A Conflict of Laws and Morals: the Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages

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INTRODUCTION

Approximately 240,000 honeymooners visit the state of Hawaii each year. That figure might increase drastically, however, if Hawaii allows homosexual couples to secure a valid and legally recognized same-sex marriage under the state's newly interpreted marriage statute. As a result of a landmark decision by the Supreme Court of Hawaii, Hawaii may soon become the first state to recognize homosexual marriages. In Baehr v. Lewin, that court held that Hawaii's statutory prohibition of same-sex marriages constitutes gender discrimination. Under the court's interpretation of the state's constitution, the statute will only be upheld if the state can demonstrate that the prohibition "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." Events in other states suggest that they soon might recognize homosexual marriages as well. Same-sex couples have initiated lawsuits attacking statutes that prohibit same-sex marriages in four
other states. If a same-sex couple from the District of Columbia prevails in their challenge to that city's marriage statute, gay couples from every state could come to the nation's capital for a legally recognized marriage and immediately return to their home states because the District does not have any residency requirements for marriage licenses. The movement to recognize same-sex marriages is gaining momentum through different means in other states. The California Bar Association, for example, has advocated for an amendment to the state's civil code that would facilitate the recognition of same-sex marriages.

The recent attempts by homosexual couples to seek legal recognition of their status are not surprising. A legally recognized marriage confers a variety of practical benefits and rights, including income tax advantages, health-care benefits, inheritance rights, the right to bring a wrongful death or loss of consortium action, and the right to make health-care decisions for an incapacitated spouse. Because no state currently recognizes same-sex marriages, homosexual couples are forced to make complicated and expensive legal arrangements to obtain the same rights that heterosexual couples enjoy simply by being legally married.

8. See Miriam Davidson, Four Same-Sex Pairs Suing to Marry; Claim State Denies Their Rights, ARIZ. REPUBLIC, Dec. 20, 1993, at A1 (discussing lawsuits filed by same-sex Arizona couples challenging that state's marriage statute); Patt Kossen, Gay Couples Stand Up For Legal Marriages; Lawsuit Challenges State Ban On Same-Gender Matrimony, PHOENIX GAZETTE, Sept. 25, 1993, at A1 (stating that homosexual couples are suing for the right to marry in five states, including Arizona and Hawaii); Jean Patteson, Gay Couples Seek Benefits, Acceptance of Marriage, CHI. TRIB., Sept. 19, 1993, Womanews, at 5 (discussing a lawsuit initiated by two Orlando women to overturn a 16-year-old Florida statute banning same-sex marriages).


10. See Phillip G. Gutis, Small Steps Towards Acceptance Renew Debate on Gay Marriage, N.Y. TIMES, Nov. 5, 1989, § 4, at 24. Recognition of homosexual marriages in California is not without opposition, however. California's Traditional Values Coalition is leading the campaign to have the state's constitution amended to make same-sex marriages illegal. See Jana Mazanec, Anti-gay Rights Amendment Galvanizes Both Sides in Colo., USA TODAY, Jan. 11, 1993, at 10A.


12. See Patteson, supra note 8, at 5.
Despite homosexual demands for equality, less than one-third of Americans approve of legally sanctioned homosexual marriages. The decision by the Supreme Court of Hawaii and the pending lawsuits in other states have spawned active opposition to the recognition of homosexual marriages. In Hawaii, several groups are circulating petitions to amend the state’s constitution to outlaw same-sex marriages. A recent poll in a major Hawaiian newspaper found that about sixty percent of the respondents opposed the idea of homosexual marriage. Conservative groups claim that the legal recognition of such marriages would lead to a breakdown of the traditional family and the teaching of homosexuality in the schools.

In response to these public protestations, Hawaii’s legislature is considering legislation to clarify the state’s marriage statute such that same-sex couples are expressly ineligible for marriage licenses. The issue of homosexual rights generally, and the recognition of homosexual marriages in particular, generates intense social conflict at all levels of government. The recognition of homosexual marriages by one state is likely to be uniquely controversial because the traditional choice of law rule governing out-of-state marriages requires a state to recognize a foreign marriage that is legally valid in the state in which it was performed. Consequently, even a state

13. See Job Rights for Homosexuals, N.Y. TIMES, Sept. 7, 1992, at 10 (quoting a recent Newsweek poll). A recent Newsweek poll found that 78% of Americans favor equal employment opportunities for homosexuals and that roughly 66% support inheritance rights and health insurance benefits for gay partners. Id. However, 53% of Americans do not consider homosexuality an acceptable lifestyle and 43% feel that homosexuality is a threat to the American family. Id. See also Walter Isaacs, Should Gays Have Marriage Rights?, TIME, Nov. 20, 1989, at 101 (quoting a poll that found that 69% of Americans disapprove of legally sanctioned homosexual marriages).

14. Jacobson, supra note 1, at 1A.

15. Id.

16. See id.

17. See Yim, supra note 4, at 25A. The Chairman of the Hawaii House Judiciary Committee stated that because the purpose of issuing state marriage licenses is to promote the health and well-being of biological offspring, recognition of same-sex marriages is “neither necessary nor appropriate.” Id.

18. Although it has been a landmark year for supporters of homosexual rights, those victories have triggered active, intense, and at times, bitter social conflict. See Kim I. Mills, Public Attention Made ‘93 a Landmark Year for Gay Rights Backers, DALLAS MORNING NEWS, Jan. 1, 1994, at 12A (outlining victories and losses of gay rights movement in 1993). Issues such as gays in the military, anti-gay rights initiatives, and the custody rights of gay parents were debated in the press as well as in state and federal courts across the country. See Bettina Boxall, Gays Look Back on a Bumpy Year—And Ahead to a Bumpy ’94; Favorable Court Rulings Made up for Unfavorable Policy Decisions. But an ACLU Lawyer Says the Movement is Only Nearing the Halfway Point, L.A. TIMES, Jan. 5, 1994, at A5.

19. See infra notes 25-28 and accompanying text.
whose citizens are adamantly opposed to homosexual marriage might be compelled to recognize such a marriage if it was legally performed in a state that recognizes same-sex marriages. As Dallas lawyer Kenneth Raggio recently predicted in an article in a Dallas newspaper:

This will cause serious tension between the two states if Hawaii recognizes same sex marriages while Texas law specifically requires that it be a man and a woman. . . . Texas has pockets of liberalism about two blocks wide. No judge in this state is going to allow a same-sex marriage.20

This Article explores the ramifications of a collision between the forces advocating same-sex marriages and the forces opposing them. Because of the clear opposition to same-sex marriages across the country,21 Hawaii’s imminent recognition of such unions raises an interesting and difficult choice of law question: What law should a court in a state that does not recognize same-sex marriages apply when confronted with a homosexual marriage legally performed and recognized by a sister state?22 Absent constitutional constraints,23 a state court will confront the difficult issue of determining its state’s public policy regarding both interstate comity and homosexual marriage.

Part I of this Article discusses the generally recognized choice of law rule applied by state courts to marriages performed in other states. Part I also analyzes both the public policy exception to the general choice of law rule and the types of marriages that various state courts have held to be violative of public policy. Part II analyzes the potential constitutional limitations on a state court’s power to reject foreign law and to refuse recognition to same-sex marriages. Part III outlines and analyzes the factors that a state court should consider in determining whether its public policy prohibits the recognition of homosexual marriages legally created and recognized in another state. The Article concludes that a court should not refuse to recognize a homosexual marriage performed legally in another

20. See Jacobson, supra note 1, at 1A.
22. Professors Closen and Heise explored this question in connection with Danish same-sex marriages. Michael L. Closen & Carol R. Heise, Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages, 16 NOVA L. REV. 809, 839-43 (1992) (arguing that federal and state courts should recognize the validity of Danish same-sex marriages). Their article did not, however, address the traditional public policy exception to the choice of law rule favoring the validation of out-of-state marriages. See id.
23. See infra Part II.
state unless the state legislature has clearly stated a public policy to the contrary.

I. MARRIAGE—THE GENERALLY RECOGNIZED CHOICE OF LAW RULE AND ITS EXCEPTIONS

A. General Rule of Validation

Every state has the right, subject to constitutional limitations,\(^{24}\) to determine who shall assume and occupy a matrimonial relationship within its borders.\(^{25}\) The universally accepted rule for determining the validity of a marriage legally created and recognized in another jurisdiction is to apply the law of the state in which the marriage was performed.\(^{26}\) The rule favoring validation of the out-of-state marriage is supported by both traditional and modern choice of law analysis. Both Restatements indicate that a state should apply the law of the state in which the marriage was celebrated.\(^ {27}\) Commentators and courts that apply choice of law analysis by concentrating on the governmental interests involved also arrive at a general rule of validation for out-of-state marriages.\(^ {28}\) The universal application of

\(^{24}\) Id.

\(^{25}\) See Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("Within the limits of her political power [a state] may, of course, enforce her own policy regarding the marriage relation—an institution more basic in our civilization that any other.").


\(^ {27}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized [subject to exception] as valid."); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934) ("[Subject to exception], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."). The First Restatement applied the law of the celebrating state based on a vested rights theory. Because marriage involves a question of status, the vested rights approach applies the law of the state that created that status. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAW § 121 (1984) ("[B]ecause marriage creates a status between the celebrants, questions concerning the validity of the marriage were referred to the law of the place that created the status.").

\(^ {28}\) See, e.g., LEFLAR ET AL., supra note 26, § 220 (noting several governmental interests justifying the general rule); WEINTRAUB, supra note 26, § 5.1C (discussing whether rule favoring validation is desirable). General application of the rule of validation under this interest analysis approach can be strained because there are often many reasons to invalidate the marriage as well. For example, residents of a forum who are prohibited by the forum law from marrying may go to another jurisdiction, legally marry, and then return immediately to the forum. See RICHMAN & REYNOLDS, supra note 27, § 108 (arguing
this rule, despite the divergent theories supporting states’ choice of law determinations, is not surprising. 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.²⁹

B. Exceptions to the General Rule

The universally recognized choice of law rule is subject to two closely related exceptions. First, a court will not recognize a marriage performed in another state if a statute of the forum state clearly expresses that the general rule of validation should not be applied to such marriages.³⁰ Second, a court will refuse to recognize a valid foreign marriage if the recognition of that marriage would violate a strongly held public policy of the forum state.³¹ These exceptions are incorporated into both Restatements³² and are universally recognized by courts and commentators that apply the interest analysis approach to choice of law issues.³³

1. Clear Statutory Prohibitions.—Statutes clearly prohibiting the recognition of marriages performed outside of the forum are rare. Perhaps the best example of such a statute was the Uniform Marriage Evasion Act.³⁴ Section 1 of the Act provided that when domiciliaries of a state that prohibited their marriage obtained a marriage in another state where it was permitted, the marriage was void and not recognized by the state of the celebrants’ domicile.³⁵ The Act, which was clearly intended to prohibit the evasion of a state’s marriage laws

that the validation of such a marriage fails to recognize the forum state’s legitimate and legislatively expressed interest in prevention of such a marriage).

²⁹. LEFLAR ET AL., supra note 26, § 220; WEINTRAUB, supra note 26, § 5.1C.
³⁰. See generally WEINTRAUB, supra note 26, § 5.1A (discussing such statutes and decisions of courts interpreting them).
³¹. Id.
³². RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) (rejecting the general rule if it contravenes “the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934) (rejecting the general rule if the marriage is polygamous, incestuous, interracial, or where the general rule is inapplicable by statute).
³³. See, e.g., LEFLAR ET AL., supra note 26, § 220 (recognizing that the interest analysis would change if the State had a strong public policy interest in prohibiting certain marriages).
³⁴. 9 U.L.A. 480 (1942) (withdrawn in 1943 from the list of Uniform Acts recommended for adoption by the states).
³⁵. UNIF. MARRIAGE EVASION ACT § 1, 9 U.L.A. 480 (1942) (withdrawn, 1943).
by its domiciliaries, never gained much popularity among the states. In fact, the statute or similar statutes are in effect today in only a small minority of states. Although these statutes are rare, state courts confronted with them are essentially unable to recognize the out-of-state marriages that they regulate. Thus, this Article will not further discuss this exception to the general rule favoring the validation of out-of-state marriages.

2. Public Policy Exception.—The second exception to the general rule validating out-of-state marriages provides that a marriage, valid where performed, will not be recognized in a forum if the recognition of such a marriage violates that forum’s “strong public policy.” Although the public policy of a state is theoretically embodied in that state’s choice of law analysis, the public policy exception has enabled courts to avoid applying the ordinarily applicable foreign law when that law violates a strongly held public policy of the forum. Some commentators insist that the public policy exception should be retained in choice of law analysis because it is grounded in ideas of fundamental justice. In application, however, the exception is highly problematic.

A foreign law is not contrary to a state’s public policy merely because it is different or because the state has not legislated on the matter. As Judge Cardozo stated in his famous opinion in Loucks

36. The statute was adopted by only five states before it was withdrawn from the recommended list of Uniform Acts. WEINTRAUB, supra note 26, § 5.1A, at n.6.

37. See Closen & Heise, supra note 22, at 813 n.9 (listing 13 states that currently have some form of a Marriage Evasion Act).

38. But see Korf v. Korf, 157 N.W.2d 691, 693 (Wis. 1968) (construing an evasion statute narrowly to avoid voiding an out-of-state marriage).


40. Because the exception is used to avoid ordinarily applicable choice of law outcomes, its use often reflects dissatisfaction on the part of the forum court with its own choice of law rule, rather than a strong conviction that the laws of another state are pernicious or repugnant. See Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 981 (1956).

41. See Paulsen & Sovern, supra note 40, at 1015.

42. See, e.g., Swann v. Swann, 21 F. 299, 301 (C.C.E.D. Ark. 1884) (“The term, [public policy], as it is often popularly used and defined, makes it an unknown and variable quantity . . . .”); Wall v. Chesapeake & Ohio Ry. Co., 125 N.E. 20, 22 (Ill. 1919) (“Different states may have different policies, and the same state may have different policies at different times . . . .”).

43. See, e.g., Bethlehem Steel Corp. v. G.C. Zarnas & Co., 304 Md. 183, 189, 498 A.2d 605, 608 (1985) (“We fully agree that merely because the Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy and thus unenforceable in our courts.”); Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (“Our own scheme of legislation may be different. We may even have no
"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges. ... They do not close their doors, unless [recognition] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." More recently, the New York Court of Appeals stated that "foreign-based rights should be enforced unless the judicial enforcement of such a ... [right] would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense." Accordingly, only rarely should the law of one state be determined to be so far outside the social and moral standards of a sister state that it violates that state's strong public policy.

The public policy of a state finds expression in its courts' decisions, its constitution, and its legislation. Courts often take several factors into consideration to determine the extent to which a domestic statute expresses a strong public policy. Some courts, for example, consider the persistent existence of a state statute to be a persuasive indication of that state's public policy. Courts may examine the state's legislation in the context of national legislative trends when determining whether a state's public policy is violated by the application of foreign law. A parochial domestic statute, for example, will be given less weight when it conflicts with a progressive legislation on the subject. That is not enough to show that the public policy forbids us to enforce a foreign right.

44. 120 N.E. 198 (N.Y. 1918).
45. Id. at 202.
47. LEFLAR ET AL., supra note 26, § 45.
48. See, e.g., Champagnie v. W.E. O'Neil Constr. Co., 395 N.E.2d 990, 993 (Ill. App. Ct. 1979) ("The public policy of a state has been said to be found in its judicial decisions, legislation, and constitution ... "); Chubbuck v. Holloway, 234 N.W. 314, 315 (Minn. Ct. App.), rev'd on other grounds, 234 N.W. 868 (Minn. 1931) ("[T]he term 'public policy' does not mean simply sound policy or good policy, but it means the law of the state whether found in our Constitution, our statutes, or our judicial records.").
49. See, e.g., Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961) (noting that marriages between an uncle and niece have been prohibited since 1702); Dorado Beach Hotel Corp. v. Jernigan, 202 So. 2d 830, 831 (Fla. Dist. Ct. App. 1967), appeal dismissed, 209 So. 2d 669 (Fla. 1968) (noting that the continuous long history of restrictions on gambling established the state's public policy to restrict gambling); Gooch v. Faucett, 29 S.E. 362, 363 (N.C. 1898) (noting that since gambling has been prohibited by statute for more than 100 years, the legislature has determined that it is dangerous to the state).
Although earlier decisions limited the sources to which a court could look in determining public policy to the state's constitution, statutes, and judicial decisions, courts more recently have recognized that a state's public policy also can be found in the prevailing social and moral attitudes of the community. Thus, the public policy of a state is not fixed in time but may change as societal changes take place.

Although the legislature usually makes a statutory declaration of its state's public policy, courts differ over the level of clarity necessary to overcome the traditional judicial rule of comity towards the laws of a sister state. Some courts require a high degree of clarity before they will reject the ordinarily applicable foreign law on public policy grounds. For example, in *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, the Court of Appeals of Maryland rejected an indemnity provision contained in a contract that was valid in Pennsylvania primarily because a domestic statute stated that such provisions were "against public policy." The dissenting opinion in that case would have required even more, arguing that the domestic statute expressed only an *internal* public policy and that the legislature could have

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50. See, e.g., *Linton v. Linton*, 46 Md. App. 660, 661, 420 A.2d 1249, 1250 (1980) (stressing, in its decision to enforce a Virginia law allowing a wife to sue her husband, that a number of states have rejected interspousal immunity); *Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1980) (using the fact that a large number of states permit interspousal tort suits to support its conclusion that permitting such a suit does not violate Texas public policy).

51. See, e.g., *Swann v. Swann*, 21 F. 299, 301 (C.C.E.D. Ark. 1884) ("The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws, and judicial decisions."); *Mertz v. Mertz*, 3 N.E.2d 597, 599 (N.Y. 1936) ("[A] state can have no public policy except what is to be found in its Constitution and laws.").

52. See, e.g., *Champagnie v. W.E. O'Neil Constr. Co.*, 395 N.E.2d 990, 993 (Ill. App. Ct. 1979) ("The public policy of a state has been said to be found in . . . [the] customs, morals and notions of justice which may prevail in the state."); *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 212-13 (N.Y. 1964) ("Strong public policy is found in prevailing social and moral attitudes of the community.").

53. See *Linton*, 420 A.2d at 1251 ("The public policy of our fathers may not have been the same as their predecessors, nor is the public policy of our fathers necessarily that of ours.").


57. Id. at 191, 498 A.2d at 608.
expressly stated, as it had in other statutes, that the statute applied, regardless of the state's ordinarily applicable choice of law rule.\textsuperscript{58} Many courts, however, do not require an explicit statement by the state's legislature to conclude that a foreign law violates a strongly held public policy of the forum.\textsuperscript{59}

\textit{a. The Public Policy Exception Applied to Marriages.}—Courts may consider a marriage so offensive to local law or common decency that they refuse to validate the marriage under the law of the state of its celebration. A marriage may be contrary to a state's public policy either because it is contrary to natural law or because it violates a positive law enacted by the state legislature.\textsuperscript{60} Although the distinction between marriages contrary to natural law and marriages contrary to positive law is not always articulated in more modern cases, the distinction is implicitly incorporated in the Second Restatement\textsuperscript{61} and may be a primary factor in the determination of a marriage's validity.

\textit{(1) Contrary to Natural Law.}—Despite the general rule of validation, courts generally do not recognize marriages that are contrary to natural law.\textsuperscript{62} One court has stated that a marriage is contrary to natural law if it is contrary to the law of "nature according to the principles of Christendom."\textsuperscript{63} A less archaic formulation of this standard appears in \textit{Leszinske v. Poole},\textsuperscript{64} where the Court of Appeals of New Mexico stated that "[t]he test for public policy . . . is whether the marriage is considered odious by the common consent of nations or whether such marriages are against the laws of na-
Courts historically have invalidated incestuous, polygamous, and interracial foreign marriages on the grounds that they violate natural law.66

(2) **Contrary to Positive Law.**—Although courts vary little regarding the validity of marriages that are contrary to natural law, courts are split as to the validity of marriages that are valid where performed, but contrary to the positive law of the forum. The decisions appear to turn on two issues: (1) the legislative intent to alter the general rule validating out-of-state marriages, and (2) concern over evasion of forum laws.

(a) **Legislative Intent.**—Before a statutory statement of public policy can be used to invalidate marriages performed in other states, many courts require that it *expressly* declare that the marriages prohibited are void regardless of where they are performed.67 Even in the face of strong statements regarding the prohibition of certain marriages within the state, these courts require clear legislative intent to contravene the traditional choice of law rule.68 These courts often require a clear intent to preempt the general rule of validation even when statutes criminalize the act of marrying or criminalize sexual relations between the celebrants of the prohibited marriage.69

65. *Id.* at 1055 (citing *McDonald v. McDonald*, 58 P.2d 163 (Cal. 1936)).
66. *See infra* notes 85-93 and accompanying text.
67. *See, e.g.*, *State v. Graves*, 307 S.W.2d 545, 548 (Ark. 1957) ("The intent must find clear and unmistakable expression."); *Allen v. Storer*, 600 N.E.2d 1263, 1266 (Ill. App. Ct. 1992) (noting that the statute did not expressly attempt to invalidate out-of-state marriages); *Loughmiller*, 629 P.2d at 161 (requiring that the statute contain express language in order to void valid out-of-state marriages); *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953) (noting that the statute did not by express terms regulate marriages performed in another state).
68. *See, e.g.*, *Johnson v. Lincoln Square Props. Inc.*, 571 So. 2d 541, 542 (Fla. Dist. Ct. App. 1990) (recognizing out-of-state common law marriage despite a state statute stating that such marriages were "void"); *Loughmiller*, 629 P.2d at 158-61 (validating an out-of-state marriage between first cousins despite a Kansas statute declaring such marriages "incestuous and absolutely void"); *Leszinske v. Poole*, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990) (recognizing a foreign marriage between an uncle and niece despite language in New Mexico’s marriage statute deeming all marriages between uncle and niece “incestuous and absolutely void”); *In re May’s Estate*, 114 N.E.2d at 6 (recognizing an out-of-state marriage between an uncle and niece despite a statute declaring all such marriages “incestuous and void”).
69. *See, e.g.*, *Whittington v. McCaskill*, 61 So. 236, 236-37 (Fla. 1913) (recognizing an interracial marriage performed out of state, even though under the Florida statute, interracial marriages were criminal); *Loughmiller*, 629 P.2d at 161 (recognizing a marriage between first cousins even though a state statute imposed criminal penalties for incestuous marriages performed in Kansas); *In re Miller’s Estate*, 214 N.W. 428, 430 (Mich. 1927) (upholding an out-of-state intermarriage despite a Michigan statute providing for a 15-year
The clear intent requirement is justified for several reasons. Numerous important policies are promoted by a rule creating a presumption of validity that is overcome only by the clearest expression of legislative intent. For example, maintaining stability and predictability in marital relations and protecting the legitimacy of children are important state interests regardless of where a marriage is performed. The intent to reject a marriage therefore should not be assumed. Finally, requiring a clear expression of intent often allows courts to avoid openly challenging a legislative policy determination by supplying them with a "reason" for not applying a draconian domestic law for which they have little sympathy.

Despite substantial precedent and the policy justifications supporting the clear intent requirement, several courts have invalidated out-of-state marriages based on public policy enunciated in state statutes lacking an expression of clear intent. The determination that a state's public policy was clear enough in a prohibitive statute to contravene the traditional choice of law rule is also justifiable. First, the clearest statement of a state's policy regarding certain marriages may be simply the prohibitive language of the statute itself. Criminalization of the act of marrying, or sexual relations between the celebrants, also is convincing evidence of the strength of the state's

criminal sentence for intermarriage); Leefeld v. Leefeld, 166 P. 953 (Or. 1917) (recognizing an out-of-state incestuous marriage even though such marriages were criminal when performed in Oregon).

70. See WEINTRAUB, supra note 26, § 5.1C. Professor Weintraub correctly points out that these same policy considerations also would justify the validation of domestic marriages prohibited by statute. Id.

71. See State v. Graves, 307 S.W.2d 545, 548 (Ark. 1957) ("While every state can regulate the status of its own citizens, in the absence of express words, a legislative intent' to contravene the jus gentium under which the question of the validity of a marriage contract is referred to the lex loci contractus 'cannot be inferred.'") (quoting State v. Hand, 126 N.W. 1002, 1003 (1910), in turn quoting Van Voorhis v. Brintnall, 86 N.Y. 18, 37 (1881)).

72. See WEINTRAUB, supra note 26, § 5.1C.

73. See, e.g., Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961) (finding express prohibitions in a marriage statute and the criminalization of incestuous marriages sufficient to invalidate an out-of-state marriage); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979); Stein v. Stein, 641 S.W.2d 856, 858 (Mo. Ct. App. 1982) (both finding valid out-of-state common law marriages to be against the public policy expressed in statutes invalidating such marriages in the state). See supra note 55 and accompanying text.

74. See, e.g., Osoinach v. Watkins, 180 So. 577, 580 (Ala. 1938) (interpreting a statute declaring all marriages between enumerated persons "incestuous and void"); Catalano, 170 A.2d at 728-29 n.2 (declaring incestuous marriage void); Laikola, 277 N.W.2d at 656; Stein, 641 S.W.2d at 857 (both referring to state statutes expressly prohibiting common-law marriages).
policy with regard to such marriages. Finally, the continued existence of a statutory prohibition, even without a statement that it applies to out-of-state marriages, is a strong indication of the continued existence of a strong public policy against such marriages.

(b) Evasion of Local Law.—Courts also disagree as to whether it is relevant to the public policy determination that the parties went to another jurisdiction for the sole purpose of evading the forum's prohibition against their marriage. Even in the absence of an anti-evasion statute, a small minority of courts have refused to recognize the validity of such marriages. Courts taking this position insist that the state's prohibition against certain marriages was intended to apply to its domiciliaries regardless of where they go to be married. Moreover, several older decisions indicated that an intent to evade forum law was, in and of itself, a violation of public policy. Finally, some commentators have asserted that it is unjust to permit only the "favored few who may have the luck, or the knowledge, or the affluence to take advantage of the validating conflicts rule" while the poor and uninformed remain subject to the forum's law.

75. See, e.g., Catalano, 170 A.2d at 727-28 n.2 (noting that incestuous carnal knowledge was subject to a 10-year sentence); Bucca v. State, 128 A.2d 506, 508 (N.J. Super. Ct. Ch. Div. 1957) (noting that intermarriage or incestuous fornication was subject to a fine and a five-year sentence).

76. See, e.g., Catalano, 170 A.2d at 728 ("To determine whether the marriage in the instant case is contrary to the public policy of this state, it is only necessary to consider that [such] marriages . . . have been interdicted and declared void continuously since 1702 . . . ."); Bucca, 128 A.2d at 508 (noting a statutory prohibition to incestuous marriage since 1682).

77. See supra notes 34-38 and accompanying text.

78. See EHRENZWEIG, supra note 26, § 139(d). See, e.g., Laikola, 277 N.W.2d at 656; Stein, 641 S.W.2d at 858 (both holding that parties claiming valid out-of-state common-law marriage could not avoid the state prohibition through a brief trip to a state where such marriages were recognized); Eggers v. Olson, 231 P. 483, 485 (Okla. 1924) (holding that parties cannot successfully evade the controlling force of state laws by going to another jurisdiction where there is no prohibition against interracial marriages).

79. See Laikola, 277 N.W.2d at 656 ("Minnesota residents may not enter into a valid common-law marriage by temporarily visiting a state which allows common-law marriages.").

80. See In re Stull's Estate, 39 A. 16, 17 (Pa. 1898) (stating that the "great weight of authority" is against the validity of a marital union obtained after entering a foreign jurisdiction "for the express purpose of violating the law of [the] domicile").

81. WEINTRAUB, supra note 26, § 5.1C.
The majority approach, however, considers even a blatant evasion of forum law irrelevant in determining the validity of a marriage. This approach recognizes the societal interest in maintaining the predictability of marriages and the legitimacy of children. The approach is also consistent with the current trend favoring interstate comity and limiting the public policy exception.

b. Specific Categories of “Problem” Marriages.—Several categories of marriages have consistently created public policy questions when their validity has been challenged in jurisdictions other than the state of celebration. Incestuous marriages, which violate either natural law according to “the general opinion of Christendom” or a statute, continue to create public policy questions. Polygamous marriages consistently bring about questions of public policy. For example,

82. See Ehrenzweig, supra note 26, § 139(d). See, e.g., Etheridge v. Shaddock, 706 S.W.2d 395, 396 (Ark. 1986) (refusing to invalidate a marriage between two first cousins even though the parties clearly went to another state merely to avoid the forum law); McDonald v. McDonald, 58 P.2d 163, 165 (Cal. 1936) (holding that a marriage obtained in Nevada for the purpose of evading California law was not invalid); Fensterwald v. Burk, 129 Md. 131, 134, 98 A. 358, 360 (1916) (discussing a complaint alleging that a marriage in a foreign jurisdiction “was in pursuance of a fraudulent plan to evade the laws of the state of Maryland”); Leszinske v. Poole, 798 P.2d 1049, 1055 (N.M. Ct. App. 1990) (refusing to void a marriage between domiciliaries solely because the parties were attempting to avoid domestic law).

83. See supra note 28 and accompanying text.

84. See, e.g., Leszinske, 798 P.2d at 1054 (noting trend towards comity and away from the public policy exception).

85. These marriages include persons in the direct line of consanguinity, including brothers and sisters but not collateral relations. See Loughmiller, 629 P.2d at 158.

86. A legislature may determine for policy reasons that certain marriages between persons related by blood or affinity should be prohibited, though they do not violate natural law. See id.; Fensterwald v. Burk, 129 Md. 131, 138, 98 A. 358, 360 (1916).

87. See, e.g., Loughmiller, 629 P.2d at 161 (finding no precedent upon which to void marriage between first cousins); Lessinske, 798 P.2d at 1053-55 (ruling on the validity of marriage between uncle and niece).

88. The overwhelming consensus in this country is that polygamous marriages are contrary to natural law. See, e.g., Earle v. Earle, 126 N.Y.S. 317, 319 (1910) (“[I]t may be assumed that no civilized Christian nation permits polygamy.”); State v. Ross, 76 N.C. 242 (1877) (“[A]ll Christian countries agree ... that polygamy is unlawful, consequently such marriages will be held null everywhere.”). In England, however, polygamous marriages have been widely upheld. See J.H.C. Morris, The Recognition of Polygamous Marriages in English Law, 66 HARV. L. REV. 961, 1002 (1953). Even in this country, courts on occasion have upheld polygamous marriages in order to resolve “incidental” questions. See, e.g., In re Dalip Singh Bir’s Estate, 188 P.2d 499, 500-02 (Cal. Ct. App. 1948) (recognizing a polygamous marriage for the purpose of intestate succession); Rogers v. Cordingly, 4 N.W.2d 627, 629 (Minn. 1942) (recognizing a Native American polygamous marriage for purposes of succession). For a discussion of public policy as it relates to “incidental” questions, see infra notes 100-108 and accompanying text.
public policy issues are implicated when a person remarries before his previous marriage is terminated, or when the validity of a marriage performed in a country in which multiple spouses are permitted is challenged.

In the past, interracial marriages also raised public policy questions. The Supreme Court held in *Loving v. Virginia* that antimiscegenation statutes were unconstitutional. Prior to that ruling, however, courts frequently determined the validity of interracial marriages based on an analysis of the public policy exception. Early decisions treated such marriages as contrary to natural law, but later courts considered the question one of positive law interpretation.

Marriages between persons under the age permitted by a forum's marriage statute also create public policy questions. Unless one of the celebrants is extremely young, the validity of such marriages is ordinarily treated as a question of interpretation of positive law. Some states have statutes that prohibit persons from remarrying within a certain period. The public policy question created by these statutes has been consistently treated as a question of positive law. Finally, "common-law" marriages create a public policy

89. See *Earle*, 126 N.Y.S. at 319 (declaring a remarriage in Italy prior to a final divorce decree polygamous and void).
90. See *Bir's Estate*, 188 P.2d at 500 (ruling that no public policy would be affected by dividing an intestate's estate between two surviving wives domiciled in a foreign province).
91. 388 U.S. 1 (1967).
92. See, e.g., *State v. Bell*, 66 Tenn. (7 Baxter) 9, 11 (1872) (voiding interracial marriage as "unnatural" and akin to incest and polygamy); *Kenny v. Commonwealth*, 71 Va. (30 Gratt) 284, 287 (1878) (characterizing interracial marriages as "connections and alliances so unnatural that God and nature seem to forbid them").
93. See, e.g., *Whittington v. McCaskill*, 61 So. 236, 236-37 ( Fla. 1913) (treating miscegenation as matter of statutory prohibition).
94. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 cmt. k (1971).
95. See, e.g., *Wilkins v. Zelichowski*, 140 A.2d 65, 66-68 (N.J. 1958) (determining whether the marriage of a 16-year-old girl was against public policy as contained in positive state statutes).
96. There are generally two types of such statutes. "Paramour" statutes typically prohibit an adulterous spouse from marrying the person with whom adultery was committed during the life of the former spouse. See *Estate of Lenherr*, 314 A.2d 255, 257 (Pa. 1974) (interpreting a typical "paramour" statute). The second type of statute prohibits former spouses from remarrying within a certain time. See *Bogen v. Bogen*, 261 N.W.2d 606, 608 (Minn. 1977) (interpreting statute prohibiting remarriage within six months of divorce decree).
97. See, e.g., *In re Ommang's Estate*, 235 N.W. 529, 531 (Minn. 1931) (interpreting public policy embodied in a paramour statute as a question of positive law).
98. In some states, a couple can be considered legally "married" without any formal ceremony or license if other criteria are satisfied. For example, Oklahoma recognizes a couple as legally married if they satisfy five requirements: (1) an actual and mutual
question in states that do not recognize them. The determination of a state's public policy regarding common-law marriages has been consistently treated as a question of positive law.99

c. Incidental Benefits of Marriage and Questions of Validity.—Incidental to the legal status of marriage are a variety of benefits and responsibilities.100 Often, the question of a marriage's validity is only incidental to the determination of whether the married parties may enjoy a particular incident of marriage. For example, a state workers' compensation or inheritance law might confer certain benefits to a "spouse." Because courts often resolve questions such as whether a person is a "spouse" by determining whether the marriage is valid,101 they may, in their efforts to resolve the question of the incidental benefit, unnecessarily invalidate the marriage for all purposes.102

The better approach to the resolution of questions regarding incidental benefits recognizes that a marriage need not be either invalid or valid for all purposes.103 The judicial inquiry under such an analysis focuses on whether the enjoyment of an incident of marriage, rather than the marriage itself, violates the public policy of the state.104 Accordingly, courts otherwise bound by positive statutes to invalidate a marriage may avoid the harsh consequences of

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100. For a brief summary of those benefits and responsibilities, see supra note 11 and accompanying text.

101. See, e.g., Vandever v. Industrial Comm'n of Ariz., 714 P.2d 866, 869 (Ariz. Ct. App. 1985) (inquiring into the validity of a marriage to determine whether a claimant was entitled to workers compensation benefits); In re Ommang's Estate, 235 N.W. 529, 531 (Minn. 1931) (using the validity of the marriage to determine whether a claimant was a "widow" entitled to administer the estate).

102. See Eggers v. Olson, 231 P. 483, 484-85 (Okla. 1924) (invalidating an interracial marriage in the resolution of a suit to quiet title which was not between the parties to the marriage).


104. See WEINTRAUB, supra note 26, § 5.1B; RICHMAN & REYNOLDS, supra note 27, § 108[c].
invalidating the marriage for all purposes. In *In re Estate of Lenherr*, for example, the Supreme Court of Pennsylvania concluded that the purpose of the state's paramour statute—protecting the injured spouse—would not be served by denying inheritance benefits to a subsequent spouse who had married in another state in violation of the statute. The court could have found the second marriage invalid for all purposes, but elected instead to award the incident of marriage.

**II. CONSTITUTIONAL LIMITATIONS ON A STATE'S ABILITY TO REJECT HOMOSEXUAL MARRIAGES UNDER THE TRADITIONAL PUBLIC POLICY EXCEPTION**

In a coordinated legal effort that has been compared to the strategy utilized by the civil rights movement in the 1950s and 1960s, gay rights activists are actively pursuing a decision by the Supreme Court that provides constitutional protection to homosexuals. Because a state court that is confronted with a homosexual marriage, legally created and recognized under the laws of a sister state, must comply with any federal constitutional requirements or limitations before deciding as a matter of state law whether the marriage will be recognized, this Article must address those constitutional issues. There are two sections of the Constitution that could limit a state's ability to reject homosexual marriages under the traditional public policy exception: (1) the Full Faith and Credit Clause, and (2)

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105. See id. § 5.1C. For a discussion of courts that invalidate marriages based only on domestic positive law, see supra notes 73-76 and accompanying text.
107. *Id.* at 258-59 (stating that the paramour statute sought to protect the sensibilities of the injured spouse, not to punish the guilty spouse).
108. *See id.*
110. Constitutional issues are not the focus of this Article, but Part II will analyze the current state of the law and arrive at tentative conclusions regarding its impact on choice of law determinations in connection with homosexual marriages. Part II is perhaps more useful, however, for identifying and examining the complicated policy issues and interests implicated by the issue of homosexual rights. State courts will consider similar issues and interests in determining whether homosexual marriages violate state public policy. For purposes of this Part, assume that the state courts confronted with homosexual marriages would, absent constitutional constraints, hold them violative of state public policy and refuse to recognize them.
111. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1.
the Due Process or Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{112}

A. Constitutional Limitations on a State's Application of its Choice of Law Rule

A state's application of its choice of law rule must comply with the constraints imposed by the Due Process Clause and the Full Faith and Credit Clause of the Constitution.\textsuperscript{115} In determining the validity of a homosexual marriage, however, a state's refusal to apply foreign law on the basis of public policy would probably survive a constitutional attack.

1. The Hague Test.—A state's rejection of foreign law through the application of domestic law will, under nearly all circumstances, satisfy the "contacts" test established by the Supreme Court in \textit{Allstate Insurance Co. v. Hague}.\textsuperscript{114} In order for a state's choice of law determination to be constitutionally permissible, the state must have "significant contact or a significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its law.\textsuperscript{115} The purpose of the contacts requirement is to prevent the application of the forum state's law from being "arbitrary or fundamentally unfair."\textsuperscript{116} It is generally accepted, however, that the test will rarely, if ever, operate to overturn a state's choice of law decision.\textsuperscript{117} The facts of \textit{Hague} indicate that a state need only have incidental contacts, which may be completely unrelated to the issue to which its law is being applied, to comply with constitutional

\begin{itemize}
\item[\textsuperscript{112}] "No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
\item[\textsuperscript{113}] See \textit{Allstate Ins. Co. v. Hague}, 449 U.S. 302, 308 (1981) (finding Minnesota's decision to apply its own law in a conflicts case violative neither of due process nor the Full Faith and Credit Clause).
\item[\textsuperscript{114}] 449 U.S. 302 (1981).
\item[\textsuperscript{115}] Id. Although there is no majority opinion in \textit{Hague}, seven of the eight justices that participated in the decision agreed that the "contacts" test was the appropriate due process test to be applied in state choice of law determinations. \textit{Id.} at 313 (plurality). The same test is applied under the Due Process Clause and the Full Faith and Credit Clause. \textit{Id.} at 308. But see \textit{id.} at 320 (Stevens, J., concurring) (arguing that the tests applied under each clause should be different in order to reflect the different interests implicated by each clause).
\item[\textsuperscript{116}] \textit{Id.} at 313.
\item[\textsuperscript{117}] See generally Symposium, \textit{Choice-of-Law Theory After Allstate Insurance Co. v. Hague}, 10 HOFSTRA L. REV. 1 (1981) (featuring contributions by many prominent conflicts scholars with a consensus that the \textit{Hague} test is very weak).\end{itemize}
requirements.\textsuperscript{118}

In most cases in which the validity of a marriage is questioned, at least one of the parties to the marriage is a domiciliary of the forum state, or the parties are seeking a right or benefit conferred by a statute or the common law of the forum state. A determination of a domiciliary's status, or the conferral of burdens and benefits under a state's statutes or judicial opinions, would surely create sufficient contacts with the state to satisfy the \textit{Hague} test. Thus, states asked to recognize homosexual marriages performed in other states will, in most cases, have sufficient contacts to constitutionally justify, based on public policy, the rejection of the foreign state's law.

2. \textit{Incorporation of Tradition in Due Process Analysis}.—Two recent plurality opinions of the Supreme Court indicate that, because of the history and universal acceptance of the public policy exception to the general rule favoring the validation of out-of-state marriages, the application of the public policy exception could \textit{never} violate due process. In \textit{Burnham v. Superior Court},\textsuperscript{119} Justice Scalia relied extensively on the historical use of "presence-based" jurisdiction and its universal continuing vitality to support his conclusion that the exercise of such jurisdiction could not violate the Due Process Clause.\textsuperscript{120} Prior to \textit{Burnham}, a plurality of the Court had already applied a similar tradition-based due process test to a state's choice of law determination. In \textit{Sun Oil Co. v. Wortman},\textsuperscript{121} Justice Scalia, relying exclusively on the historical and continuing use of the distinction between substance and procedure in state choice of law determinations, upheld a state court's application of its own statute of limitations against an attack based on the Due Process and Full Faith and Credit clauses.\textsuperscript{122}

The public policy exception to the general choice of law rule validating out-of-state marriages has its own historical pedigree.\textsuperscript{123} Use of the exception continues today with wide acceptance by both

\textsuperscript{118} See generally RICHMAN & REYNOLDS, \textit{supra} note 27, at 239-45 (providing a thorough analysis of the asserted contacts in \textit{Hague} and their relationship to Minnesota's interests in applying its law).
\textsuperscript{119} 495 U.S. 604 (1990).
\textsuperscript{120} \textit{Id}. at 622 ("[A] doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [the traditional notions of fair play and substantial justice] standard.").
\textsuperscript{121} 486 U.S. 717 (1986).
\textsuperscript{122} See \textit{id}. at 730 (plurality) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.") (quoting \textit{Jackman v. Rosenbaum Co.}, 260 U.S. 22, 31 (1922)).
\textsuperscript{123} See LEFLAR \textit{ET AL.}, \textit{supra} note 26, § 45.
courts and commentators. It is unlikely, therefore, that the application of the public policy exception, particularly in the context of a determination of the validity of a homosexual marriage, would be held to violate either the Due Process or Full Faith and Credit Clauses of the Constitution.

B. The Constitutional Right of Homosexuals to Marry

Even if a state’s application of the public policy exception to refuse recognition of a homosexual marriage is constitutional, a state may not invalidate such a marriage if homosexuals have a constitutional right to marry. Although a court might find that the Due Process or Equal Protection Clause of the Fourteenth Amendment confers such a right, neither argument has a particularly high probability of ultimate success.

1. Substantive Due Process.—The first argument for recognizing a constitutional right of homosexuals to marry is based on the contention that the right to marry is a “fundamental right” protected by the Due Process Clause. The Supreme Court has interpreted several amendments to the Constitution as protecting certain “fundamental rights” from invasion by the states. It has characterized these rights as fundamental liberties that are so “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed.” Courts apply strict judicial scrutiny when reviewing any law regulating or restricting such a right.

The list of rights the Supreme Court has declared fundamental is relatively short. It includes the right to freely associate, the right to

124. See supra notes 39-108 and accompanying text.
125. The Supreme Court has had an almost shocking intolerance for homosexual issues in the past. See infra notes 150-161 and accompanying text.
126. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) (recognizing that the Constitution protects “substantive liberties”). The Court has held that fundamental rights, such as the right to personal liberty and privacy, are implicit in the Fourteenth Amendment. See Roe v. Wade, 410 U.S. 113, 152-54 (1973) (holding that the right of privacy includes a woman’s qualified right to terminate her pregnancy); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (holding that the right of marital privacy was violated by a statute forbidding the use of contraceptives). The Court has also suggested that fundamental rights are reserved to the people by the Ninth Amendment. See Griswold, 381 U.S. at 486 (Goldberg, J., concurring). The Ninth Amendment to the Constitution states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.
vote, and the right to interstate travel.\textsuperscript{129} In addition, a fundamental right to privacy protects the freedom of choice in matters relating to an individual's personal life.\textsuperscript{130} This right to privacy includes the right of heterosexuals to marry. In \textit{Loving v. Virginia,}\textsuperscript{131} for example, Chief Justice Warren struck down Virginia's antimiscegenation statute, stating that the right to marry is "one of the 'basic civil rights of man,' fundamental to our very existence and survival."\textsuperscript{132} Language in prior decisions also stressed the important role marriage plays in our society.\textsuperscript{133} Twelve years after \textit{Loving,} the Court confirmed in \textit{Zablocki v. Redhai}\textsuperscript{134} that strict judicial scrutiny is appropriate in determining the validity of a limitation on the right to marry.\textsuperscript{135}

Commentators have since argued that the fundamental right to marry includes the right for persons of the same gender to marry.\textsuperscript{136} In support of this position, they assert that procreation is not the underlying basis for constitutional protection of heterosexual marriages.\textsuperscript{137} Rather, the right to marry is constitutionally protected because of its interrelationship with the right to privacy, the right to freely associate, and because it promotes societal stability.\textsuperscript{138} Because any marriage would implicate these concerns, they argue that the reasons for protecting heterosexual marriages also apply to homosexual marriage.\textsuperscript{139}

The Supreme Court, however, is unlikely to recognize a fundamental right of homosexuals to marry. In fact, it expressly stated in

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\item \textsuperscript{129} Id. § 11.7, at 393.
\item \textsuperscript{130} Id. See, e.g., Carey v. Population Servs., Int'l, 431 U.S. 678, 685-86 (1977) (recognizing a fundamental right to make choices regarding contraceptives); Roe, 410 U.S. at 152-53 (recognizing a fundamental right to abortion).
\item \textsuperscript{131} 388 U.S. 1 (1967).
\item \textsuperscript{132} Id. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
\item \textsuperscript{133} See Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) (characterizing marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress").
\item \textsuperscript{134} 434 U.S. 374 (1978).
\item \textsuperscript{135} Id. at 384-86. The Court struck down a Wisconsin statute that restricted the ability of economically poor residents to marry. Id. at 388.
\item \textsuperscript{136} See John D. Ingram, \textit{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, 55 (1984) (arguing that statutory restrictions on same-sex marriages are unconstitutional); \textit{Sexual Orientation and the Law, supra} note 11, at 1606-11. But see Maltz, \textit{supra} note 11, at 967 (concluding that the Constitution should not be interpreted to protect the variety of rights implicated by the right to marry).
\item \textsuperscript{137} \textit{Sexual Orientation and the Law, supra} note 11, at 1608.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} See id. at 1607-08.
\end{itemize}
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Zablocki that it did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." In addition, the argument for recognition of a constitutional right of homosexuals to marry has had no success in the few state courts that have addressed the issue. For example, the Washington Court of Appeals refused to recognize a constitutional right of homosexuals to marry. It distinguished the Supreme Court's marriage cases simply by stating that they rested upon the implicit acceptance of the definition of marriage as a union between a man and a woman.

Even the Supreme Court of Hawaii, which, based on a different constitutional theory, applied strict scrutiny in reviewing the constitutionality of Hawaii's marriage statute, held that the fundamental right to marry does not encompass a right to same-sex marriage. In Baehr v. Lewin, the court began its fundamental rights analysis by recognizing that past Supreme Court decisions interpreting the right to marry referred only to heterosexual marriages. It further pointed out that the Supreme Court discussed the right to marry within the context of the fundamental rights to procreation, childbirth, abortion, and child rearing. The court also noted that the right to same-sex marriage does not conform particularly well to the definitions of a fundamental right previously articulated by the Supreme Court:

[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. Neither do we believe that a right to same-sex marriage is implicit in the concept

143. Id. at 1191.
144. Id. at 1197.
145. Baehr, 852 P.2d at 57.
146. Id.
147. Id. at 56.
148. Id. (quoting Zablocki v. Redhail, 434 U.S. 374, 384-86 (1978)).
of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.\footnote{149}

Perhaps the largest obstacle to the recognition of a fundamental right to homosexual marriage lies in the Supreme Court's decision in \textit{Bowers v. Hardwick}.\footnote{150} In \textit{Bowers}, the Court held that the constitutional right to privacy does \textit{not} include a "fundamental right [of] homosexuals to engage in acts of consensual sodomy."\footnote{151} The \textit{Bowers} opinion is a strong indication that the Supreme Court would not recognize a fundamental right of homosexuals to marry for several reasons. First, a proscription against homosexual sodomy is analogous to a proscription against homosexual marriage. Even assuming that the constitutional protection of the right to marry may not rest upon procreation or the regulation of sexual conduct,\footnote{152} the general connection between marital status and sexual activity is difficult to separate.\footnote{153} In fact, if the Court were to recognize a fundamental right of homosexuals to marry, this recognition would create an inherent tension between \textit{Bowers}, which permits states to criminalize voluntary consensual homosexual sodomy,\footnote{154} and \textit{Griswold} and its progeny, which prohibit a state from interfering with sexual relations between married people.\footnote{155} Finally, the Court in \textit{Bowers} stressed the historical record of proscriptions against sodomy and the continued existence of such proscriptions in twenty-five states.\footnote{156} Even if states begin to recognize homosexual marriages, the significance of the historical record of nonrecognition of such marriages will not quickly fade.\footnote{157}

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  \item \footnote{149}{\textit{Id.} at 57 (citing \textit{Griswold v. Connecticut}, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)).}
  \item \footnote{150}{478 U.S. 186 (1986).}
  \item \footnote{151}{\textit{Id.} at 192.}
  \item \footnote{152}{Commentators have argued that the Supreme Court's opinions in \textit{Griswold}, \textit{Roe}, and \textit{Carey} implicitly indicate that procreation is not a basis for the constitutional protection of marriage. See \textit{Sexual Orientation and the Law}, supra note 11, at 1608.}
  \item \footnote{153}{The connection between marriage and sexual activity has been consistently recognized by state courts in determining whether certain marriages are against that state's public policy. See \textit{Catalano v. Catalano}, 170 A.2d 726, 727-28 n.2 (Conn. 1961) (holding that an out-of-state incestuous marriage is contrary to public policy). In \textit{Catalano}, the court pointed to the fact that incestuous carnal knowledge was subject to a 10-year sentence of imprisonment. \textit{Id.}}
  \item \footnote{154}{\textit{Bowers}, 478 U.S. at 196.}
  \item \footnote{155}{See \textit{Griswold v. Connecticut}, 381 U.S. 479, 484-85 (1965).}
  \item \footnote{156}{See \textit{Bowers}, 478 U.S. at 196.}
  \item \footnote{157}{See \textit{Closen & Heise}, supra note 22, at 826-27.}
\end{itemize}
The *Bowers* decision was soundly criticized in two stinging dissenting opinions, however.\(^{158}\) In addition, several legal commentators have pointedly disparaged the decision.\(^{159}\) Despite this criticism, and even with the personnel shifts that have occurred on the Court since the *Bowers* opinion was written, there is little chance that the decision will be overturned. The current Court has articulated a clear reluctance to overturn particularly divisive decisions.\(^{160}\)

Thus, the argument that a fundamental right to homosexual marriage exists under the Due Process Clause has been consistently unsuccessful. The argument failed even when made before a court that applied strict scrutiny in reviewing a marriage statute that prohibited marriages between persons of the same gender.\(^{161}\) The history and vitality of proscriptions against homosexual marriages makes the recognition of such a right even more unlikely. Finally, the Supreme Court's decision in *Bowers* presents a formidable obstacle to recognition of such a right. After *Bowers*, the Court, in order to recognize the right, would have to either disingenuously distinguish between proscriptions against sodomy and proscriptions against homosexual marriages, or overturn a fairly recent divisive decision.

2. *Equal Protection.*—The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws."\(^{162}\) Although the clause does not prohibit the government from treating persons differently or classifying persons in the application of its laws, it ensures that similar individuals will be treated similarly by the government.\(^{163}\) It also guarantees that government classifications will not be based on impermissible criteria or burden a particular group of individuals arbitrarily.\(^{164}\)

A classification satisfies the Equal Protection Clause if a sufficient relationship exists between the end the law seeks to achieve and the

\(^{158}\) See *Bowers*, 478 U.S. at 199 (Blackmun., J., dissenting), 214 (Stevens., J., dissenting).


\(^{160}\) See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (plurality opinion) (stating that in addition to other considerations supporting the doctrine of *stare decisis*, the Court should be particularly reluctant to overturn "intensely divisive" decisions).

\(^{161}\) See *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (holding that there is no fundamental right to same-sex marriage).

\(^{162}\) U.S. CONST. amend. XIV, § 1.


\(^{164}\) See *id*. 
classification. Courts determine the constitutionality of legislative classifications by evaluating the classification itself, the importance of the government interest it seeks to achieve, and the closeness of the relationship between the two. The final judgment depends on the degree to which the court scrutinizes the classification and the amount of deference it gives the legislature.

Courts evaluate the constitutionality of state laws according to equal protection analysis. The general rule is that legislation will be upheld under the Equal Protection Clause if it is "rationally related to a legitimate state interest." This low level of judicial scrutiny is called the "rational basis test" and gives social and economic legislation wide latitude. At the other extreme, courts subject legislation affecting fundamental rights or containing suspect classifications to a strict scrutiny standard of review that requires the law to be narrowly tailored to achieve a compelling state interest. Finally, courts employ a heightened standard of review, or "intermediate scrutiny," to classifications based on gender. Such a "quasi-suspect" classification will not be upheld unless it is substantially related to a sufficiently important government interest.

The outcome of judicial review under the Equal Protection Clause largely depends on which of the three standards of review a court chooses to apply. Demonstrating a rational relationship between a law and the end it seeks to achieve is a far less demanding

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166. Id. § 14.3, at 573. The court could, at one extreme, completely defer to the legislature's determination of the classification and the government interest, or at the other extreme, review the reasonableness of every legislative determination in detail. Id.
168. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980) (stating that in cases involving social and economic benefits, the Court has "consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn").
169. See supra notes 126-134 and accompanying text.
170. The Court originally applied the term "suspect" to characterize classifications based on national origin. Korematsu v. United States, 323 U.S. 214, 216 (1944). The current list of suspect classifications is very short, namely those based on race, alienage, or national origin. See Cleburne, 473 U.S. at 440. See also Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (discussing whether homosexuality is a "suspect class").
171. See Cleburne, 473 U.S. at 440.
172. Id. at 440-41.
burden than, for example, proving that a compelling government interest justifies a law's suspect classification. Unless a court finds that a marriage statute prohibiting homosexual marriages discriminates on the basis of gender, as opposed to sexual orientation, most likely it will apply the rational basis test to the legislation and uphold the prohibition.

a. Homosexuals as a Suspect or Quasi-Suspect Class.—The Supreme Court has identified several factors to guide the inquiry as to whether a particular group constitutes a suspect or quasi-suspect class. First, the Court generally considers whether the group under consideration has suffered a history of purposeful discrimination. The next factor is "whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious." This factor incorporates a consideration of (1) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society," (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes, and (3) whether the trait defining the class is immutable. Suspect and quasi-suspect classes differ in that the characteristics defining a suspect class are nearly always irrelevant to any valid government purpose, whereas the characteristics defining a quasi-suspect class are sometimes relevant to the achievement of a valid government purpose.

Several commentators have argued forcefully that homosexuals as a group satisfy the criteria for a suspect or quasi-suspect class. There is clear disagreement, however, among the courts that have considered the question. The majority of these courts, including

175. See Watkins v. United States Army, 847 F.2d 1329, 1346 (9th Cir.), rev'd granted en banc, 847 F.2d 1362 (9th Cir. 1988), and different results reached on rev'd en banc, 875 F.2d 699 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990).
176. See id. at 433-44.
177. See id. at 453-55 (Stevens, J., concurring). Because the characteristics defining a quasi-suspect class could be relevant to the achievement of a valid government purpose, the Court refrained from applying the almost insurmountable strict scrutiny test applied to suspect classes. See id.
several state courts denying homosexuals the right to marry, have either expressly held that homosexuals do not constitute a suspect class or have without explanation simply applied the rational basis test to the legislation under review. A few courts have considered the factors listed above and concluded that homosexuals constitute a suspect class. One court has concluded that homosexuals constitute a quasi-suspect class.

Courts on both sides of this disagreement have incorporated the Supreme Court’s decision in *Bowers* into their equal protection analysis. Post-*Bowers* courts that have rejected homosexuality as a suspect classification have relied on the strong antihomosexual rhetoric contained in that decision. In *Padula v. Webster*, for example, the Court of Appeals for the District of Columbia Circuit

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181. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987) (rejecting homosexuality as a suspect classification in a case for wrongful termination); *Gay Inmates of Shelby County Jail v. Barksdale*, 819 F.2d 289 (6th Cir. 1987) (applying the rational basis test to regulations separating prisoners based on sexual orientation); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (applying the rational basis test to a law prohibiting public homosexual conduct by teachers), aff’d, 470 U.S. 903 (1985); *State v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) (en banc) (applying the rational basis test to a law prohibiting certain sexual conduct); *In re Opinion of the Justices*, 252 A.2d 1095 (N.H. 1987) (stating that homosexuals do not constitute a suspect class and applying a rational basis test to a proposed bill prohibiting homosexual adoptions). Several state court decisions have applied the rational basis test specifically to prohibitions of same-sex marriages. See *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974).

182. See supra notes 174-178 and accompanying text.

183. See, e.g., *Watkins v. United States Army*, 847 F.2d 1329, 1349 (holding that homosexuals meet all requirements for a suspect class), *reh’g en banc granted*, 847 F.2d 1362 (9th Cir. 1988), and different results reached on *reh’g en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990); *BenShalom v. Marsh*, 703 F. Supp. 1372, 1380 (E.D. Wis.) (holding that homosexuals constitute a suspect class), *rev’d*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). These courts recognized that homosexuals have been subjected to a long history of bitter discrimination and to unfair prejudice due to inaccurate stereotypes. See *Watkins*, 847 F.2d at 1345-46. Homosexuality was treated by the courts as an immutable trait that has little to do with a person’s ability to contribute to society. Id. at 1346-48.


186. See *Watkins*, 847 F.2d at 1355 (Reinhardt, J., dissenting) (“The anti-homosexual thrust of *Hardwick* and the Court’s willingness to condone anti-homosexual animus in the actions of the government, are clear.”). See also *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (citing Blackstone’s description of sodomy as “‘the infamous crime against nature,’ . . . ‘the very mention of which is a disgrace to human nature’ [and] ‘a crime not fit to be named’”; id. at 200 (Blackmun J., dissenting) (characterizing the majority opinion as having “an almost obsessive focus on homosexual activity”).

187. 822 F.2d 97 (D.C. Cir. 1987).
stated that homosexuals, as a class, are defined by their conduct.\textsuperscript{188} Because, under \textit{Bowers}, that conduct can be constitutionally criminalized, the \textit{Padula} court reasoned that it would be difficult to conclude that any discrimination against homosexuals was invidious.\textsuperscript{189}

The few post-\textit{Bowers} courts that have deemed homosexuals a suspect class have pointed out that \textit{Bowers} did not address the equal protection issue.\textsuperscript{190} Rejecting the assertion that homosexuals are defined by an intent to commit sodomy,\textsuperscript{191} these courts minimized the applicability of the \textit{Bowers} decision by distinguishing the government's constitutional ability to prohibit certain conduct from its constitutionally suspect ability to discriminate against a particular class of persons.\textsuperscript{192} Although this minority of courts made an earnest effort to distinguish or limit \textit{Bowers}, a realistic reading of the decision indicates that the Supreme Court demonstrated a clear unwillingness to provide constitutional protection to homosexuals.\textsuperscript{193}

Based on the weight of authority and the strong rhetoric contained in the \textit{Bowers} decision, most courts would not treat homosexuality as a suspect or quasi-suspect classification. Legislation prohibiting homosexual marriages would therefore fall under the rational basis test. Under this standard, it would almost undoubtedly be upheld. In fact, several state courts have already held such legislation constitutional under the rational basis test.\textsuperscript{194} These decisions relied partially on the traditional definition of marriage as the union of a man and a woman.\textsuperscript{195} In addition, they pointed to

\textsuperscript{188} \textit{Id.} at 103.

\textsuperscript{189} \textit{See id.} at 103 ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

\textsuperscript{190} \textit{See Watkins}, 847 F.2d at 1399 (citing \textit{Bowers}, 478 U.S. at 196 n.8).

\textsuperscript{191} \textit{See BenShalom v. Marsh}, 703 F. Supp. 1372, 1379 (E.D. Wis.) ("Yet not one shred of evidence has been presented to the court to show that homosexuals as a group share a compelling desire to commit that particular form of sexual conduct."). \textit{Revd.}, 881 F.2d 454 (7th Cir. 1989), \textit{cert. denied}, 494 U.S. 1004 (1990).

\textsuperscript{192} \textit{See Watkins}, 847 F.2d at 1340 ("[N]othing in \textit{Hardwick} actually holds that the state may make invidious distinctions when regulating sexual conduct.").

\textsuperscript{193} \textit{See Bowers v. Hardwick}, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution.").

\textsuperscript{194} \textit{See}, e.g., \textit{Baker v. Nelson}, 191 N.W.2d 185, 187 (Minn. 1971) ("There is no irrational or invidious discrimination."), \textit{appeal dismissed}, 409 U.S. 810 (1972); \textit{Singer v. Hara}, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) ("There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships.").

\textsuperscript{195} \textit{See Baker}, 191 N.W.2d at 186 ("The institution of marriage as a union of man and woman... is as old as the book of Genesis.").
state interests in preserving the institution of marriage for the purposes of procreation and the rearing of children.\(^{196}\)

The Supreme Court held in *Bowers* that a state's interest in preserving morality was a sufficiently rational basis for enacting laws limiting the private conduct of homosexuals.\(^{197}\) The connection between laws prohibiting homosexual sodomy and laws prohibiting homosexual marriages\(^{198}\) also indicates that prohibitions of homosexual marriages would be upheld under the rational basis test.

**b. Prohibitions of Same-Sex Marriages Treated as Gender Classifications.**—Another theory exists under which statutes prohibiting same-sex marriages might be subjected to heightened judicial scrutiny. If a court could be convinced that such a marriage statute classifies on the basis of gender, it would apply intermediate scrutiny in judging

\(^{196}\) *Id.*. *See also* Singer, 522 P.2d at 1197. It is difficult to see, however, how prohibiting homosexual marriages rationally relates to a state's interests in promoting heterosexual marriages, procreation and child rearing. Perhaps these states determined as a matter of social policy that certain relationships, heterosexual marriages in particular, are preferred. In fact, states have provided heterosexual married couples with numerous tax, insurance, and other incentives at a substantial social cost. Perhaps these states also determined, as a matter of social policy, that there is no preference for homosexual marriages because they do not as efficiently, if at all, promote the traditional heterosexual values of procreation and child rearing. For this reason, it is arguably rational not to recognize homosexual marriages.

[M]arriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman. Singer, 522 P.2d at 1197. Although this argument may deserve criticism, *see* Ingram, *supra* note 136, at 48, it is capable of withstanding the rational basis test, which gives very wide latitude to economic and social legislation. *See supra* notes 167-168 and accompanying text.

\(^{197}\) *Bowers*, 478 U.S. at 196. The majority in *Bowers* implicitly accepted as legitimate the state interest in prohibiting conduct that has been condemned as immoral for hundreds, if not thousands, of years under traditional Judeo-Christian moral and ethical standards. *See id.* at 192 ("Proscriptions against [sodomy] have ancient roots."). 196-97 (Burger, C.J., concurring) ("[D]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."). The state interest in promoting traditional moral values has not escaped criticism; it was forcefully rejected as insufficient by the dissenters in *Bowers*. *See id.* at 211 (Blackmun, J., dissenting) ("The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond conformity to religious doctrine."). *See also* Ingram, *supra* note 136, at 48 (rejecting "public morality" as a legitimate basis for prohibiting homosexual marriages). Previous Supreme Court opinions also questioned the legitimacy of that interest. *See* e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1968) (rejecting the state interest in morality as a justification for prohibiting interracial marriages). *But see* Paris Adult Theater I v. Slaton, 413 U.S. 49, 59-60 (1964) (defending the "right of the Nation and of the States to maintain a decent society") (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

\(^{198}\) *See supra* notes 151-155 and accompanying text.
the statute's constitutionality. A comparison of the statutes that prohibited interracial marriages and the statutes of states that currently prohibit homosexual marriages provides the best argument for evaluating the latter as gender classifications. Before 1966, many state statutes, often called antimiscegenation statutes, prohibited, and in some cases, criminalized interracial marriages. The Supreme Court declared antimiscegenation statutes unconstitutional in *Loving v. Virginia*. In that case, the State argued that the statute did not violate the Fourteenth Amendment because it treated both races equally; both races were punished, and neither race was permitted to do something that the other was not. Rejecting this argument, the Court stated:

[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discriminations. . . . In the case at bar, . . . we deal with statutes containing racial classifications, and the 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.

Thus, parties seeking to overturn statutes prohibiting homosexual marriages could argue that, just as the antimiscegenation statutes prevented persons from marrying because of race, statutes prohibiting same-sex marriages prevent persons from marrying because of gender. Aside from the Supreme Court of Hawaii, however, every court that has addressed this argument has held that the constitutional implications of antimiscegenation statutes and statutes preventing same-sex marriages are distinguishable. Insisting that the term "marriage" applies only to the union of a man and woman, they have concluded that it is the definition of marriage itself, not a gender classification, that prevents persons of the same sex from marry-

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199. See supra notes 91-93 and accompanying text.
201. Id. at 8-9.
202. Id.
ing. As the Washington Court of Appeals stated in *Singer v. Hara.*

Given the definition of marriage which we have enunciated, the distinction between the case presented by appellants and those presented in *Loving* and *Perez,* is apparent. In *Loving* and *Perez,* the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into by two persons of the opposite sex.

The reasoning underlying the above explanation is flawed for two reasons. First, because the definition of marriage is determined by the state statute, it is circular to claim that a "marriage," defined by the state as a relationship that cannot exist between people of the same gender, does not contain a state-created gender classification. Second, such an explanation ignores the fact that, prior to *Loving,* Virginia courts attempted to justify antimiscegenation statutes with similar logic, claiming that an interracial "marriage" could not exist because the Deity had deemed such unions to be intrinsically unnatural.

Even if courts apply intermediate scrutiny in evaluating the constitutionality of statutes prohibiting same-sex marriages, they might still uphold them. Under intermediate scrutiny, legislation will fail unless its classification is substantially related to a sufficiently important government interest. Legislation prohibiting homosexual marriages might purport to advance several state interests, including the promotion of procreation, morality or the traditional family, or supporting laws prohibiting homosexual acts, and avoiding the social ostracism of homosexuals.

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205. *Singer,* 522 P.2d at 1191 ("The operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman.").
207. *Id.* at 1192.
Although the state interest in procreation and the traditional family has been questioned, and the importance attributed to the state interest in morality is, at best, unsettled, the Bowers Court clearly validated, at least under the rational basis test, the state interest in prohibiting homosexual conduct. The Court's emphasis in Bowers on the long history and continued legislative popularity of laws criminalizing sodomy is a strong indication that the even more extensive history of laws prohibiting or not recognizing homosexual marriages would cause the Court to find the state interest promoted by those statutes sufficiently important to satisfy the intermediate scrutiny standard.

III. DETERMINATION OF STATE PUBLIC POLICY REGARDING HOMOSEXUAL MARRIAGES LEGALLY RECOGNIZED BY ANOTHER STATE

Absent constitutional limitations, every state has the right to determine who may assume and occupy a matrimonial relationship within its borders. The determination of whether a homosexual marriage, legally created and recognized in another state, violates the strong public policy of the forum state requires the forum court to decide whether such a marriage violates natural law, and if not, whether the state's positive law indicates a contrary domestic public policy sufficiently strong to reject the traditional choice of law rule. In its evaluation of a state's positive law, a court must examine the state's marriage statute as well as other relevant state laws, such as criminal or civil rights statutes, that might indicate a strong public interests in encouraging familial stability and monogamy in light of the nation's AIDS epidemic. See Closen & Heise, supra note 22, at 810-11.

212. See Sexual Orientation and the Law, supra note 11, at 1608-10. Commentators have argued that the Supreme Court's holdings in Griswold and Roe implicitly reject procreation as an important state interest. Id. Also, over the last two decades, the Court has expanded its definition of the "traditional" family. See Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977) (extending the scope of the privacy right to families comprised of close relatives brought together out of choice, necessity, or duty).

213. See supra note 197.


215. See infra notes 254-259 and accompanying text.

216. Thus, a state marriage statute prohibiting same-sex marriages would only be struck down on Equal Protection grounds if homosexuals are determined to constitute a suspect class. See Ingram, supra note 136, at 46-50; Sexual Orientation and the Law, supra note 11, at 1609-11.

217. See Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("Within the limits of her political power [a state] may, of course, enforce her own policy regarding the marriage relation—an institution more basic in our civilization than any other.").
policy against homosexual marriages. The court should analyze those statutes within the context of national legislative trends as well as the prevailing social or moral attitudes of its state.218 This Article makes two assumptions to facilitate an analysis of the sources for determining a state's public policy towards same-sex marriages: (1) that the homosexual marriage legally recognized in the sister state has all of the legal benefits and obligations a valid heterosexual marriage has in that state,219 and (2) that no issues have arisen as a result of an evasion of forum law by the forum's domiciliaries.220

A. Contrary to Natural Law

States generally will not recognize a foreign marriage if that marriage is determined to be "contrary to natural law."221 Traditionally, a court's determination of whether a marriage was contrary to natural law focused on whether the marriage comport with Judeo-Christian principles.222 Courts currently examine whether the marriage is "considered odious by the common consent of nations or . . . against the laws of nature."223 Either standard, however, would provide ample support for a state court to conclude that homosexual

218. See supra notes 39-53 and accompanying text.

219. This assumption is realistic. Although the only current legislation recognizing homosexual marriages is a Danish statute, THE DANISH REGISTERED PARTNERSHIP ACT, No. 372 (Denmark 1989), that statute, subject to four very limited exceptions, grants two persons of the same sex engaged in a "registered partnership" the same rights and responsibilities as married partners. See Closen & Heise, supra note 22, at 812-13. Moreover, the Supreme Court of Hawaii's decision in Baehr indicates that, absent a compelling justification for treating homosexual couples differently, same-sex marriages will be afforded all of the benefits and obligations currently enjoyed by heterosexual couples in that state. Baehr v. Lewin, 852 P.2d 44, 65-68 (Haw. 1993).

220. Only a very few states have Marriage Evasion Acts in effect today. See WEINTRAUB, supra note 26, § 5.1A. Only a minority of courts considers the evasion of forum law in determining whether a particular marriage is against public policy, see supra notes 77-84 and accompanying text, but where evasion statutes do exist, state courts cannot recognize foreign marriages where they find an evasion of forum law. See id.; Mortenson v. Mortenson, 316 P.2d 1106, 1107 (Ariz. 1957) (rejecting the validity of a marriage in the face of a Marriage Evasion Act).

221. See Vartanian, supra note 60, at 186. Some courts have avoided this rule by focusing on the "incidental" question before it rather than the validity of the marriage for all purposes. See, e.g., In re Dalip Singh Bir's Estate, 188 P.2d 499, 501-02 (Cal. Ct. App. 1948) (permitting two wives of a polygamous marriage, recognized in the United States as contrary to natural law, to inherit property within the state). For a discussion of incidental questions, see supra notes 100-108 and accompanying text.

222. See Osoinach v. Watkins, 180 So. 577, 579 ( Ala. 1938) ("[A] marriage which is contrary to the law of nature as generally recognized in Christian countries is void everywhere . . . .").

223. Leszinske v. Poole, 798 P.2d 1049, 1055 (N.M. Ct. App.), cert. denied, 797 P.2d 983 (N.M. 1990) (citing McDonald v. McDonald, 58 P.2d 163 (Cal. 1936)).
Same-Sex Marriages are contrary to natural law. Even if same-sex marriages are soon recognized in a very small minority of states, they clearly are not recognized by the "common consent of nations." No state, by statute or judicial interpretation, currently recognizes same-sex marriages. Moreover, Denmark is the only country in the world that confers legal recognition upon homosexual marriages.

The historical treatment and descriptions of homosexual conduct also would support a conclusion that homosexual marriages are contrary to natural law. Although recent scholarship indicates that the historical treatment of same-sex marriages, particularly outside of Western cultures, has been inconsistent, "proscriptions against [homosexual activity] have ancient roots." Throughout the Middle Ages, ecclesiastical courts enforced the biblical prohibition against sodomy by burning homosexuals at the stake. The first statute prohibiting sodomy in England was enacted as early as 1533. In his concurrence to Bowers, Chief Justice Burger thoroughly discussed the historical treatment of homosexual conduct. Homosexual sodomy was a capital crime under Roman law. Blackstone described homosexual sodomy as "the infamous crime against nature" . . . of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' Many state sodomy laws originally incorporated Blackstone's characterization. The North Carolina sodomy statute, for example, originally prohibited "the abominable and detestable crime against nature, not fit to be named among Christians."

Although a court could fairly reach the conclusion that homosexual marriages are contrary to natural law, it is by no means compelled to do so. First, an entire third of Americans do not find the

\[\text{224. See } \text{Leszinske, } 798 \text{ P.2d at } 1055 \text{ (citing McDonald v. McDonald, 58 P.2d } 163 \text{ (Cal. } 1936)).\]
\[\text{225. See } \text{Clossen & Heise, supra note } 22, \text{ at } 826-29.\]
\[\text{226. See id. at } 811.\]
\[\text{227. For an excellent recent analysis of the history of same-sex marriages, see William N. Eskridge, Jr., A History of Same-Sex Marriage, } 79 \text{ VA. L. REV. 1419 } (1993).\]
\[\text{228. Bowers v. Hardwick, } 478 \text{ U.S. } 186, 192 \text{ (1986).}\]
\[\text{230. Id.}\]
\[\text{231. Bowers, } 478 \text{ U.S. at } 196-97 \text{ (Burger, C.J., concurring).}\]
\[\text{232. Id. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *215).}\]
\[\text{233. Apaser-Gbotsu et al., supra note } 229, \text{ at } 526.\]
\[\text{234. Id. (citing N.C. REV. CODE ch. } 34 \text{ § } 6 \text{ (1837)).}\]
recognition of homosexual marriages objectionable.\textsuperscript{235} In addition, only a minority of states currently impose any criminal penalties for sodomy, and only six states have specific statutes expressly prohibiting homosexual conduct.\textsuperscript{236} Even historically, only a small number of states expressly singled out homosexual conduct as deserving of special condemnation.\textsuperscript{237}

That homosexual sodomy has been condemned throughout Western history also is open to question. "Over the course of Western history, sexual practices between men, like other sexual practices, have been tolerated as well as condemned."\textsuperscript{238} There is substantial evidence that same-sex marriages were, at some points in its history, accepted in ancient Egypt.\textsuperscript{239} Similarly, homosexual conduct was not uniformly condemned in Ancient Greece or Rome.\textsuperscript{240} In fact, some homosexual practices were widely accepted. In ancient Rome, for example, a marriage between men was legally possible until 342 A.D.\textsuperscript{241} Recent scholarship indicates that same-sex marriages may have been not only accepted, but sanctioned by the Christian Church in the Middle Ages.\textsuperscript{242}

Finally, many of the courts that have addressed homosexual marriages did not find such marriages contrary to natural law. Aside from a few vague references in two decisions that might be interpreted to indicate that a homosexual marriage is contrary to natural law,\textsuperscript{243} most of the jurisdictions simply interpreted their state's marriage statute and discussed the accepted definition of marriage.\textsuperscript{244} Even aside from \textit{Baehr},\textsuperscript{245} no language in any of the

\begin{itemize}
\item \textsuperscript{235} See \textit{supra} note 13 and accompanying text.
\item \textsuperscript{236} See \textit{Apaser-Gbotsu et al., supra} note 229, at 524.
\item \textsuperscript{237} See \textit{Goldstein, supra} note 159, at 1082-85.
\item \textsuperscript{238} \textit{Id.} at 1086.
\item \textsuperscript{239} See \textit{Eskridge, supra} note 227, at 1437-38.
\item \textsuperscript{240} \textit{Goldstein, supra} note 159, at 1087; \textit{Eskridge, supra} note 227, at 1441-47.
\item \textsuperscript{241} \textit{Goldstein, supra} note 159, at 1087.
\item \textsuperscript{242} See \textit{Eskridge, supra} note 227, at 1447-53. Both the Roman Catholic and Greek Orthodox churches developed ceremonies strikingly similar to marriage ceremonies, to memorialize same-sex relationships. \textit{Id.}
\item \textsuperscript{243} See \textit{McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971) (characterizing homosexual marriage as a "socially repugnant concept"); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").}
\item \textsuperscript{244} See, \textit{e.g.}, \textit{Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (relying on the traditional definition of marriage to interpret a marriage statute); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (1971) (defining marriage as a relationship between a man and a woman); Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (interpreting a statute to not include same-sex marriages).}
\end{itemize}
opinions rejecting homosexual marriages indicated that they are socially shocking or contrary to natural law. In Singer v. Hara, for example, the Court of Appeals of Washington seemed to accept the fact that homosexual marriages might at some time become socially acceptable; it stated that “the legislature may change the definition of marriage within constitutional limits, [but] the constitution does not require the change sought by appellants.”

B. Contrary to Positive Law

Assuming that it finds that homosexual marriages are not contrary to natural law, a state court conducting a choice of law analysis will next determine whether such a marriage is contrary to a strong public policy expressed in its state’s positive law. This determination depends upon the degree of clarity required by the court of a legislative intent to reject the general rule favoring the validation of marriages.

1. Express Legislative Intent Required.—No state statute currently provides that homosexual marriages, valid where celebrated, are void. Thus, a court that requires an express legislative intent to invalidate out-of-state marriages should find that homosexual marriages performed out of state do not violate state public policy. Regardless of whether the state has an express internal prohibition against homosexual marriages or whether it criminalizes homosexual sodomy and refuses to protect homosexual

247. Id. at 1197.
248. See supra 67-76 and accompanying text.
249. See Closen & Heise, supra note 22, at 827-29. This is hardly surprising given that no state currently recognizes such marriages. Id.
250. See, e.g., Etheridge v. Shaddock, 706 S.W.2d 395, 396 (Ark. 1986) (requiring a statute that expressly prohibits marriage between first cousins to invalidate such an out-of-state marriage); Estate of Loughmiller, 629 P.2d 156, 161 (Kan. 1981) (noting that the state had no statute expressly applying to out-of-state marriages); In re May’s Estate, 114 N.E.2d 4, 6 (N.Y. 1953) (noting that a statute did not by express terms regulate incestuous marriages performed in another state).
251. Only three states have such express prohibitions. See IND. CODE ANN. § 31.7.1.2 (Burns 1987); UTAH CODE ANN. § 30.1.2 (1989); VA. CODE ANN. § 20.14 (Michie 1990). See May’s Estate, 114 N.E.2d at 6 (requiring an express legislative statement even where the state marriage statute declared all marriages between an uncle and niece “incestuous and void”).
a court that requires express statutory language must recognize such a marriage performed out of state. The express language requirement promotes comity between states with two conflicting social policies and promotes stability and predictability for the parties to the marriage.

2. Public Policy Determined From Positive Law.—Some jurisdictions do not require an express statement of intent to reject the traditional rule favoring the validation of out-of-state marriages. Whether a strong public policy against homosexual marriages exists in such jurisdictions is a complicated question largely dependent upon the positive law of the individual state. The remainder of this Section will discuss how the courts in these jurisdictions should interpret the primary manifestations of state public policy toward homosexual marriages. These manifestations include the state’s marriage statute, the existence of laws criminalizing sodomy, the existence of statutes extending or limiting the civil rights of homosexuals, and the prevailing moral or societal attitudes toward such marriages.

a. The State’s Marriage Statute.—Every state and the District of Columbia have enacted statutes regulating marriage. Although many variations exist among state marriage laws, all of the statutes define who is eligible to marry. A court interpreting its state’s marriage statute to determine the state’s public policy towards homosexual marriages first must determine whether the state’s statute permits homosexual marriages. If the court holds that the statute does not permit homosexual marriages, it must next determine, by the context and intensity of the statutory prohibition, whether the statute evidences a “strong” public policy against such marriages even when legally performed and recognized in a sister state.

Four states’ marriage statutes limit the ability to marry to heterosexual couples either by expressly prohibiting homosexual marriages or by defining marriage such that homosexual couples

252. Only six states specifically criminalize homosexual conduct; curiously, none of these states expressly prohibiting homosexual marriages. See Aparser-Gbotsu et al., supra note 229, at 525 n.10. Cf. In re Miller’s Estate, 214 N.W.2d 428, 430 (Mich. 1927) (requiring, despite the criminalization of sexual intercourse between the parties, express legislative intent to declare a valid out-of-state marriage void).

253. See supra notes 73-76 and accompanying text.

254. See generally Closen & Heise, supra note 22, at 826-29 (containing a general discussion of the various requirements of state marriage statutes).

255. Id.

are excluded. Most state marriage statutes do not prohibit homosexual marriages, but contain gender-specific terms such as "husband" and "wife" or "male" and "female." Even though these statutes do not contain any express prohibitions against same-sex marriages, every court that has confronted the question has held that such statutes do not contemplate or permit homosexual marriages. Finally, eight states' marriage laws neither expressly prohibit homosexual marriages nor use gender-specific terms. Parties could argue that these statutes indicate a legislative intent to recognize homosexual marriages, but courts would probably interpret these statutes as not permitting homosexual marriages as well.

Although no state statute currently recognizes homosexual marriages, it does not necessarily follow that they all demonstrate a strong public policy against such marriages. The statutes containing express prohibitions are similar to those that courts in the past have
determined to demonstrate a strong public policy, but the remaining statutes, because they only implicitly prohibit homosexual marriages, indicate nothing more than a legislative determination that only heterosexual relationships should be encouraged by the conferral of marriage benefits. Because of the universal acceptance of the rule favoring the validation of marriages and the important policies promoted by that rule, courts should require their state legislatures to state more than a mere preference for traditional social arrangements before they hold that their marriage statute demonstrates a strong public policy against legally recognizing the homosexual marriages of a sister state.

b. Existence of Sodomy Statutes.—Commentators have argued that because sexual conduct is not necessarily related to marriage, the existence of a sodomy statute in a state should not indicate a strong public policy against homosexual marriages. This argument, however, would probably not persuade a court to ignore a state sodomy statute as a manifestation of the state’s strong public policy. It denies reality to suggest that as a society, we do not associate sexual relations with marriage. Moreover, in determining whether a marriage between two persons violates the strong public policy of a state, courts have traditionally examined whether sexual relations between those persons are criminalized.

263. See, e.g., Osoinach v. Watkins, 180 So. 577, 579 (Ala. 1938) (finding an incestuous marriage void based on the public policy as expressed in a state statute); Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961) (finding that the statutory prohibition against incestuous marriages was evidence of a strong public policy); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979) (holding that marriages declared void by the state legislature indicated a strong public policy); Hensington v. Estate of Hensington, 640 S.W.2d 824, 825 (Mo. Ct. App. 1982) (finding a statute that declares common-law marriages null and void “higher evidence” of public policy).

264. See supra notes 24-28 and accompanying text.

265. See, e.g., Closen & Heise, supra note 22, at 831 (“Many marriages do not involve sexual relations because of the advanced age, physical incapacity, unwillingness of one or both spouses, or mutual agreement not to engage in intercourse.”); Ingram, supra note 136, at 47 (“No state imposes upon heterosexual married couples a condition that they have a proven capacity or declared willingness to procreate.”).

266. See Closen & Heise, supra note 22, at 831.

267. The association of the two is manifest in the fact that adultery is a traditional grounds for divorce and illegitimacy carries with it a social stigmatization for the child.

A somewhat more difficult question arises, however, when the state sodomy statute does not distinguish between homosexual and heterosexual conduct.\textsuperscript{269} Although requiring an express prohibition of homosexual conduct before relying on a sodomy statute as a statement of public policy would promote state interests in both comity and stability in marital relations, courts would probably nevertheless conclude that such statutes indicate a strong public policy against homosexual marriages. Traditionally, sodomy laws have been directed primarily toward homosexuals.\textsuperscript{270} Arguably, therefore, sodomy laws indicate a strong public policy against homosexual marriages, whether or not they are limited to homosexual conduct.

A majority of states, however, have repealed their sodomy statutes.\textsuperscript{271} The repeal of a state's sodomy statute should also be treated as a manifestation of a state's public policy. Courts should view it as a positive indication that the state does not possess a strong public policy against homosexual marriages.

c. Existence or Prohibitions of Protective Civil Rights Legislation.—At least six states currently have legislation that prevents discrimination on the basis of sexual orientation.\textsuperscript{272} Typically, these statutes prohibit discrimination in housing, employment and public accommodations.\textsuperscript{273} In addition, over 110 cities and counties have local ordinances that either prohibit discrimination on the basis of sexual orientation or extend health insurance coverage and employment benefits to the partners of homosexuals.\textsuperscript{274}

In direct contrast to legislation extending protections to homosexuals, several states and local governments have enacted “anti-gay rights” legislation. For example, a recently proposed amendment to the Oregon Constitution declared homosexuality “abnormal,
wrong, unnatural, and perverse.\textsuperscript{275} Although the amendment was ultimately unsuccessful in Oregon, similar declarations have been enacted or will soon be on the ballot in a number of local jurisdictions.\textsuperscript{276} More common, however, is legislation that prevents state and local governments from establishing special protections for homosexuals. Colorado's controversial "Amendment 2," for example, prohibits any state or local legislation that protects homosexuals, lesbians, or bisexuals from discrimination.\textsuperscript{277} Although "Amendment 2" has been held to be unconstitutional,\textsuperscript{278} conservative groups in at least twenty other states are attempting to enact similar legislation.\textsuperscript{279}

A court determining the validity of a legally recognized out-of-state homosexual marriage could interpret the existence of protective legislation in the jurisdiction in two ways. First, although legislation prohibiting discrimination on the basis of sexual orientation does not necessarily embody the community's sentiment regarding homosexual marriages, a state court could reasonably conclude that such legislation indicates a public tolerance of homosexuality sufficient to justify


\textsuperscript{276} Cobb County, Georgia, for example, recently passed a resolution stating "lifestyles advocated by the gay community are incompatible with the standards to which this community subscribes." See Peter Applebome, Vote in Atlanta Suburb Condemns Homosexuality, N.Y. TIMES, Aug. 12, 1993, at A16. Similar antigay measures are likely to be on the ballots of many other communities in the near future. See Mary Jo Pitzl, McCain Calls for Tolerance in Oregon, Anti-Gay Group Applauds Senator, ARIZ. REP., Aug. 31, 1993, at A1 (discussing the attempts of the Oregon Citizens Alliance to get antigay resolutions on the ballots of seven Oregon communities).

\textsuperscript{277} Amendment 2 of the Colorado Constitution provides:

\begin{quote}
No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.
\end{quote}

COLO. CONST. amend. 2.

\textsuperscript{278} In Evans v. Romer, 854 P.2d 1270 (Colo. 1993), the Colorado Supreme Court held that any "legislation or state constitutional amendment" infringing on the fundamental right to participate in the political process is subject to strict judicial scrutiny. \textit{Id.} at 1282. Applying that test, a Colorado trial court held in December that the state's Amendment 2 was unconstitutional. See Evans v. Romer, No. 92 CV 7223, 1993 WL 518586 at *9 (Colo. Dist. Ct. Dec. 14, 1993).

\textsuperscript{279} See Valerie Richardson, Amendment 2, Act II, Gay Rights Foe Builds on Colorado Victory, WASH. TIMES, June 2, 1993, at H1.
the application of the traditional choice of law rule validating out-of-state marriages. On the other hand, a court also could disregard the existence of such legislation and concentrate instead on the state's articulation of public policy in its marriage or sodomy statutes. Justifying this position is a recent study which found that while an overwhelming majority of Americans support equal employment opportunities for homosexuals, only twenty-three percent approve state-sanctioned homosexual marriages.\(^\text{280}\)

Similarly, a court could consider the existence of "Amendment 2" type legislation in a jurisdiction a manifestation of a public policy against homosexual marriages, or it could treat the legislation as irrelevant to a determination of the state's public policy regarding homosexual marriages performed outside the state. Legislation that condemns homosexuality as a lifestyle, however, may be a more convincing indication that a jurisdiction has a strong public policy against homosexual marriages. A court confronted with a statute that expressly characterizes homosexuality as perverse or unnatural may therefore be more likely to reject the traditional choice of law rule and refuse to recognize a homosexual marriage performed legally in another state.

d. Prevailing Social or Moral Attitudes.—A court is not limited to a state's legislation and judicial opinions in determining whether or not homosexual marriages violate a strongly held public policy in the state. Although it is difficult, a court also may consider the prevailing social and moral attitudes of the community.\(^\text{281}\)

Admittedly, a large portion of the American public continues to oppose homosexual marriages, but the public debate surrounding this issue is steadfastly increasing. In fewer than ten days in the month of September, for example, at least three articles appeared in major American newspapers covering the current attempts of homosexual couples to have their status legally recognized.\(^\text{282}\) Despite the current lack of state recognition, an increasing number of homosexual couples are participating in private wedding ceremonies.\(^\text{283}\) In fact, approximately 2000 homosexual couples participated in a mass

\(^{280}\) See Job Rights for Homosexuals, supra note 13, at 10; Isaacson, supra note 13, at 101.

\(^{281}\) See Kramer v. Bally's Park Place, Inc., 311 Md. 387, 396-97, 535 A.2d 466, 470 (1988) ("'Strong public policy is found in prevailing social and moral attitudes of the community.'") (quoting Intercontinental Hotels Corp. v. Octden, 203 N.E.2d 210 (N.Y. 1964)).

\(^{282}\) See Jacobson, supra note 1, at 1A (Sept. 17th); Patteson, supra note 8, at 5 (Sept. 19th); Kossen, supra note 8, at Al (Sept. 25th).

\(^{283}\) See Patteson, supra note 8, at 5.
wedding ceremony at the recent gay-rights march in Washington, D.C. 284 Although a clear majority of Americans do not support state-sanctioned homosexual marriages, at least one-third do not find such relationships objectionable. 285

Professors Closen and Heise have analyzed in detail several societal factors they believe indicate that the general opposition to homosexual marriages is eroding. 286 First, increasing numbers of courts are recognizing causes of action for palimony between unmarried co-habitants, 287 perhaps indicating an erosion of the Victorian style reverence for the institution of marriage. 288 In addition, a few courts, even absent a legally recognized marriage, have afforded partners in homosexual relationships some of the incidents of marriage. 289 In *State v. Hadinger*, 290 for example, the Ohio Court of Appeals held that a partner in a same-sex relationship was protected under that state's Domestic Violence Act. 291 These factors suggest not only an increasing acceptance of homosexual relationships, but a recognition that such relationships warrant the benefits that traditionally have been reserved only for married couples.

Thus, a pronounced and growing difference of opinion exists among Americans regarding the recognition of homosexual marriages. Absent legislation clearly indicating that the public opposition to homosexual marriages outweighs the societal interests promoted by the general rule favoring validation of out-of-state marriages, a court should not, based on current societal attitudes alone, deny recognition of those marriages.

284. Id.
285. See Isaacson, *supra* note 13, at 101. Surprisingly, a recent radio show in Phoenix regarding a lawsuit challenging Arizona's nonrecognition of same-sex marriages generated largely supportive responses from callers. Kossen, *supra* note 8, at A1 ("Outside of a few religious objections and a man worried such a lawsuit may lead to marriage between people and their pets, the radio show attracted positive calls.").
287. Id. at 840. See Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding cohabitation agreements between unmarried couples enforceable so long as consideration does not rest on sexual services).
291. Id. at 1193.
CONCLUSION

The choice of law rule favoring the validation of marriages legally performed and recognized in another state promotes predictability and stability in marital relations as well as interstate comity. Homosexual marriages will, because of their novelty and the current national debate over homosexuality in general, test the outer limits of this universal rule. Although courts may look to a variety of sources in determining the public policy of their state, they should invalidate homosexual marriages only when an express statement by the state legislature indicates that such marriages are void though legal in the state of celebration. At the very least, they should require the existence of statements strongly indicating an antihomosexual animus. Surely a state that feels strongly enough to reject loving and committed relationships legally recognized in another state can enact two or three sentences to make its condemnation of that relationship absolutely clear.