation."²⁰

A. *The Case Against Same-Sex Marriage*

Those who make the case against recognition of same-sex marriage argue on many fronts. The first argument such advocates make is most often that marriage is defined as a legal union between a man and a woman, and therefore, by definition, two men or two women cannot be so described.²¹ The highest court in Kentucky went so far as to cite three different dictionaries' definitions of marriage,²² and though Kentucky's marriage statutes did not specifically forbid legal recognition of same-sex married partners, the court concluded that the appellants were "prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined."²³ One commentator recently remarked that "under the law as it stands today, homosexual marriage is an

(1996).

19. For example, a poll conducted in Louisiana showed very little difference in the results when comparing black respondents with white respondents. Eighty-three percent of white people polled, and 86 percent of black people polled were opposed to legalizing same-sex marriage. *Respondents Overwhelmingly Oppose Issue*, BATON ROUGE ADVOC., Jan. 8, 1997, at 1C, available in 1997 WL 7230699.

20. Trosino, *supra* note 12, at 94 n.12.

21. See Kevin Aloysius Zambrowicz, Comment, "To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?, 43 CATH. U. L. REV. 907, 916-17 (1994) (noting that courts deciding against recognition of same-sex marriages have used this definition rationale); see also Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); Trosino, *supra* note 12, at 113.

22. See Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); see also Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

23. Jones, 501 S.W.2d at 589.

oxymoron. It simply does not exist, because the legal definition of marriage 'is that it is a union of a man and a woman.'²⁴

Closely analogous to the definition-of-marriage rationale is the "tradition" argument. Opponents of same-sex marriage commonly remind us that no state in the nation, and indeed no country in the world recognizes it.²⁵ U.S. Representative Bob Barr, cosponsor of the DOMA, was quoted after the bill passed the House as saying that:

America will not be the first country in the world that throws the concept of marriage out the window and for the very first time in the history of civilization says that homosexual marriages are as important as, and rise to the level of the legal and moral equivalency of, heterosexual marriage.²⁶

It is true that even Hungary, which decided in May, 1996 to recognize the validity of same-sex common law marriages,²⁷ has not gone that last step—issuing state-sanctioned marriage licenses—to put same-sex unions on the same plane as heterosexual marital relationships.

Additionally, references to custom were used by the court in *Jones v. Hallahan*: "Marriage was a custom long before the state commenced to issue licenses for that purpose. . . . In all cases, however, marriage has always been considered as the union of a man and a woman" ²⁸ Commentator Richard F. Duncan states that "[s]ame-sex marriage has been unanimously and consistently rejected by the laws of every state in this country. Even when a state's marriage statute does not expressly confine marriage to one man and one woman, the courts have consistently held that same-sex marriages are not permitted."²⁹

The next argument put forth by defenders of the current state of marriage is that marriage is integrally connected with procreation. Therefore, same-sex couples, being incapable of reproduction together, cannot marry. The

24. Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 589 (1996) (quoting HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 77 (2d ed. 1988)). *But cf.* Trosino, *supra* note 12, at 116 (stating that the definition rationale is circular because it "amounts to an intellectually unsatisfactory response: marriage is the union of a man and a woman because marriage is the union of a man and a woman").

25. *See, e.g., The Defense of Marriage Act; Hearing on S.1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 39 n.75 (1996) [hereinafter *Defense of Marriage Hearing*] (prepared statement of Lynn D. Wardle) (indicating that Denmark, Norway, Sweden, and Iceland have domestic partnerships, but that neither these countries nor any other has blessed such unions with the term "marriage").

26. Jerry Gray, *House Passes Bar to U.S. Sanction of Gay Marriage*, N.Y. TIMES, July 13, 1996, at 1.

27. *See* Deb Bridge, *Everyone Entitled to Equality: Homosexuality as Normal as Being Left-handed*, CALGARY HERALD, July 4, 1996, at A10, available in 1996 WL 5087529.

28. *Jones*, 501 S.W.2d at 589. The Court of Appeals of Kentucky affirmed the refusal of marriage licenses to two women, holding that the two were incapable of entering into marriage based on the definition of marriage as an opposite-sex union. *See id.*

29. Duncan, *supra* note 24, at 589.

Washington appellate court in *Singer v. Hara*³⁰ determined the denial of a marriage license to the two male appellants was not gender discrimination but was "based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."³¹ The court brushed off the argument that barren opposite-sex couples and those who chose not to procreate were still granted the right to marry, by noting that such are exceptional cases: "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."³² Indeed, the U.S. Supreme Court has invoked the traditional procreative function of the marital relationship in decisions that involve the right to marry.³³

In addition, judges and commentators have used religious mores and biblical passages, as well as general public morality, to deny judicial requests for same-sex marriage and otherwise argue against the concept.³⁴ Without a doubt, the U.S. Supreme Court's ruling in *Bowers v. Hardwick*³⁵ has served as support for opponents of same-sex marriage.³⁶ The Supreme Court in *Bowers* signified that "at least in certain instances, morality can serve as a rational basis for legislation."³⁷ States which outlaw all sodomy, or homosexual sodomy in particular, between consenting adults obviously have a defined public policy that opposes the consummation of such marriages:

"Criminalizing intimate contact between same-sex couples is not only a prohibition of the law but also the strongest possible expression that an act

30. 522 P.2d 1187 (Wash. Ct. App. 1974).

31. *Id.* at 1195.

32. *Id.*

33. See *Zambrowicz*, *supra* note 21, at 915-16 (indicating that *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Maynard v. Hill*, 125 U.S. 190 (1888), all make reference to procreation and child-rearing in describing marriage); see also *Duncan*, *supra* note 24, at 595 ("The institution of marriage is designed to promote and encourage procreation. . . . [C]onventional marriage is of critical importance to society because, as Chief Justice Warren observed in *Loving v. Virginia*, it is 'fundamental to our very existence and survival.'") (case name not italicized in original) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). *But cf.* *Deitrich*, *supra* note 1, at 136 ("If the only valid purpose of marriage was procreation, all the decisions concerning birth control were wrongly decided.")

34. *But see* Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461, 488 (1995) (contending that "[i]t is obvious that the majority of those who quote *Leviticus* are shamefully selective," for the passages surrounding the remonstrance of homosexual acts include "slaughtering animals without making a sacrifice to God; deception . . . ; making a worker wait overnight for earned wages; cutting one's beard; tattoos") (citations omitted). See generally *D'Amato*, *supra* note 17, at 926 (discussing the court's use of morality to bolster its decision in *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992)); *Zambrowicz*, *supra* note 21, at 912 n.33.

35. 478 U.S. 186 (1986).

36. See *Jax*, *supra* note 34, at 464.

37. *D'Amato*, *supra* note 17, at 926 n.96.

violates the public policy of a state, and a court may very well use the existence of a state sodomy law as a basis for ruling that same-sex marriages violate a strong public policy of the state."³⁸

A few more claims have been used by those who speak out against same-sex marriage. These reasons for maintaining the status quo include references to homosexuality being unnatural,³⁹ worries that state endorsement of same-sex marriage will legitimize homosexual orientation and cause it to spread,⁴⁰ concerns that same-sex marriage partners raising children will confuse their children and subject them to harassment from others,⁴¹ and belief that a heterosexual married relationship is the best and most beneficial setting in which to raise children.⁴² Because no court except the Hawaii Supreme Court has subjected same-sex marriage bans to heightened scrutiny, the litany of reasons above has served as a repertoire of rational governmental interests. Moreover, homosexuals have not yet been found to be a suspect class for the purposes of U.S. constitutional law,⁴³ and courts have avoided extending the fundamental

38. *Id.* at 926 (quoting Interview by D'Amato of University of Illinois College of Law Professor Harry Krause in Champaign, Ill. (Oct. 13, 1994)).

39. See Duncan, *supra* note 24, at 595 ("Nature has designed the human body to allow heterosexual couples to unite biologically in a way it has denied homosexuals . . ."); Trosino, *supra* note 12, at 108 (commenting that opponents have used gay couples' inability to reproduce children together in the manner of most heterosexual couples to prove their relationships are against nature, and discounting this argument by analogizing it to "the white supremacist's argument against interracial marriage"). "Although the white supremacist feared the loss of white preeminence, the heterosexual supremacist fears the loss of heterosexual dominance." *Id.*

40. See Trosino, *supra* note 12, at 110 (noting that this argument is faulty because it rests on the assumption that homosexuality spreads through socialization, when evidence indicates that sexual orientation is not chosen); see also Jax, *supra* note 34, at 470-71 (commenting that granting homosexuals the right to marry will not increase homosexuality, nor will denial cause it to go away). "Lifting the ban on same-sex marriage cannot enable one to change what is biologically fated. Furthermore, history affirms that homosexuality has existed in humankind regardless of its acceptance among the power-majority." *Id.* Still, scientific evidence has not been conclusive as to what causes a person's sexual orientation, and many continue to believe it is not biological or genetic and can even be "cured," and that the law serves a vital purpose in educating citizens about the correct sexual norms and behavior. See Duncan, *supra* note 24, at 599.

41. See Trosino, *supra* note 12, at 110-11; see also D'Amato, *supra* note 17, at 934 n.141 (indicating that studies show that children of gay parents are likely to suffer from unkind words from their peers during early adolescence).

42. James Trosino notes the persistent myth that homosexuals are pedophiles, and remarks that children are actually less likely to be molested by a homosexual adult than by a heterosexual adult. Moreover, he indicates that studies show children of gay parents are no more likely than children of heterosexual parents to become homosexual. See Trosino, *supra* note 12, at 110-11.

43. See Zambrowicz, *supra* note 21, at 931 n.154 (noting that race, allegiance, and national origin have all been defined as suspect classes).

right to marry by defining marriage strictly as a union between a man and a woman.⁴⁴

B. The Case for Same-Sex Marriage

Proponents have argued everything from constitutional rights to simple justice in support of the recognition of same-sex marriage. Those who partake in state-sanctioned marriage must take on new responsibilities associated with marriage. But people who marry are rewarded with a host of benefits,⁴⁵ as well as peace of mind that the solemn commitment ideally brings. Proponents of same-sex marriage claim that persons desiring to marry another of the same sex have been denied their basic constitutional rights and have been deprived of justice.

1. Marriage Is a Fundamental Right Guaranteed by the Due Process Clause

One justification for extending the right to marry to same-sex couples is that the Constitution compels it. The U.S. Supreme Court has repeatedly held that individuals have a fundamental right to make decisions for themselves when it comes to physical intimacy, child-rearing, and choosing a spouse.⁴⁶ Even prisoners, arguably the least worthy of having their individual rights protected, have a fundamental right to get married.⁴⁷ States may restrict the right to marry only if they have compelling reasons for doing so. The interests of public health,

44. *See id.* at 932. Indeed, this commentator suggests that advocates of same-sex marriage expend no energy on arguing that homosexuals as a class are being denied equal protection, because it is not likely they will be found a suspect class (they have recently acquired some political power, they are not necessarily visibly identifiable like members of a particular race or alienage, and there is a question that their homosexuality is an immutable characteristic). *See id.* at 940-43. He believes that other avenues, such as sex discrimination arguments, are more likely to succeed. *See id.* at 936; *cf. Jax, supra* note 34, at 474-76 (arguing that homosexuality is an immutable trait, highlighting evidence that homosexuality is biological or genetic, and citing to a psychologist who noted that "treatments" such as "castration in gays, hysterectomies in lesbians, lobotomies, and shock therapy could not change homosexuals into heterosexuals").

45. *See* Deitrich, *supra* note 1, at 122 (listing favorable tax treatment, intestate succession, employer health coverage, social security entitlements, spousal communication rights, and hospital and jail visitation rights as state-granted benefits of marriage).

46. *See* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Eisestadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

47. *See* *Turner v. Safley*, 482 U.S. 78, 97-100 (1987) (holding that prohibition of marriages of inmates to other inmates or civilians except in so-called "compelling" circumstances (generally, pregnancy) was invalid on its face because the regulation was not reasonably related to the asserted state interests, and reasoning that while the state could reasonably restrict the time and place of inmates' marriages, this statute amounted to an almost complete ban).

the protection of children, and the prevention of incest, bigamy, and polygamy have been found to be sufficiently compelling to justify marriage restrictions.⁴⁸

a. What Are Fundamental Rights?

In *Bowers v. Hardwick*,⁴⁹ the Court held that homosexual sodomy, because it is not traditionally ingrained in American culture, was not a fundamental right with which the government may not interfere: the majority described “fundamental rights” as “those liberties that are ‘deeply rooted in this Nation’s history and tradition.’”⁵⁰ The Court conveniently did not factor into the analysis its decisions in which rights to abortion and the use of contraception were held fundamental, despite the fact that governments had traditionally proscribed these.⁵¹ Even more telling is that interracial marriage was also traditionally proscribed,⁵² yet the Court brought it under the umbrella of substantive due process.⁵³

It is incorrect to define fundamental rights solely in connection with a conception of this country’s, or Anglo-American, history and tradition. In all truth, recognition of fundamental rights protected by the Fourteenth Amendment has been the result of balancing personal liberty against the interests of the public as a whole. As Justice O’Connor admitted in *Planned Parenthood v. Casey*,⁵⁴ “the inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”⁵⁵ Justice

48. See Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1048 (noting that restricting marriage because a party has venereal disease is a public health concern, that age restrictions are in the best interests of children, and that consanguinity restrictions prevent incest); see also *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (rejecting Reynolds’s claim that outlawing polygamy violated his rights to free exercise of the Mormon faith and finding that polygamy contravened the state interest in monogamy, and “fetter[ed] the people in stationary despotism”).

49. 478 U.S. 186 (1986).

50. *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

51. See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216 (1987) (“Deviating sharply from the Court’s own precedents, *Bowers* necessarily works to undercut the theoretical underpinnings of the modern Court’s substantive due process doctrine.”).

52. See *supra* note 12 and accompanying text.

53. Professor Barbara J. Cox states that “what has been protected under United States Supreme Court due process and right-to-privacy precedent is not any particular practice or act, but instead the decision to take certain actions.” Cox, *supra* note 48, at 1057 (emphasis added).

54. 505 U.S. 833 (1992).

55. *Id.* at 849.

O'Connor continued, saying "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."⁵⁶

Accordingly, commentator Christine Jax asserts that not only has the Supreme Court recognized a fundamental right to marry, but its other relevant fundamental rights cases have centered around the individual's right of decisionmaking. Pairing these aspects leads to a right to marry *the person of one's choosing*.⁵⁷ This analysis helps attack the argument that homosexuals have a fundamental right to marry, as long as their chosen spouse is of the opposite sex. The same argument was employed in defending antimiscegenation laws—individuals were free to marry, the State of Virginia argued, as long as their chosen spouse was of the same race. As the Supreme Court recognized in *Loving*, such restrictions impermissibly impede the fundamental right to marry the person of one's choosing—ideally, the person the individual loves the most. Jax concludes that "this fundamental right of the individual to marry is one that should remain with the individual regardless of the sex of the individual whom they wish to marry."⁵⁸

b. Strict Scrutiny Applies Because Marriage Is a Fundamental Right

Proponents argue that the right to marry the person of one's choosing is a fundamental right belonging to the individual; therefore, governments must have a compelling reason to restrict the right.⁵⁹ Additionally, if the reason for the restriction is compelling, the law must actually serve the state-claimed purpose.⁶⁰

56. *Id.* at 850.

57. See Jax, *supra* note 34, at 466-67.

58. *Id.* at 467; see also Cox, *supra* note 48, at 1056-57:

[T]he Hawaii Supreme Court made the same error that the United States Supreme Court made in *Bowers v. Hardwick*. Just as the *Bowers* Court erred by focusing on the existence of a fundamental right to homosexual sodomy, instead of recognizing a fundamental right to privacy in one's choice of sexual partners, so too did the *Baehr* court err by focusing on the existence of a fundamental right to same-sex marriage, instead of applying the already recognized fundamental right to marry to same-sex couples.

59. *But see* *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.").

60. If a right is fundamental, a law restricting that right will be subject to strict scrutiny. A law that restricts a fundamental right will be presumed unconstitutional unless the state proves it has a compelling reason to restrict it, and that the law is narrowly tailored to achieve the governmental purpose. See *Clark v. Jeter*, 486 U.S. 456 (1988) (holding that Pennsylvania's differing statute of limitations for paternity suits—6 years for illegitimate births, unlimited time period for legitimate births—violated the Equal Protection Clause); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding that a Virginia poll tax payment used as a precondition to voting violated the Equal Protection Clause because it restricted the right to vote based on affluence of the voter); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (finding

Proponents either argue that the asserted governmental purposes are not compelling, or, if they are compelling, that they are not furthered by the restriction. Reasons for the restriction include: prejudice towards homosexuals, promotion of procreation, public morality, and interest in the upbringing of children.⁶¹

i. Prejudice Towards Homosexuals

First, proponents of same-sex marriage allege that prejudice is an impermissible governmental purpose.⁶² This argument gained a strong foothold after the recent Supreme Court decision in *Romer v. Evans*.⁶³ The Supreme Court in *Romer* struck down an amendment to the Colorado Constitution which prohibited any legislative or judicial action aimed at preventing discrimination against gays and lesbians. The Court held that prejudice towards a particular group is an impermissible justification for laws.⁶⁴ It is true that *Romer v. Evans* involved an equal protection claim, not the deprivation of fundamental rights. Still, the basic principle of governmental purpose is the same and is instructive in the area of substantive due process. The government in *Romer* only needed to prove its purpose was legitimate, and the Supreme Court found that animus towards a group of people did not cross that threshold. Contrastingly, if the government had interfered with a fundamental right, its purpose would have had to have been *compelling*. If animus is not legitimate, it certainly cannot be compelling.

ii. Procreation

Next, with marriage defined as a fundamental right to marry the person of one's choosing, proponents argue that the promotion of procreation does not

Oklahoma law that provided for sterilization of criminals violated the Equal Protection Clause because it denied the fundamental right to procreation and it applied to some criminals and not others).

61. See *supra* Part II.A.

62. See Trosino, *supra* note 12, at 108 (analogizing the prejudice behind miscegenation laws to the prejudice which drives restrictions on gay marriage). "Although the white supremacist feared the loss of white preeminence, the heterosexual supremacist fears the loss of heterosexual dominance." *Id.*

63. 116 S. Ct. 1620 (1996).

64. See William Eskridge, *Credit is Due: Same-Sex Marriage and the U.S. Constitution's 'Full Faith and Credit' Clause*, NEW REPUBLIC, June 17, 1996, at 11, 11 (asserting that the Supreme Court in *Romer v. Evans* held that animus towards homosexuals "is not a legitimate state interest, much less an important public policy"); see also Deitrich, *supra* note 1, at 140 n.159 (maintaining that the Supreme Court has said that laws which give effect to private bias are invalid, see *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

qualify as compelling either.⁶⁵ Even if the governmental interest of procreation were found to be compelling, proponents of same-sex marriage argue that the restriction neither furthers nor is substantially related to that state interest. For example, they discount the procreation reason for the restriction by noting that some gay couples are currently either having or adopting children, and some heterosexual married couples live in childless marriages.⁶⁶

iii. The Upbringing of Children

Although a state interest in the upbringing of children *is* compelling, proponents argue that outlawing same-sex marriage does not ensure that children will be safeguarded from harm. First, proponents point to trouble (divorce, violence, and abuse) within the “traditional” American family to attack state arguments preferring heterosexual families for the raising of children. Indeed some argue that the traditional family has never existed, and that it is possible that homosexual parents would be better parents.⁶⁷ In response to their opponents’ worries that homosexuals raising children will cause homosexuality to spread, they note studies that show that incidence of homosexuality in children of gay parents is the same as when children have heterosexual parents.⁶⁸

65. One commentator contended that a state interest in procreation is no longer compelling: “The idea that the survival of the race is a compelling state interest that is in jeopardy is simply ludicrous. This country is in no danger of becoming underpopulated.” Jax, *supra* note 34, at 468.

66. See D’Amato, *supra* note 17, at 932-33 (“Same-sex couples are not, by definition, incapable of having children or raising a family. Many gays and lesbians have children from prior relationships. . . . In addition, many homosexuals have children by artificial insemination and surrogacy as well as by adoption.”).

67. Steven Homer comments in his note on the state of traditional marriage and family life, noting the prevalence of divorce, remarriage, and single-parent households: “[T]he actual experience of most American families differs considerably from the rhetoric associated with the family in many judicial opinions.” Homer, *supra* note 6, at 521; see also D’Amato, *supra* note 17, at 940 (alleging that “there is no ‘typical’ American family”). “[The majority of] families today comprise nontraditional arrangements consisting of single parent units resulting from divorce and unmarried motherhood, step-families, grandparent-grandchild units, senior citizen group homes, pseudo-parent-child units, and unmarried heterosexual, lesbian and gay family units.” *Id.*; see also Herbert A. Sample, *House Opposes Same-Sex Marriage*, SACRAMENTO BEE, July 13, 1996, at A1 (quoting Rep. Steve Gunderson, openly gay member of Congress from Wisconsin, responding to proponents of the DOMA: “marriage might be under attack from alcohol abuse, spousal abuse and, I might suggest, even Sunday afternoon football”).

68. James Trosino notes that studies show children of gay parents are no more likely than children of heterosexual parents to become homosexual. Additionally, he asserts that the notion that homosexuals are pedophiles is a persistent myth and observes that children are actually less likely to be molested by a homosexual adult than by a heterosexual adult. See Trosino, *supra* note 12, at 110-11.

iv. Morality

Like the government's interest in the upbringing of children, according to the Supreme Court, states have a compelling interest in making restrictions based on morality.⁶⁹ The Supreme Court approved an asserted governmental interest in morality in *Bowers*. Moreover, it appears at first glance that laws against same-sex marriage further that governmental end. However, what the Court in *Bowers* neglected to recognize was that morality is defined differently by different people. Whose morals was the Court protecting? The Supreme Court has held after *Bowers* that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."⁷⁰ Proponents of same-sex marriage can argue that a governmental purpose of public morality is not furthered by the restriction because it is not clear what public morality is. Nevertheless, the fact that the judiciary is likely to grant much deference to states in this area, considering that regulation of marriage has traditionally been accorded to the states,⁷¹ leaves the decision of this issue under substantive due process uncertain.

2. Equal Protection Guarantees Same-Sex Couples the Right to Marry

The argument that same-sex marriage bans violate the equal protection rights of same-sex couples who have been refused marriage certificates is the most successful argument to date in the battle for same-sex marriage recognition.⁷² Because the restriction disallows marriage to persons who choose a partner of the same sex, these persons are treated dissimilarly to applicants who choose

69. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

70. *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

71. For example, the Indiana Supreme Court expressed such deference to legislative regulation of marriage:

There can be no doubt that the Legislature may prescribe who may marry; the age at which they may marry; the procedure and form essential to constitute marriage; the duties and obligations created by marriage. . . . Nor can there be any doubt that the Legislature has full power to prescribe reasonable regulations relating to marriage and to provide punishment for those who solemnize or contract marriage contrary to statutory command. The regulation of marriage and divorce has been fully recognized as a matter within the exclusive province of the Legislatures of the states.

Sweigart v. State, 12 N.E.2d 134, 138 (Ind. 1938) (citation omitted).

72. This argument succeeded in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The Hawaii Supreme Court did not, however, find the state's discrimination against homosexuals impermissible. On the contrary, the court held that homosexuals are not a suspect class; therefore, the state need only have a rational basis for discriminating against them. Instead, the court found that laws which deny same-sex couples the right to marry amounted to impermissible gender discrimination. See *infra* text accompanying notes 73, 77.

partners of the opposite sex—gender-based discrimination. In *Baehr v. Lewin*, the Hawaii Supreme Court held that the Hawaii Constitution explicitly prohibits discrimination based on gender, and that laws that discriminate on that basis are subject to strict scrutiny.⁷³ Hawaii's approach to gender discrimination differs from the U.S. Supreme Court's treatment of gender discrimination, in that Hawaii affords more protection based on gender. The U.S. Supreme Court requires that governments have an important, instead of compelling, reason for discriminating on the basis of gender, and that laws substantially further the governmental interest (so-called "intermediate scrutiny").⁷⁴

Laws rarely survive the application of strict scrutiny. When a state passes laws that discriminate against members of a suspect class, the laws are presumed unconstitutional. Because this presumption is so strong, most are predicting that Hawaii will soon recognize same-sex marriages.⁷⁵ Perhaps such a holding is not inescapable in states which do not apply such rigorous scrutiny to laws that discriminate on the basis of gender. Even if states other than Hawaii apply traditional intermediate scrutiny to gender-based classifications, proponents are ready to argue that asserted governmental interests are not important enough and that the restriction is not substantially related to such interests.⁷⁶

The plaintiffs in *Baehr* argued that they were discriminated against on the basis of gender. The plaintiffs insisted that they were refused marriage licenses from the state because of their gender;⁷⁷ that is, Ninia Baehr would have been allowed to marry Genora Dancel if either one of them were a man instead of a woman. Therefore, a woman is accorded different treatment than a man, in that a man can marry a woman, but a woman cannot. A man is treated differently from a woman, as well, in that the woman can marry a man, but a man cannot.

Courts facing equal protection claims before *Baehr* have simply held that male and female applicants are treated the same, because both may be prohibited from marrying a partner of the same sex.⁷⁸ Hawaii was the first to give credence to the fact that the Supreme Court in *Loving v. Virginia* rejected an analogous argument by the State of Virginia.⁷⁹ Virginia argued that all persons regardless of race were equally prohibited from marrying a person of another race, but the Supreme Court recognized that the underlying reason was promotion of white supremacy

73. See *Baehr*, 852 P.2d at 67.

74. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

75. See, e.g., Eskridge, *supra* note 64. Indeed the flood of legislation regarding same-sex marriage recognition hitting many state legislatures is evidence that people are taking Hawaii's treatment of this case seriously.

76. See, e.g., Zambrowicz, *supra* note 21, at 942-49.

77. See *Baehr*, 852 P.2d 44.

78. See, e.g., *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

79. See *Baehr*, 852 P.2d at 67-68.

and would not allow it.⁸⁰ Commentators on the issue of same-sex marriage contend that the reason underlying the same-sex marriage ban is “heterosexism” and is just as invalid as the racism that prompted bans on interracial marriage.⁸¹ The bottom line, which the Hawaii Supreme Court understood, is that miscegenation laws violated the Lovings’ rights to equal protection of the laws, because a white person was permitted to marry another white person, but a black person was not.⁸² The same is true for a man who wishes to marry a man. A person of the opposite gender has that right, but a man does not.⁸³

The argument that the equal protection rights of homosexuals *as a class* are violated by laws restricting marriage to opposite-sex couples is distinct from the conception of such laws as discriminatory on the basis of gender.⁸⁴ Based on *Bowers*, the progeny of gays-in-the-military cases,⁸⁵ and the cases upholding bans on same-sex marriage, however, it is safe to conclude that courts have shied away

80. See *Loving v. Virginia*, 388 U.S. 1. (1967). “[T]he fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Id.* at 9. “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* at 11.

81. See Trosino, *supra* note 12, at 108.

82. See *Loving*, 388 U.S. 1.

83. See Cox, *supra* note 48, at 1051:

Just as the U.S. Supreme Court rejected the notion that “equal application” of the anti-miscegenation statute to both whites and blacks immunized the statute from running afoul of the Equal Protection Clause, the *Baehr* plurality simply substituted “sex” for “race” to reject [dissenting Justice] Heen’s argument that, because the statutes denying same-sex marriage applied to both men and women, they were not based on sex discrimination.

84. The gender discrimination argument assumes that sexual orientation is irrelevant—a heterosexual person could conceivably choose to marry a person of the same gender.

85. See *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (affirming, upon rehearing en banc, district court’s holding that policy prohibiting persons with homosexual orientation from serving in Navy did not violate plaintiff’s equal protection rights); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (holding that policy of conducting expanded background investigation for gay and lesbian applicants for top secret security clearance did not unconstitutionally restrict equal protection or freedom of association rights); *Bcn-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (holding disqualification of U.S. Army Reserve officer as not violative of plaintiff’s rights of free speech or equal protection); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (upholding plaintiffs’ dismissal for engaging in homosexual conduct). *But see Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996) (refusing to vacate district court’s order requiring the reinstatement of National Guard colonel who admitted homosexual orientation in top secret clearance interview); *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469 (9th Cir. 1994) (holding that discharging Navy serviceman who made statement that he was gay on national television program violated serviceman’s constitutional rights to equal protection); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991) (reversing district court’s dismissal of army officer’s complaint, and finding officer’s complaint stated a claim for violation of equal protection rights).

from recognizing homosexuals as a suspect class. Indeed, the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*⁸⁶ has been interpreted as an example of the Court's reluctance to recognize new suspect classes. Consequently, it is unlikely that the current Court would expand equal protection to give homosexuals greater protection, despite the fact that homosexuals as a group have historically suffered from widespread discrimination and prejudice.⁸⁷ Some advocates recommend focusing on alternative arguments, because "[d]espite its plausibility . . . the argument that homosexuals are entitled to special protection from discrimination is unlikely to be accepted by the Court that decided *Bowers*, and in any case perhaps we can build more narrowly on existing law."⁸⁸

Finally, some recent developments in constitutional law present another avenue for advocates of same-sex marriage to explore for possible arguments. While the Supreme Court has not recognized homosexuals as a suspect class for purposes of equal protection analysis, it has nonetheless provided some protection for homosexuals in a recent case. In *Romer v. Evans*,⁸⁹ the Court struck down a state constitutional amendment as violative of the plaintiffs' equal protection rights. The amendment would have prohibited any Colorado governmental unit from giving homosexuals special rights or protections.⁹⁰ The Court found the law was motivated by animus for a particular class of people, and held this purpose, far from being compelling, was illegitimate and improper.⁹¹ Although a court will

86. 473 U.S. 432 (1985) (using the rational-basis level of review to overturn a zoning ordinance that treated mentally retarded individuals dissimilarly than others); see Linda E. Carter, *Intermediate Scrutiny Under Fire: Will Plyler Survive State Legislation to Exclude Undocumented Children from School?*, 31 U.S.F. L. REV. 345, 379 (1997) (observing that as a result of *Cleburne*, "the Court does not appear inclined to extend liberally what is identified as intermediate scrutiny to new categories"); see also Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 726 (1996) ("The majority opinion of Justice White [in *Cleburne*] firmly rejected applying intermediate scrutiny, essentially fearing it would produce a slippery slope for other cases brought by permanently disabled persons.").

87. See Sunstein, *supra* note 10, at 7-9.

88. *Id.* at 9; see also Zambrowicz, *supra* note 21, at 932. But see Jax, *supra* note 34, at 473-78 (arguing that homosexuals should be recognized as a suspect class).

89. 116 S. Ct. 1620 (1996).

90. See *id.* at 1623. The amendment repealed existing ordinances which sought to prevent discrimination on the basis of sexual orientation, and prohibited any executive, legislative, or judicial action intended to protect homosexuals. See *id.*

91. See *id.* at 1627. The Court held:

Amendment 2 fails, indeed defies, even [the rational basis] inquiry. First, 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, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects

Id.

typically accept any rational basis for a challenged law that does not deprive a suspect class of equal protection, affording the legislature considerable deference, *Romer* is one of a handful of cases in which the Supreme Court has applied rational basis review,⁹² yet struck down the law in question. Because of this, some have termed the Court's scrutiny in cases such as *Romer* as "heightened" or "active" rational basis review.⁹³

Regardless of the debate over whether the Court has added a fourth tier to its equal protection scrutiny or is legitimately invalidating laws that have no rational basis, it is possible that laws which prohibit marriages between homosexuals would likewise not survive rational basis review. This would avoid having to prove that homosexuals are a suspect class. The more tenuous gender discrimination argument would not be necessary either. Instead, such laws would fail because the legislature was only motivated by animus for a particular group of people: "*Romer* thus embodies a ban on laws motivated by a desire to create second-class citizenship. . . . This was the forbidden motivation that the Court described as 'animus.'"⁹⁴

Certainly, *Romer* seems to strike a blow at *Bowers*—the punishment of homosexual sodomy (which is what the Court confined its decision to in *Bowers*, leaving the validity of the restriction on heterosexual sodomy unconsidered) is undoubtedly motivated by animus towards a class of people. Yet the Court in *Romer* failed even to make mention of the case, and *Bowers* continues to stand as good law despite the inconsistencies between it and *Romer*: "*Hardwick* seemed to say that it is legitimate for the state to express disapproval of homosexual conduct, indeed that it is legitimate for the state to express that disapproval via the criminal law."⁹⁵ Some argue that a challenge to a statute criminalizing homosexual sodomy would not likely survive today, in light of *Romer*.⁹⁶ While *Bowers* involved a fundamental-rights, substantive-due-process challenge, *Romer* involved an equal protection challenge—a plaintiff punished for violating a homosexual sodomy statute can claim his equal protection rights were violated. Such a statute would treat homosexuals differently than heterosexuals, and a purpose other than animus towards homosexuals would have to be given for the law to be upheld.⁹⁷

92. Rational basis review is used by courts when the challenged restriction discriminates against a nonsuspect class or does not interfere with fundamental rights. The law will be upheld as long as "it bears a rational relation to some legitimate end." *Id.*

93. See Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick-Romer v. Evans*, 32 HARV. C.R.-C.L. L. REV. 225, 239-40 (1997).

94. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996).

95. *Id.* at 64-65.

96. See Joslin, *supra* note 93, at 244.

97. See *id.* at 245.

3. Evolution

Despite the remonstrance of Representative Barr that the United States must not lead the world in discarding the traditional conception of marriage,⁹⁸ five nations across the Atlantic have provided legal recognition and distributed benefits to their same-sex couples.⁹⁹ That other nations, and even states and cities within our nation,¹⁰⁰ are passing domestic partnership legislation, that gay rights bills have been passed,¹⁰¹ and that some corporations have begun giving employee benefits to the same-sex partners of their employees,¹⁰² all indicate that society is edging ever closer to acceptance of gays and lesbians. It is in this evolution of morality and law that a strong case for same-sex marriage recognition can be made.

There is no question that constitutional law has embodied an evolutionary spirit in the last half of this century. The majority of high court justices have understood that times, values, and norms change, and have frequently fashioned their jurisprudence accordingly. Whether or not this amounts to a travesty depends upon one's view of the proper extent of the judicial role. Regardless, the Supreme Court and the high courts of the several states have been drawing lines between maintaining tradition and adapting the law to new scenarios. A prime example is the recent decision by the Kentucky Supreme Court in *Commonwealth v. Wasson*.¹⁰³ Nineteen years earlier, the same court denied the claims of two women wishing to marry each other, because they did not fit the definition of marriage as it was traditionally defined.¹⁰⁴ In *Wasson*, the court determined that a law making same-sex sodomy a crime was unconstitutional in that it violated

98. See Gray, *supra* note 26, at 1.

99. See Uncas Fernandez, *Lawmaker Confident Leap Toward Same-Sex Marriage in Brazil Won't Be Last*, AGENCE FRANCE-PRESSE, Dec. 12, 1996, available in 1996 WL 12198437 (listing Denmark, Hungary, Iceland, Norway, and Sweden as nations where domestic partnership legislation is in effect, and discussing the pending bill in Brazil as likely to succeed). The Netherlands recently adopted a matrimonial registry law for homosexual partnerships as well. See Joanne von Alroth, *Gay Couples' Registry Backed in Oak Park*, CHI. TRIB., July 26, 1997, at 3, available in 1997 WL 3575583.

100. See, e.g., Julie Forster, *Colorado: Denver, IBM Extend Employee Benefits to Gay Workers*, WEST'S LEGAL NEWS, Sept. 23, 1996, at 9956, available in 1996 WL 533147 (reporting that three states provide benefits to gay and lesbian domestic partners and over 30 cities across the U.S. do so as well).

101. See Riccucci & Gossett, *supra* note 17.

102. See Forster, *supra* note 100; see also Bettina Boxall, *A New Era Set to Begin for Gay Couples, Domestic Partners*, L.A. TIMES, July 7, 1997, at A3, available in 1997 WL 2226887 (reporting that nearly a quarter of companies with more than 5000 employees offer health benefits to their employees' nontraditional partners, whether homosexual or not, including American Express, Apple Computer, Bank of America, IBM, and the State of New York).

103. 842 S.W.2d 487 (Ky. 1992).

104. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

equal protection and the right of privacy.¹⁰⁵ Jonathan Deitrich, in his discussion of this case, commented:

Under the due process or privacy prong, the *Wasson* court noted that morality is an *evolving concept*. After chastising the United States Supreme Court for its “misdirected application of the theory of original intent” in *Bowers*, the court pointed to *Loving*, where “a contemporary, enlightened interpretation of the liberty interest” struck down the anti-miscegenation statute, despite the fact that it was “highly unlikely that protecting the rights of persons of different races to [marry] was one of the considerations behind the Fourteenth Amendment.” As evidence of the “moral evolution” in the present context, the court noted that in 1961 all fifty states outlawed sodomy, whereas in 1992 barely half continued to do so.¹⁰⁶

Another pertinent example, highlighted by commentator Anthony D. D’Amato, is found in former assumptions about women and marriage.¹⁰⁷ Former tradition, once embodied in the law of the states, dictated that “a married woman had no independent legal status of her own.”¹⁰⁸ Through a process of legislative and judicial evolution, such concepts have been discarded as law and morality evolved.¹⁰⁹

Across the country, and indeed in other nations, a new tolerance and acceptance of gay and lesbian individuals is growing, albeit slowly.¹¹⁰ Just as

105. See *Wasson*, 842 S.W.2d 487; see also Deitrich, *supra* note 1, at 137 (“[The court’s] opinion thoroughly punctured the ‘majoritarian morality’ justification.”).

106. Deitrich, *supra* note 1, at 138 (emphasis added) (quoting *Wasson*, 842 S.W.2d at 497).

107. See D’Amato, *supra* note 17, at 934.

108. *Id.*

109. Cf. Sunstein, *supra* note 10, at 20-21. Sunstein has theorized, though, that the opposition to same-sex relations stems from traditional formulations of the gender caste system:

Perhaps same-sex marriages are banned because of what they do—because of how they unsettle—gender categories. Perhaps same-sex marriages are banned because they complicate traditional gender thinking, showing that the division of human beings into two simple kinds is part of sex-role stereotyping, however true it is that women and men are “different.”

Id.

110. See Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 569-70 (1994):

Greater visibility of lesbians and gay men, coupled with the spread of domestic partnership ordinances throughout the country, which set the stage for granting certain rights and benefits usually associated with marriage, suggest that the majority of individuals in society no longer feel abhorrence toward homosexuals and, in fact, even believe that lesbians and gay men deserve some of the same partnership protections that married couples enjoy.

But see Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 405-06 n.43 (1994) (citing a 1993 poll which demonstrated that while 65% of the respondents agreed homosexuals should have equal rights, as many as 73% said they opposed same-sex marriages and 70%

traditions about women and men in marriage have changed, and traditions against interracial marriage, once shrouded in morality and law, have been considered and discarded, it is rational to reconsider the requests for same-sex marriage in light of evolving concepts of equality due to homosexuals.¹¹¹ "Recognizing out-of-state, same-sex marriages would be a first step toward shedding another archaic policy—one that treats homosexuals as second-class citizens by denying them the right to marry."¹¹²

Another example of legal evolution is evident in cases in which courts have recognized same-sex partners as families. In *Braschi v. Stahl Associates*,¹¹³ the court held that for purposes of a New York rent control statute, which prohibited landlords from evicting family members of deceased tenants, the statute applied to a same-sex partner of a deceased tenant.¹¹⁴ The court wrestled with the concept of change and concluded: "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."¹¹⁵

In another case, an Ohio appeals court held that the state's Domestic Violence Act¹¹⁶ protected a same-sex partner, though the language of the statute contemplated "person living as a spouse."¹¹⁷ In light of such cases, one commentator noted: "If same-sex couples have the necessary characteristics to qualify as a family for certain situations, logic dictates that same-sex couples have the right to consummate that familial relationship with marriage."¹¹⁸ Finally, in Florida, a state which bans both homosexual marriage and adoption, an appeals court recently enforced a cohabitation agreement formed between two homosexual adults.¹¹⁹

opposed adoption rights for homosexuals); Laura Vozzella, *Home-Grown Crime Scariers Than Serial Killers*, FORT WORTH STAR-TELEGRAM, Aug. 6, 1997, at 1, available in 1997 WL 11897630 (reporting that antigay violence and crime is on the rise, and that incidents seem to increase in frequency after news reports about gay issues, such as the gay marriage litigation).

111. See D'Amato, *supra* note 17, at 935-36.

112. *Id.* at 936.

113. 543 N.E.2d 49 (N.Y. 1989).

114. See *id.*

115. *Id.* at 53.

116. OHIO REV. CODE ANN. § 2919.25 (Anderson 1996).

117. *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (quoting OHIO REV. CODE ANN. § 2919.25(E)(1)(a) (Page Supp. 1990); see also D'Amato, *supra* note 17, at 938 (discussing *Hadinger*).

118. *Zambrowicz*, *supra* note 21, at 928; see also D'Amato, *supra* note 17, at 937. Other judicial actions have included application of palimony doctrine to cases involving same-sex couples and awards of marital incidents (benefits from Workers' Compensation) to a same-sex lover of a deceased worker. See *id.* ("The [California Compensation] Board reasoned that to hold otherwise would result in an inequitable distribution of property based on nothing more than prejudice against homosexuals.")

119. See *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

To summarize, an evolving jurisprudence is evidence that the time has come, or will come soon, to recognize same-sex marriage.¹²⁰ The Hawaii Supreme Court acknowledged this when it concluded that the ban on same-sex marriage amounted to gender-based discrimination.¹²¹ It is pertinent to consider that “*Baehr* is the first case in which a court imagines that same-sex couples *could* marry.”¹²²

III. THE FULL FAITH AND CREDIT CLAUSE, CONFLICT OF LAWS, AND THE DEFENSE OF MARRIAGE ACT

With the recognition of same-sex marriage by at least one state looming ever closer, the question on everyone’s mind is, What effect will a decision in favor of same-sex marriages in Hawaii have on the rest of the states? The answer is not altogether clear, but some are very concerned about it. Since the 1993 decision by the Hawaii Supreme Court,¹²³ several state legislatures and the U.S. Congress have considered the matter. Warned by advocates for same-sex marriage that the Full Faith and Credit Clause¹²⁴ will require every state in the union to recognize marriages solemnized in Hawaii, legislatures opposing such a result have begun passing legislation refusing to recognize such marriages.¹²⁵ Congress recently

120. *But see* Sunstein, *supra* note 10, at 25-27 (arguing for judicial restraint in this area in order to avoid a mass revolt by the people and to avoid damage to the public’s confidence in the judiciary).

121. *See Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993). “[W]e do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.” *Id.* at 63.

122. Homer, *supra* note 6, at 509 (emphasis added).

123. *Baehr*, 852 P.2d 44.

124. U.S. CONST. art. IV, § 1.

125. *See, e.g.*, Bruno Tedeschi, *Assembly Panel OKs Bill Banning Gay Marriages, Deletes ‘Public Policy’ Provision*, RECORD, Jan. 24, 1997, at A04, available in 1997 WL 6870882. A survey of states which have recently passed nonrecognition statutes includes the following: Alaska (ALASKA STAT. § 25.05.013 (Michie 1996) (effective May 7, 1996)), Arizona (ARIZ. REV. STAT. ANN. §§ 25-112, 25-101 (West Supp. 1996)), Arkansas (1997 Ark. Adv. Legis. Serv. 144 (Michie)), Delaware (DEL. CODE ANN. tit. 13, § 101 (Supp. 1996) (amendment effective June 21, 1996)), Georgia (GA. CODE ANN. § 19-3-3.1 (Supp. 1997) (effective April 2, 1996)), Idaho (IDAHO CODE § 32-209 (1996)), Indiana (IND. CODE ANN. § 31-11-1-1 (West 1997)), Maine (ME. REV. STAT. ANN. tit. 19, § 93 (West 1997)), Michigan (MICH. COMP. LAWS ANN. § 551.1-272 (West 1988 & Supp. 1997)), Mississippi (MISS. CODE ANN. § 93-1-1 (Supp. 1997)), North Carolina (N.C. GEN. STAT. § 51-1.2 (Supp. 1996)), Oklahoma (OKLA. STAT. ANN. tit. 43, § 3.1 (West Supp. 1997) (effective Jan. 1, 1997)), Pennsylvania (23 PA. CONS. STAT. ANN. § 1704 (West Supp. 1997)), Tennessee (TENN. CODE ANN. § 36-3-113 (1996)), Utah (UTAH CODE ANN. §§ 30-1-2, 30-1-4 (Supp. 1997)), and Virginia (VA. CODE ANN. § 20-45.2 (Michie Supp. 1997)). The following states have recently passed legislation disapproving of same-sex marriage, without specifically stating that the state refuses to recognize same-sex marriages solemnized elsewhere: Illinois (750 ILL. COMP. STAT. 5/212 (West Supp. 1997))

endorsed such state statutes and limited the meaning of marriage in the context of federal laws. The issue remains whether the Full Faith and Credit Clause compels recognition in other states of a same-sex marriage legally procured in another state, or whether, under conflict-of-laws doctrine, states may choose their own law over the law of the state where the marriage validly took place. Equally important is whether Congress acted within its power in adopting the DOMA.

A. The Validity of the DOMA

Proponents of same-sex marriage understandably speak in harsh terms about the DOMA.¹²⁶ DOMA represents Congress's and the president's refusal to accept the gains made in Hawaii towards recognition of such marriages. Proponents of same-sex marriage argue that DOMA is invalid because Congress has traditionally left regulation of marriage and family matters to the states, deferring to state definitions in construing federal laws touching on marriage and family. It would appear, though, from the plain reading of the Full Faith and Credit Clause that Congress has the power to designate what effect a state's laws will have in other states. The Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."¹²⁷ Moreover, that Congress has traditionally deferred to state definitions of marriage is not a persuasive argument, in light of the fact that Congress has never

(amendment effective May 24, 1996)), Kansas (KAN. STAT. ANN. § 23-115 (1988 & Supp. 1996)), Maryland (MD. CODE ANN., FAM. LAW § 2-201 (1991)), South Carolina (S.C. CODE ANN. § 20-1-15 (Law Co-op. 1976 & Supp. 1996)), South Dakota (S.D. CODIFIED LAWS § 25-1-1 (Michie 1992 & Supp. 1997)).

126. Pub. L. 104-199, 110 Stat. 2419 (1996). DOMA is codified at 1 U.S.C.A. § 7 (West 1997):

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

It is also codified at 28 U.S.C.A. § 1738C (West Supp. 1997):

No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe or a right or claim arising from such relationship.

127. U.S. CONST. art. IV, § 1 (emphasis added).

been faced with the prospect of one state recognizing same-sex marriages.¹²⁸ One commentator has defended DOMA by claiming that it simply clarifies the law: it provides definitions for federal laws, and it reiterates that states have the power to not recognize aberrant laws from other states under the Full Faith and Credit Clause.¹²⁹

*B. Does the Full Faith and Credit Clause Compel
Recognition?*

Proponents of same-sex marriage make bold assertions that the Full Faith and Credit Clause¹³⁰ will compel recognition by other states of same-sex marriages solemnized in Hawaii. But this result is not so obvious. The Full Faith and Credit Clause exists for the basic purpose of ensuring that a judgment rendered in one state will retain the force of law in another state. In constructing the clause, the framers did not want states to ignore the judgments¹³¹ rendered and laws¹³² passed by their sister states. As a result, states are obligated, out of deference and mutual respect, to give sister state judgments the same credit that they would be given in the sister state.¹³³ In short, the Full Faith and Credit Clause requires that acts, records, and judicial proceedings procured in one state be enforced in other states. It would seem that marriage statutes and marriage decrees can be contemplated within the bounds of the Clause.¹³⁴ However, marriage laws have

128. See *Defense of Marriage Hearing*, *supra* note 25 (prepared statement of Lynn D. Wardle):

The reasonable presumption that when using marriage terms in federal legislation Congress generally intended to incorporate the relevant "ordinary" state definition of marriage underscores the need for Congress to clarify that it does not intend to include same-sex unions when it uses marriage terms in federal laws.

129. See *id.*; see also *infra* notes 139-40 and accompanying text.

130. U.S. CONST. art. IV, § 1.

131. See Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 501 (1995) ("[T]he law has been settled since the early nineteenth century that the Full Faith and Credit Clause requires every state to recognize judgments of courts of competent jurisdiction from other states.").

132. See *id.* at 502. The author asserts, however, that law, both statutory and judicial, receives weaker consideration than judgments under the Clause. See *id.* The author concludes that although there may be reason for according law less respect, such law must be respected when it is applicable, under choice-of-law rules, in a case. See *id.* at 503.

133. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 448 (1989) ("While the area is not free of uncertainty, the basic obligation of federal full faith and credit is firm. State courts must give as much effect to sister-state judgments as they would have where rendered.").

134. See Henson, *supra* note 110, at 586-87 (stating that marriage may not be an "act" or "judgment" but is certainly a public "record").

[N]o one would quibble with the assertion that marriage, regulated by state statutes, confers many private rights and benefits upon those who enter its

not been traditionally considered enforceable under the Clause—indeed, the requirements for marriage vary significantly from state to state. Instead, the area has predominantly been handled in the conflict-of-laws context.¹³⁵

As mentioned above, the Clause accords Congress an enforcement power to prescribe the effect of acts, records, and proceedings. Congress has rarely exercised this power. Passage of the Parental Kidnapping Prevention Act of 1980 (“PKPA”)¹³⁶ was only the second time Congress used its enforcement power under the Clause; in passing DOMA, Congress used its enforcement power for the fourth time.¹³⁷ A plain reading of the enforcement provision in the Clause clearly indicates that Congress can limit or extend states’ obligation to give credit to another state’s judgments and decrees.

Further, the Supreme Court has not considered the Full Faith and Credit obligation as an absolute dictate. In a state workers’ compensation case, the Supreme Court held that one state may not impose upon other states the effect of its *aberrant* laws and judgments. In *Thomas v. Washington Gas Light Co.*,¹³⁸ the Court said: “To vest the power of determining the extraterritorial effect of a State’s own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent.”¹³⁹ In an earlier case, in which the

sanctified doors. Therefore, the act of marriage and subsequent civil effects that flow from the act should be subject to full faith and credit protection in the same way as occurs in the case of divorce.

Id. at 587.

135. See LESLIE J. HARRIS ET AL., FAMILY LAW 257 (1996):

Recognition by one state of marriages contracted in another state is generally a matter of policy governed by principles of choice of law rather than a matter of compulsion under the full faith and credit clause, unless the marriage has been the subject of a judicial proceeding (as through an annulment action or declaratory judgment proceeding).

136. The Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A (West 1994). In the PKPA, Congress used this grant of power under the Full Faith and Credit Clause to direct states on when they should recognize custody decrees rendered in other states, in the interests of preventing the kidnapping of children by noncustodial parents.

137. See 28 U.S.C.A. § 1738C (West Supp. 1997). The first time Congress used its enforcement power under the Full Faith and Credit Clause was 1948, when it passed a statute providing for the proof and admission of any state’s court records and judicial proceedings in all other states’ courts: “Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C.A. § 1738 (West 1994). Congress also provided for the interstate enforcement of child support orders in 1994. See 28 U.S.C.A. § 1738B (West Supp. 1997).

138. 448 U.S. 261 (1980).

139. *Id.* at 272; *accord* Nevada v. Hall, 440 U.S. 410 (1979). The Supreme Court, in holding that the State of Nevada could not claim immunity from suit brought in California court by California residents for personal injuries sustained from a vehicle collision between plaintiffs and a Nevada state employee, stated:

Supreme Court affirmed a California court's application of its own workers' compensation law to an out-of-state insurer even though the insurer would not have been made a party under a conflicting Massachusetts statute, the Court said:

[W]e think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.¹⁴⁰

Therefore, the fact that Hawaii will be the only state in the union to recognize same-sex marriage bolsters the validity of other states' refusal of recognition of marriages celebrated there, at least under the Full Faith and Credit Clause.

C. Conflict-of-Laws Doctrine

Laws governing marriage vary significantly from state to state. Because people not uncommonly marry in states other than their domicile for various reasons, conflict-of-laws doctrine has developed with respect to the issue of marriage recognition. Each state is free to choose its own method of determining whether its law or the law of the state where the marriage was celebrated will govern judicial proceedings involving the marriage.¹⁴¹ Despite the disparity, however,

In this case, California has "declared its will"; it has adopted as its policy full compensation in its courts for injuries on its highways resulting from the negligence of others, whether those others be residents or nonresidents, agents of the State, or private citizens. Nothing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada. In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect. It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.

Id. at 426-27.

140. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939). "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." *Id.*

141. *See* SHREVE & RAVEN-HANSEN, *supra* note 133, at 160 ("State courts usually apply their own common law rules.").

a majority rule has emerged.¹⁴² As indicated in the *Restatement (Second) of Conflict of Laws*, a marriage valid where solemnized is valid everywhere, except where another forum has the most significant contacts to the marriage and recognition would violate the forum state's strong public policy.¹⁴³

States following the approach of choice-of-law questions of the *Restatement (Second)* first presume the validity of a marriage validly performed in another state.¹⁴⁴ A state may refuse to recognize a marriage validly performed elsewhere only if it determines it has the most significant relationship with the parties to the marriage *and* that its strong public policy would be violated by recognizing the marriage. The *Restatement (Second)* lists seven factors that help courts determine which state has the most significant relationship with the spouses and marriage:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.¹⁴⁵

Even if, after considering these factors, the state determines that it has the most significant relationship with the parties and marriage, it still must recognize the marriage as valid if the state does not have a strong public policy against recognition.¹⁴⁶

142. Professor Barbara J. Cox reports that 23 states plus the District of Columbia use the choice-of-law approach represented in the *Restatement (Second)*. See Cox, *supra* note 48, at 1096. Other approaches have not attracted similar devotion. These approaches include: the *Restatement* approach (15 states); governmental interest analysis (4 states); and choice-influencing considerations theory (5 states). See *id.* at 1083-97. The approach of the three remaining states is "impossible to classify under any given approach." *Id.* at 1083 n.283. The doctrinal differences between these approaches is beyond the scope of this Note; the fact that Indiana uses the *Restatement (Second)*, see *id.* at 1096, will become important later. An excellent survey can be found in Barbara Cox's article. See *id.* at 1083-97.

143. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1)-(2) (1988); see also EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5, at 421-23 (1982). The Uniform Marriage and Divorce Act recommends a more liberal approach, requiring recognition of the marriage without consideration of the state's public policy. See Note, *In Sickness and In Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2051 (1996).

144. In fact, the *Restatement (Second)* reflects a general policy in favor of marriage validation. See Cox, *supra* note 48, at 1064. There are several practical reasons supporting this policy, including protecting the parties' expectations and providing stability where children and property are involved. See *id.* at 1065. Moreover, the rule "avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." *Id.* (quoting WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 116, at 362 (2d ed. 1993)).

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 283.

146. See Cox, *supra* note 48, at 1095.

What amounts to a strong public policy? If it exists, it will be found in the state's court decisions, legislation, and constitution.¹⁴⁷ Specifically, if a state has statutory law prohibiting same-sex marriage, or common law to the same effect, courts handling a recognition case will probably find that recognition would violate the state's strong public policy. A specific, or perhaps even a general, marriage evasion statute would have the same effect for the state's residents who travel to the state where marriages are legally solemnized, and then return to their domicile. If the state retains legislation criminalizing homosexual sodomy, courts may find the law to be evidence of the state's strong public policy against recognition.¹⁴⁸ Lastly, courts may invoke public sentiment and morality that opposes recognition as evidence of a strong public policy.¹⁴⁹

Litigants could argue, however, that there are valid public policy reasons *in favor* of recognizing same-sex marriages validly solemnized elsewhere. States that have "validation statutes," which presume the validity of out-of-state marriages,¹⁵⁰ and those which have passed statutes prohibiting discrimination on the basis of sexual orientation¹⁵¹ may in fact have a public policy in favor of recognition (or at least no strong public policy against recognition). Beyond statutory law, a court faced with a recognition case should consider the obligations (though concededly not absolute) of comity and reciprocal treatment inherent in the Full Faith and Credit Clause.¹⁵² Moreover, considerations of family stability and children favor recognition, especially considering that same-sex couples are presently living like families and are reproducing and adopting children now, anyway. Still, if states can muster a strong public policy, they are within their rights in refusing to recognize the marriage, and counterarguments may not succeed.

As previously mentioned, however, even a state with a demonstrated strong public policy against recognition of same-sex marriages may have to recognize

147. See Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 457 (1994).

148. See *id.* at 485.

149. See *id.* at 491.

150. Nineteen states and the District of Columbia have validation statutes. See Cox, *supra* note 48, at 1066-67; Keane, *supra* note 131, at 515 n.103. Five other states, including Illinois, Georgia, Arizona, Louisiana, and North Dakota, have validation statutes that are weakened by provisions that except marriages that would be against the laws of the state, or against the state's public policy. See Cox, *supra* note 48, at 1068.

151. In 1994, California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, Wisconsin, and the District of Columbia all had state statutes prohibiting sexual orientation discrimination. See Cox, *supra* note 48, at 1082 n.276; see also Keane, *supra* note 131, at 520 ("[S]tates which have affirmatively altered their law to benefit lesbians and gay men—for example, by passing antidiscrimination legislation or repealing their sodomy laws—will have some difficulty asserting that the state maintains a strong public policy against homosexuality.").

152. See Note, *supra* note 143, at 2042.

the marriage of a same-sex couple formerly domiciled in the state where the marriage was legally solemnized, because that would be the state which had the most significant relationship with the couple. Conflict-of-laws doctrine generally requires that the law of the state with the most significant contacts should apply in judicial determinations in another state.

Another reason, however, is that the couple's fundamental right to travel, guaranteed by Article IV of the U.S. Constitution, would be violated by nonrecognition of the marriage in their destination state. The Constitution prohibits states from inordinately restricting a person's right to enter or leave a state, and limits a state's "authority to condition the right to leave on an individual's agreement to follow its law while in another state."¹⁵³ A restriction would survive judicial scrutiny, however, if the state proved that it was necessary to prevent harm inside the state.¹⁵⁴ If the marriage were illegal within the state, the act of an individual leaving the state to perform that illegal act and then returning could be construed as causing harm to the state.¹⁵⁵ The success of this constitutional claim, then, rests upon a declaration of the individual's right to marry as fundamental—thus, constitutionally protected. The state cannot, absent compelling reasons, make illegal an act which is fundamental.¹⁵⁶

A third possible constitutional basis in favor of recognition exists in the recent Supreme Court decision, *Romer v. Evans*.¹⁵⁷ In *Romer*, the Court applied rational basis review to Colorado's Amendment 2, a measure designed to prohibit any nondiscrimination laws created for the benefit of homosexuals, and struck it down. The Court found that the state constitutional amendment "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . [A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."¹⁵⁸ While some argue that *Romer* does not signal that DOMA and counterpart statutes at the state level are unconstitutional,¹⁵⁹ the uncharacteristic striking down of a constitutional amendment under rational basis scrutiny may indicate a turn in the

153. Keane, *supra* note 131, at 508. "These principles reflect not only a desire to permit individual mobility, but also a real concern for the visited state's right to regulate the conduct of visitors within its borders." *Id.*

154. *See id.*

155. *See id.*

156. *See supra* notes 46-48 and accompanying text.

157. 116 S. Ct. 1620 (1996).

158. *Id.* at 1628 (omissions and emphasis in original) (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

159. *See Defense of Marriage Hearing, supra* note 25 (prepared statement of Lynn D. Wardle) (arguing that DOMA is distinguishable from Colorado's Amendment 2, because DOMA classifies based on conduct, while the amendment classified based on homosexual orientation, and because DOMA seeks to protect "the basic unit of our society" while the amendment would have stripped homosexuals "of potentially all protection of the laws").

Court's jurisprudence regarding homosexuals.¹⁶⁰ It cannot be doubted that DOMA and the state statutes are intended to deny an identifiable class of the benefit of laws. True, they only restrict marriage laws and not a large array of laws as the Colorado amendment contemplated, but the *Romer* majority seemed to focus on animosity towards a class as an impermissible, illegitimate state interest. Though the potential emanations from *Romer* remain to be seen, it is quite possible that DOMA and the state statutes are constitutionally invalid under *Romer*.¹⁶¹

IV. SURVEY OF INDIANA LAW AND POLICY: WILL INDIANA RECOGNIZE SAME-SEX MARRIAGES?

Indiana was one of only a few states which, before the "scare" of *Baehr v. Lewin*, had a statute on the books explicitly prohibiting same sex marriage.¹⁶² The existence of this statute is, of course, a huge strike against any recognition of same-sex marriage. In addition, Indiana has recently joined the flurry of states attempting to pass legislation to preclude recognition of same-sex marriages performed legally in other states. On April 25, 1997, the *Conference Committee Report on House Enrolled Act No. 1265 and Senate Enrolled Act No. 8-1997* was adopted by both the House and Senate,¹⁶³ and the legislation was signed by Governor Frank O'Bannon on May 13, 1997. The legislation amended the same-sex marriage prohibition in Indiana Code § 31-7-1-2 to include the following language: "A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."¹⁶⁴ This new statute does not end the discussion about Indiana's recognition of same-sex

160. See Joslin, *supra* note 93, at 225 ("The Supreme Court's decision in *Romer v. Evans*, invalidating Colorado's Amendment 2, delivers a significant blow to the obstacles the Court erected one decade before in *Bowers v. Hardwick*.") (case names not italicized in original).

161. See *id.* at 245-46 (quoting portions of Cass Sunstein's testimony before the U.S. Senate Committee on the Judiciary in which Sunstein expressed his belief that DOMA violates the precepts of *Romer*, because DOMA was born of animosity for homosexuals).

162. See IND. CODE § 31-7-1-2 (1996) (repealed 1997). This statute said: "Only a female may marry a male. Only a male may marry a female." This language was incorporated into IND. CODE § 31-11-1-1 (1997).

163. The bill passed the House on February 6, 1997, by a vote of 84-8; it passed the Senate on April 9, 1997, passing 38-10. See Stuart A. Hirsch, *Ban on Gay Marriages to Go to Governor*, INDIANAPOLIS STAR, Apr. 26, 1997, at B1.

164. The legislation began as House Bill 1019, sponsored by Representative Woody Burton. H.B. 1019, 110th Leg., 1st Reg. Sess. (Ind. 1997). It was renamed House Bill 1265 (H.B. 1265, 110th Leg., 1st Reg. Sess. (Ind. 1997)) and was enrolled as House Enrolled Act No. 1265 (H.E.A. 1265, 110th Leg., 1st Reg. Sess. (Ind. 1997)) and Senate Enrolled Act No. 8-1997 (S.E.A. 8-1997, 110th Leg., 1st Reg. Sess. (Ind. 1997)). After passage, the legislation was named Act of May 13, 1997, Pub. L. No. 198-1997. The amended statute, Indiana Code § 31-7-1-2, was repealed, and renamed Indiana Code § 31-11-1-1. See IND. CODE § 31-11-1-1; IND. CODE § 31-7-1-2 (1996).

marriages should they be legalized in Hawaii, but it is indicative of a steep uphill battle.

The State of Indiana has a relatively small case load concerning void marriages or even marriages which, though validly performed in other states, violate Indiana law. However, it is clear that Indiana courts follow the general rule of marriage validation represented by the *Restatement (Second) of Conflict of Laws*.¹⁶⁵ In 1950, in *Gunter v. Dealer's Transportation Co.*, an Indiana appeals court asserted that "[t]he validity of th[is] marriage, being governed by the law of the place of its celebration, must be recognized in Indiana as a matter of comity."¹⁶⁶ A year later, the Indiana Supreme Court confirmed this statement of law: "The validity of a marriage depends upon the law of the place where it occurs."¹⁶⁷ Furthermore, Indiana courts have taken seriously the obligation under the Full Faith and Credit Clause to give effect to sister state judgments and decrees. For example, in the context of out-of-state divorces, courts have enforced the effects of divorces procured in other states despite the differences between Indiana divorce law and policy and those of the other states.¹⁶⁸

There is an exception within the context of the general rule which requires recognition of marriages validly solemnized in another state. If a state not wishing to recognize a marriage celebrated in another state has significant contacts to the marriage and the participants, it may apply its own law, instead of giving credit to the other state's, so long as it has a strong public policy that disfavors such recognition.¹⁶⁹ What does this mean for same-sex marriage recognition in Indiana? The answer to this question depends first upon characterization of the plaintiffs. There are three potential plaintiffs who will sue to enforce their same-sex marriage: first, the plaintiffs may be residents of Indiana who visited Hawaii to avail themselves of Hawaii's marriage law; second, the plaintiffs may be residents of Hawaii or some other state at the time

165. See Cox, *supra* note 48, at 1096 (reporting that Indiana follows the *Restatement (Second) of Conflict of Laws*).

166. 91 N.E.2d 377, 379 (Ind. Ct. App. 1950) (citing *Roche v. Washington*, 19 Ind. 53 (1862)).

167. *Bolkovac v. State*, 98 N.E.2d 250, 254 (Ind. 1951).

168. See *Irons v. Irons*, 180 N.E.2d 105, 106 (Ind. 1962) (overruling wife's petition for rehearing) ("[I]t is not our province as a reviewing court to consider whether the practice of obtaining so-called ex parte out of state divorces, by persons who have spent much of their married life in this state, is good or bad for the litigants or society in general."); *Irons v. Irons*, 178 N.E.2d 156, 158 (Ind. 1961) ("[T]o permit decrees of sister states to be overturned upon a small quantum of proof would be to emasculate the constitutional provision requiring each state to give full faith and credit to the judicial proceedings of every other state."); *Scherer v. Scherer*, 405 N.E.2d 40, 43 (Ind. Ct. App. 1980) ("Indiana courts have afforded practical recognition, and give full faith and credit, to divorce decrees of the courts of sister states which have acquired the necessary jurisdiction of the subject matter and the parties . . .").

169. See D'Amato, *supra* note 17, at 916 (discussing sections 283(2) and 283(3) of the *Restatement (Second) of Conflict of Laws*); see also *supra* notes 146-52 and accompanying text.

of their marriage, who later move to Indiana; and third, the plaintiffs may be residents of Hawaii or another state, but who intended to become residents of Indiana immediately following their nuptials.

First, Indiana still retains the right under conflict-of-laws doctrine to deny recognition of marriages validly celebrated in another state in which one or both parties are domiciliaries of Indiana.¹⁷⁰ In this circumstance, Indiana has the most significant contacts with the marriage and the parties, and in a judicial proceeding in which the validity of the marriage is at issue, the court would be free to apply Indiana law, thereby treating the couple as if they were not married at all. However, the *Restatement (Second) of Conflict of Laws*,¹⁷¹ and the U.S. Supreme Court, in construing the obligation under the Full Faith and Credit Clause¹⁷² require an additional finding before a judgment, act, or decree of a sister state can be disregarded: a state must prove that recognition of the marriage violates a strong public policy of the state. Litigants who are domiciliaries of Indiana who want legal recognition of their marriages must argue against the public policy that the State of Indiana asserts, but the prospects are not promising.

Second, it is clear that if the State of Indiana does not have the most significant contacts to the couple at the time of the marriage, then an Indiana court would have no basis to deny recognition of the marriage. For example, Indiana would probably not have the most significant relationship with a couple who was domiciled in a state other than Indiana at the time of the marriage. Under the *Restatement (Second)* rule, even if a state has a strong public policy against the marriage, if it does not have the most significant relationship with the parties or the marriage, then it must apply the law of the forum where the marriage was solemnized. Although it appears that this category of marriages must be recognized, it still must be determined what effect the recent adoption of Indiana Code § 31-11-1-1, which declares void marriages between same-sex partners solemnized elsewhere, will have on the category.

At first glance, the legislation seems to stymie validly married same-sex couples who wish to move to Indiana and be considered married in the eyes of the law. The legislation could, however, be challenged and found unconstitutional, a result which, though possible,¹⁷³ could take years. Plaintiffs

170. Indiana follows the conflict-of-laws doctrine represented by the *Restatement (Second) of Conflict of Laws*. See Cox, *supra* note 48, at 1096.

171. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2).

172. See, e.g., *Irons*, 178 N.E.2d at 161 (“The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another’s adjudications has been fairly discharged . . .”) (citing *Williams v. North Carolina*, 325 U.S. 226, 233 (1945)).

173. See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (concluding that laws which are based on animus towards a particular class cannot survive rational-basis scrutiny); see also D’Amato, *supra* note 17, at 942 n.212 (explaining that a subsequent move or visit to Indiana would be protected by the fundamental right to travel).

who challenge the statute could assert that Indiana Code § 31-11-1-1 discriminates on the basis of gender to the extent that it treats persons who wish to marry persons of their choosing dissimilarly with others who do the same, but choose people of the opposite sex.¹⁷⁴ Indiana accords gender-based classifications intermediate scrutiny.¹⁷⁵ Therefore, although the legislation would not be scrutinized as carefully as laws which classify based on race or ethnicity, it would also not be presumptively valid, unlike legislation that is only subject to rational-basis review. Moreover, the statute was, at least partially, motivated out of animus for an unpopular class of citizens.¹⁷⁶ Animus is not a legitimate governmental reason, even under deferential rational-basis scrutiny.¹⁷⁷ While we have yet to see how *Romer* will be construed in the context of same-sex marriages, the Supreme Court has made clear that legislation is impermissible if it limits the extent to which a class may appeal to the political process for relief.

In the third case, if the plaintiffs are a validly married same-sex couple, both nonresidents, who intended to move to Indiana right after the marriage, Indiana would have the most significant relationship to the marriage and a court could choose to apply Indiana law. A couple who intended to move to Indiana right after their marriage could not validly argue that Indiana law should not be applied. Moreover, Indiana Code § 31-11-1-1, if valid, would be effective against the couple's claim.

A. Indiana's Strong Public Policy

The second category of plaintiffs is made up those who contract valid same-sex marriages, but are residents of a state other than Indiana at the time of marriage, who later move to Indiana. Presuming that Indiana Code § 31-11-1-1 is unconstitutional and therefore not a bar, in order for these plaintiffs to succeed in gaining legal recognition of their marriages, they must prove that Indiana does *not* have a strong public policy against same-sex marriages. First, though for purposes of this discussion it is presumed that Indiana Code § 31-11-1-1 is unconstitutional, the fact that the Indiana legislature specifically proscribed same-sex marriage and the recognition of same-sex marriages solemnized elsewhere may still be powerful evidence of public opinion.¹⁷⁸ If this statute never existed, litigants defending their same-sex marriages could argue that the

174. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baehr v. Miike*, Civil No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

175. See *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335 (Ind. Ct. App. 1995); see also IND. CONST. art. 1, § 23.

176. Indiana Senator Richard Bray, R-Martinsville, was quoted before the bill passed as saying: "The state has the right to refuse to recognize behavior that is socially and morally obnoxious to its residents." Alex Ihnen & Christy McKay, *Indiana Might Ban Same-Sex Marriages*, IND. DAILY STUDENT, Feb. 12, 1997, at 1.

177. See *Romer*, 116 S. Ct. 1620.

178. See IND. CODE § 31-7-1-2 (1996) (repealed 1997).

other statutes regulating marriage “only implicitly prohibit homosexual marriages, [and] indicate nothing more than a legislative determination that only heterosexual relationships should be encouraged by the conferral of marriage benefits.”¹⁷⁹ Without the express prohibition, the laws are less determinative of a strong public policy.

Another source of strong public policy against same-sex marriage recognition could be found in Indiana’s marriage evasion statute.¹⁸⁰ This statute declares void marriages obtained in other states by Indiana residents in order to evade two listed statutes. One of the enumerated statutes will not allow a circuit court clerk to issue a marriage license to a person adjudged to be mentally incompetent, or to a person appearing to be under the influence of alcohol or drugs.¹⁸¹ If a person goes to another state to avoid this law, he or she has violated Indiana’s evasion statute. The other statute lists the requirements of the application for a marriage license; section 31-7-3-3(a)(7) of this statute requires that an application contain “[a] statement of facts necessary to determine whether any legal impediment to the proposed marriage exists.”¹⁸² If Indiana Code § 31-11-1-1 is unconstitutional, then it cannot qualify as a legal impediment, and the marriage evasion statute would not be effective against our nonresident couple.

Additionally, although Indiana does not have a marriage validation statute, Indiana case law expresses a judicial lean towards marriage validation.¹⁸³ Finally, courts considering whether to recognize a same-sex marriage may take into account morality and public sentiment. Of course, an accurate picture of the public attitude is very difficult to obtain, especially on such a contentious issue.¹⁸⁴ It is likely that national polls would be used, and a judge’s personal bias could come into play.

B. Counterarguments to the State’s Strong Public Policy

Again presuming that Indiana Code § 31-11-1-1 is found unconstitutional, litigants seeking recognition of their same-sex marriages still must assert that the law of the state in which their marriage was solemnized should govern. Assuming that Indiana has the most significant relationship with the marriages, litigants must argue that Indiana does not have a strong public policy disfavoring recognition. In order to accomplish this, litigants could point out that there are public policy reasons in support of their marriages. First, the litigants could point out that courts have recognized other types of invalid marriages in the past or

179. Hovermill, *supra* note 147, at 488 (“The statutes containing express prohibitions are similar to those that courts in the past have determined to demonstrate a strong public policy . . .”).

180. See IND. CODE § 31-7-6-6.

181. See *id.* § 31-7-3-10.

182. *Id.* § 31-7-3-3(a)(7).

183. See *supra* notes 165-68 and accompanying text.

184. See Hovermill, *supra* note 147, at 491.

created presumptions in favor of their validity.¹⁸⁵ For example, bigamous marriages have been prohibited by law in Indiana, yet courts have allowed second marriages solemnized outside of Indiana a presumption of validity pending the assailant's proof of invalidity.¹⁸⁶ Courts have also presumed the validity of the second marriage where a spouse to the first marriage simply had not heard from or about his or her first spouse for six years.¹⁸⁷ In the case of *Gunter v. Dealer's Transportation Co.*,¹⁸⁸ the court derived from the facts that though the couple's marriage was void because the husband was not validly divorced at the time it was procured, the couple had lived for a time in a state that recognized common law marriage, and hence the wife would be considered the husband's common law wife (and was thereby entitled to his workmen's compensation upon his death).¹⁸⁹ The court so held even though Indiana does not recognize common law marriages.

In addition, Indiana courts have allowed the finding of a common law marriage where the parties' actual marriage was void by reason of one party's insanity at the time of marriage.¹⁹⁰ In another example, the court held a marriage valid despite the fact that the underage wife had evaded Indiana law requiring parental consent to the marriage.¹⁹¹ Similarly, an Indiana court refused to recognize a consanguineous marriage validly performed in another country, thereby denying one party a divorce; the court nonetheless declared that the couple's children were legitimate, and that equity compelled an award of marital property be paid to the "wife."¹⁹²

As these cases demonstrate, despite the public policy represented in the Indiana marriage laws, courts have used their discretion either to recognize marriages as valid or to issue equitable remedies. In the spirit of the oft-cited case, *Teter v. Teter*,¹⁹³ courts have been guided by the rule that "[t]he law presumes morality, and not immorality; *marriage, and not concubinage*;

185. Because there are no Indiana cases dealing with same-sex marriage, we can look to the judicial treatment of other types of marriages validly solemnized in states other than Indiana for analogy. Admittedly, cases involving the validity of marriages solemnized outside of Indiana are quite old and at times present tenuous analogy. There simply is not much in the way of marriage recognition cases, and no recent cases.

186. *See, e.g., Rainier v. Snider*, 369 N.E.2d 666, 668 (Ind. Ct. App. 1977) ("Indiana was an early subscriber to the view that one of the strongest presumptions of law is that a marriage, once shown, is valid.").

187. *See Cooper v. Cooper*, 86 Ind. 75 (1882).

188. 91 N.E.2d 377 (Ind. Ct. App. 1950).

189. *See id.*

190. *See Wiley v. Wiley*, 123 N.E. 252, 258 (Ind. Ct. App. 1919).

191. *See Christlieb v. Christlieb*, 125 N.E. 486 (Ind. Ct. App. 1919).

192. *See Sclamberg v. Sclamberg*, 41 N.E.2d 801 (Ind. Ct. App. 1942).

193. 88 Ind. 494 (1883).

legitimacy, and not bastardy.”¹⁹⁴ Litigants must present to courts that Indiana common law as represented in marriage cases favors marriage validation, stability, and legitimacy of children. If a same-sex couple, domiciled and validly married in Hawaii, later moves to Indiana, legal recognition of their marriage will be vital to their married existence. Past cases underline the importance of marriage recognition, even though the marriages could not have been solemnized in Indiana. Furthermore, litigants could argue that recognition of same-sex marriage actually promotes family stability and monogamy.¹⁹⁵ These attributes of traditional marriage are readily transferred to same-sex marriage, and benefit society in the same manner.

Litigants could also argue the principles of deference and mutual respect attendant to other states’ decrees. One commentator claims that “[e]ach state has an interest in ensuring that marital relationships entered into under its auspices are respected by other states. In order to preserve multistate relationships and ensure reciprocal treatment, states must sometimes defer to the law of another state.”¹⁹⁶ Advocates could note as well that Indiana repealed its law making consensual sodomy a crime in 1977.¹⁹⁷ Though there is a difference between respecting personal privacy and overt governmental approval or acceptance, which would be the case with state issuance of marriage licenses to homosexuals, it is commonly understood that partners to a marriage are sexually active. That Indiana allows sexual intimacy between homosexual men but does not allow them to marry is inconsistent with this common expectation. Moreover, the repeal of this law could be construed as reformation of public intolerance for homosexual men in particular, or at least acceptance of freedom of decisionmaking in the realms of personal privacy and intimacy in general. This legislative change is evidence of the absence of a strong public policy against same-sex marriage. Therefore, an Indiana court faced with the choice-of-law question should choose the law of the state where the marriage was solemnized, thereby recognizing the marriage.

194. *Id.* at 498 (alteration and emphasis added) (quoting *Hynes v. McDermott*, 91 N.Y. 451, 459 (1883)); see also *Langdon v. Langdon*, 183 N.E. 400, 403 (Ind. 1932) (“Every intendment of the law is in favor of matrimony. When marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proof, the law raises a strong presumption of its legality” (omission added) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE & DIVORCE § 457 (6th ed. 1881))), *overruled on other grounds by* *Azimow v. Azimow*, 255 N.E.2d 667, 671 (Ind. Ct. App. 1970).

195. See *Hovermill*, *supra* note 147, at 455 (“A choice of law rule that validates out-of-state marriages provides stability and predictability in questions of marriage, ensures the legitimization of children, protects party expectations, and promotes interstate comity.”).

196. Note, *supra* note 143, at 2042.

197. See IND. CODE § 35-1-89-1 (1976) (repealed 1977).

V. CONCLUSION

The question remains whether the American people, much less the citizens of Indiana, are ready for gay and lesbian marriage. Even in Hawaii the legislature recently passed a constitutional amendment which, if adopted by the state's voters, would allow the legislature to reserve marriage for male-female couples.¹⁹⁸ This measure illustrates an attempt by the Hawaii legislature to reverse the path of the Hawaii courts.¹⁹⁹ And it is not likely that the Supreme Court would put a stop to a mad rush to deny recognition by democratic process, despite the possible grounds for constitutional violations. As Cass Sunstein, a frequent commentator on homosexual legal issues, asserted:

[T]here is reason for great caution on the part of the courts. An immediate judicial vindication of the principle could well jeopardize important interests. It could galvanize opposition. It could weaken the anti-discrimination movement itself. It could provoke more hostility and even violence against gays and lesbians. It could jeopardize the authority of the judiciary. It could well produce calls for a constitutional amendment to overturn the Supreme Court's decision.²⁰⁰

Though backlash is evident in Hawaii and many other states, also evident are coterminous ameliorative measures: the same day that the Hawaii legislature passed the constitutional amendment, it passed a bill that would give same-sex couples many of the benefits married couples enjoy.²⁰¹ Two months later, on July 8, 1997, the bill was signed into law by Hawaii's governor. Hawaii presently offers an extremely comprehensive benefits package to partners not legally able to marry.²⁰² Admittedly, the legislators passed this measure in an effort to stave off the need for same-sex marriage. Still, the law represents a victory for gays and lesbians, however conservative.

We cannot forget how contentious an issue interracial marriage was, or how explosive school desegregation was, or that adding discrimination based on sex to Title VII was a joke intended to thwart the bill's passage. If the ban on same-

198. See Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, Apr. 30, 1997, at A3. Moreover, polls indicate that as many as 70% of Hawaiians oppose the legalization of same-sex marriage. See Meki Cox, *Hawaii Set to Extend Gay Rights; Pairs Get Benefits, Not Right to Marry*, ARIZ. REPUBLIC, July 6, 1997, at A10.

199. See *Hawaii House Adopts Amendment to Ban Same-Sex Marriages*, ASSOCIATED PRESS, Jan. 23, 1997, available in 1997 WL 4853054. The vote will occur in November of 1998. Dan Foley, attorney for plaintiffs in *Baehr v. Lewin* and *Baehr v. Miike*, questioned the form of the amendment and said it was rushed through the House. See *id.*

200. Sunstein, *supra* note 10, at 25.

201. See Boxall, *supra* note 102, at A3. The legislation gives partners who are not legally able to marry each other over 60 benefits, including family medical insurance, auto insurance eligibility, inheritance rights, victims' rights, joint property rights, the ability to sue for wrongful death, and the ability to issue a domestic violence complaint, among others. See *id.*

202. See *id.*

sex marriage violates the Constitution, we do a disservice to our citizens to deny a class of people the benefits of marriage. We live in a society governed by laws that incorporate a plethora of moral, cultural, and normative values. The issue of same-sex marriage, more than most issues, causes us to inspect the bases for our laws and to determine whether they are legitimate, appropriate, or fair. Once a state has legalized same-sex marriage, the strength of the bans remaining in other states and the new antirecognition statutes will have to be tested.

