

Northwestern University School of Law
Public Law and Legal Theory Papers

Year 2005

Paper 7

Interstate Recognition of Same-Sex Marriages
and Civil Unions: A Handbook for Judges

Andrew Koppelman*

*Northwestern University School of Law, akoppelman@law.northwestern.edu

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Abstract

Same-sex marriage is here. Massachusetts now recognizes such marriages, and increasing numbers of same-sex couples have married. Other states have virtually the same status: Vermont recognizes “civil unions,” and California recognizes “domestic partnerships,” that have virtually all the rights of marriage. Are these statuses exportable? Will same-sex unions be recognized in other states? The answer should not be mysterious. There is a well developed body of law on the question of whether and when to recognize extraterritorial marriages that are contrary to the forum’s public policy. Assuming that courts decide to follow that law, the answer is, it depends. This article will offer a short overview. The answer is somewhat complex, but there are large areas of clarity.

RECOGNITION AND ENFORCEMENT OF SAME-SEX MARRIAGE

INTERSTATE RECOGNITION OF SAME-SEX MARRIAGES AND CIVIL UNIONS: A HANDBOOK FOR JUDGES

ANDREW KOPPELMAN[†]

*If there is one thing that the people are entitled to expect from their lawmakers,
it is rules of law that will enable individuals to tell whether they are married and,
if so, to whom.*

— Justice Robert Jackson¹

Same-sex marriage is here. Massachusetts now recognizes such marriages,² and increasing numbers of same-sex couples have married. Other states have virtually the same status: Vermont and Connecticut recognize “civil unions,”³ and California recognizes “domestic partnerships”⁴ that have virtually all the rights of marriage.⁵ Are these

[†] Professor of Law and Political Science, Northwestern University. Thanks to Heather Benno, Jane Brock, and Marcia Lehr for their assistance, and to the members of the Northwestern Zodiac Workshop for helpful comments. This research was supported by the Northwestern University School of Law Summer Faculty Research Program and the Kathleen M. Haight Fund.

¹ *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

² See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

³ VT. STAT. ANN. tit. 15, § 1204(a) (2002) grants parties to a civil union “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” Section 14 of the Connecticut act declares that

[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.

2005 Conn. Pub. Act No. 05-10, available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00010-R00SB-00963-PA.htm>.

⁴ CAL. FAM. CODE § 297.5(a) (West 2004) declares that [r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and du-

statutes exportable? Will same-sex unions be recognized in other states?⁶

The answer should not be mysterious. There is a well-developed body of law on the question of whether and when to recognize extra-territorial marriages that are contrary to the forum's public policy. Assuming that courts decide to follow that law,⁷ the answer is somewhat complex, but there are large areas of clarity. This Article will offer a short overview.⁸

The cases involving same-sex marriages that come before the courts fall into four categories. Each category presents different problems and requires a different analysis. Once courts have determined in which category a case belongs, the analysis should be straightforward.

ties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

The only distinction from Vermont is that California domestic partners, in filing state income tax returns, "shall use the same filing status as is used on their federal income tax returns." *Id.* § 297.5(g). This proviso was added because legislators feared that conflicting tax codes would make same-sex households more likely to be audited. See Lisa Leff, *Davis Signs Domestic Partner Bill*, LONG BEACH PRESS-TELEGRAM, Sept. 20, 2003, at A6.

⁵ For economy, I will refer to both statuses hereinafter as "civil unions." There are also a number of other state "domestic partnership" laws, but these are far weaker, carrying with them only a small subset of the rights of married couples. For a survey, see American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 379-97, 414-16 (2004). On the specific deficiencies of one such statute, see David M. Stauss, Note, *The End or Just the Beginning for Gay Rights Under the New Jersey Constitution?: The New Jersey Domestic Partnership Act*, Lewis v. Harris, and the Future of Gay Rights in New Jersey, 36 RUTGERS L.J. 289, 306-18 (2004).

⁶ This Article only addresses the issues raised by marriage recognition. I do not consider the special problems raised by same-sex divorce. See Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KING'S C. L.J. 63 (2004). I largely agree with the analysis of Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 729-46 (2004), but most of the cases she considers involve the dissolution question, which I do not take up here.

⁷ It is, of course, possible that courts will be so hostile to same-sex couples that they will refuse to recognize same-sex marriages under any circumstances. Such a position would, however, raise serious constitutional difficulties. See Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 65 OHIO ST. L.J. 1264, 1267 (2005).

⁸ The argument will be more fully developed in a longer work, which will be published as a book.

The first category, “evasive” marriages,⁹ includes cases in which parties have traveled out of their home state for the express purpose of evading that state’s prohibition of their marriage and returned home immediately after being married. Such marriages will be invalid if they violate the strong public policy of the couple’s home state. Discerning public policy will be easy in the forty states that have legislation on the books declaring that they will not recognize foreign same-sex marriages; in other states, the outcome will be uncertain and will turn on the details of local law.

The second category, “migratory” marriages, includes cases in which the parties did not intend to evade the law of any state when they married, but they contracted a marriage valid where they lived and subsequently moved to a state where their marriage was prohibited. An example would be a same-sex couple who were residents of Massachusetts when they married and who later moved to Pennsylvania. These are the hard cases, on which authority is sparse and conflicting. Absent a statutory ban on same-sex marriage, the state’s public policy will not be clear enough to justify withholding recognition. Even if there is such a statute, the strength of the public policy it reflects will depend on which incident of marriage is at issue. Property claims arising out of a marriage cannot simply be annulled by the decision of one spouse to move to another state, and the marriage must be an impediment to the remarriage of either of the partners. Moreover, if the incident of marriage in question is one that could have been conferred by contract under the forum’s law, such as the right to make medical decisions for one’s partner, then the state’s policy cannot be offended by the mere fact that the couple took advantage of a legal shortcut to that right created by another state’s law.

The third category, and the one that most urgently demands clarity, is “visitor” marriages, in which a couple or a member of a couple is temporarily present in a state that does not recognize their marriages. Though there is little authority that addresses this precise question, such marriages should always be recognized, for all purposes. Any other result is inconsistent with the constitutional right of citizens to travel.

The fourth category is “extraterritorial” cases, in which the parties have never lived within the state but the marriage is relevant to litigation conducted there. For example, after the death intestate of one

⁹ I borrow this useful nomenclature from *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2038 (2003) [hereinafter *Developments*].

spouse, the other may seek to inherit property that was located within the forum state. In these cases, there is clear authority in favor of recognition.

I. THE RELEVANCE OF THE MISCEGENATION¹⁰ CASES

Unfortunately, before we can examine the relevant authority in this area, we must begin by clearing away some trash: legally irrelevant authority that is commonly thought to have some bearing on the question of marriage recognition. We must also, in deference to the political realities within which courts operate, disregard some very powerful arguments which, if accepted, moot the recognition question.

Many people have confusedly thought, and some still think, that the Full Faith and Credit Clause of the Constitution¹¹ requires states to recognize marriages from other states. But this has never been the law. The clause requires states only to recognize other states' judgments rendered after adversarial proceedings.¹² There is almost no authority for the proposition that full faith and credit applies to mar-

¹⁰ I will not put scare quotes around this word, but use it with the same caveats set forth by Peggy Pascoe:

Many scholars avoid using the word *miscegenation*, which dates to the 1860s, means race mixing, and has, to twentieth-century minds, embarrassingly biological connotations; they speak of laws against "interracial" or "cross-cultural" relationships. Contemporaries usually referred to "anti-miscegenation" laws. Neither alternative seems satisfactory, since the first avoids naming the ugliness that was so much a part of the laws and the second implies that "miscegenation" was a distinct racial phenomenon rather than a categorization imposed on certain relationships. I retain the term *miscegenation* when speaking of the laws and court cases that relied on the concept, but not when speaking of people or particular relationships.

Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 48 n.11 (1996).

¹¹ The Full Faith and Credit Clause of the Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

¹² See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 17 (1997) [hereinafter Koppelman, *Dumb*]; Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1246-49 (2001).

riage,¹³ and there is a great deal of authority to the contrary, indicating that states may decline to recognize foreign marriages when those marriages are contrary to the strong public policy of the forum state.¹⁴

Some have also thought that if the union is denominated a “civil union” or “domestic partnership” rather than a “marriage,” it has a diminished right to extraterritorial recognition. This difference of label changes the analysis in two respects, which tend to cancel one another out. First, the general policy in favor of recognizing marriages may be thought to be weaker in this case. Second, the recent wave of legislation refusing to recognize same-sex marriages is of doubtful relevance here, since most of those statutes specifically refuse recognition only to same-sex marriages.¹⁵ Opposition to legal recognition of same-sex relationships is far weaker than opposition to giving those relationships the label of marriage.¹⁶ So it is unclear whether the re-

¹³ See Koppelman, *Dumb*, *supra* note 12, at 10-15; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 971 n.183 (1998) [hereinafter Koppelman, *Public Policy*]. Both of these articles are reprinted in abridged and slightly revised form in ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 94, 127 (2002) [hereinafter KOPPELMAN, *GAY RIGHTS*].

¹⁴ Koppelman, *Public Policy*, *supra* note 13, at 946-62; *Developments*, *supra* note 9, at 2045.

¹⁵ When it passed the Vermont civil unions statute, the Vermont General Assembly stated that the civil union system “does not bestow the status of civil marriage” on same-sex couples. 2000 Vt. Acts & Resolves No. 91, § 1(10). Most of the state constitutional amendments enacted in November 2004 reach civil unions as well, specifically those of Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, and Utah. Such laws were adopted by legislatures in Louisiana, Nebraska, West Virginia, and possibly Florida (the language is ambiguous). See *infra* app.

¹⁶ For example, a poll in March 2000 found that health insurance for gay partners was supported by 58% of Americans, and 54% thought (contrary to the federal Defense of Marriage Act) that same-sex partners should get Social Security benefits. John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46, 49. An Associated Press poll two months later produced nearly identical results. Will Lester, Associated Press, *Poll: Americans Back Some Gay Rights*, May 31, 2000, available at 2000 WL 21988231. The poll found that “51 percent were opposed to allowing gay couples to marry, while 34 percent approved.” *Id.* On the other hand, “at least half of Americans support[ed] the rights of gays to receive health insurance (53 percent), Social Security benefits (50 percent) and inheritance (56 percent) from their partners.” *Id.* When people are asked about giving gay couples *all* the same legal rights as married couples, the split is a third in favor, a third against, and a third who do not care. See Heather Mason, Gallup Org., *How Would Same-Sex Marriages Affect Society?* (Nov. 11, 2003), at www.gallup.com/poll/content/print.aspx?ci=967 (last visited Feb. 7, 2005). More precisely, when asked “Do you think gay or lesbian couples should—or should not—be allowed all the same legal rights as married couples in every state, or does it not matter to you?” the numbers are 32% “[y]es, should,” 35% “[n]o, should not,” and 32% “[d]oesn’t matter.” *Id.* The margin of sampling error is three percentage points, so the differences are statistically insignificant. *Id.* The poll was conducted jointly by CNN, *USA Today*, and Gallup in September, 2003.



cent statutes are or are not an obstacle to full recognition of Vermont civil unions. These considerations essentially cancel one another out, and the analysis goes through in much the same way that it would if the label “marriage” were used.

We must also disregard the powerful constitutional arguments in favor of universal recognition of same-sex marriage. I have argued in the past,¹⁷ and continue to think, that the conflict of laws in this case is as illusory as the old conflict over the validity of interracial marriages, since a real conflict requires two valid, arguably applicable laws. However, it would be surprising if the federal courts were to impose same-sex marriage on the entire country, and the strength of the constitutional arguments for doing so does not change that fact.¹⁸ The reality is that there is a choice-of-law issue. For purposes of this Article, then, I shall assume what I am confident is not true.¹⁹

Because different states have different rules concerning who may marry, the question of a marriage’s validity may raise an issue of conflict of laws—that is to say, an issue in which a court must decide “whether or not and, if so, in what way, the answer to a legal question will be affected because the elements of the problem have contacts with more than one jurisdiction.”²⁰ In conflicts cases, the “overwhelming tendency”²¹ is to validate marriages, but the courts have frequently recited an exception in cases where recognition would violate the strong public policy of the forum state.²²

This area of the law has become somewhat archaic, because the public policy exception to marriage recognition has been invoked

¹⁷ See KOPPELMAN, GAY RIGHTS, *supra* note 13, at 6-71.

¹⁸ Under present circumstances, it would not even be wise for courts to get far ahead of public opinion on this issue. See *id.* at 141-54.

¹⁹ This is the price of avoiding irrelevance. Imagine you were a lawyer in 1910 who disagreed with *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which held that the Fourteenth Amendment permits a law requiring racial segregation. In order to be able to participate in conversation with other lawyers about arguments that had any hope of being adopted in court, you would have to relax that assumption. Even if your view of the law were the one that ultimately would prevail, as in fact it did, that fact would be irrelevant to your immediate situation.

²⁰ RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 1 (3d ed. 1986).

²¹ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 398 (3d ed. 2002).

²² *Id.* at 398-99.

primarily in three contexts:²³ polygamy, incest, and miscegenation. The first two were always misnomers to some extent. No state ever recognized polygamy.²⁴ Nor did any state ever violate “the core instances of the incest taboo by legalizing parent-child or sibling marriages; the incest cases involved marriages between first cousins, aunts and nephews, uncles and nieces, or even more remote relations.”²⁵

Interracial marriage aroused the strongest passions in the courts, whose “opinions can be arranged along a discomfort continuum, with polygamy being the least offensive, incest falling in the middle and miscegenation giving courts the greatest amount of consternation.”²⁶ In 1967, the Supreme Court declared unconstitutional every miscegenation prohibition in the country, thereby eliminating any conflict of laws with respect to that issue.²⁷ Since that time, there has not been any comparably severe moral conflict among the states with respect to marriage. Until now.

Forty states have laws on the books declaring that they will not recognize foreign same-sex marriages and that such marriages are contrary to their public policy.²⁸ They present a significant obstacle to the recognition of same-sex marriages from Massachusetts. It is less clear whether most of these laws are even relevant to the recognition of civil unions from other states since almost all of them use the word “marriage” to describe what they are denying to same-sex couples.²⁹ Nonetheless, some of them have very strong language, describing same-sex marriages as “void” or “prohibited.”³⁰ These provisions are widely understood as enacting a “blanket rule of nonrecognition, under which states would ‘ignore marriage licenses granted to same-sex

²³ There have also been cases involving differences in age restrictions and in rules concerning remarriage after divorce. See Koppelman, *Public Policy*, *supra* note 13, at 941, 947.

²⁴ See *id.* at 946-48.

²⁵ *Id.* at 948.

²⁶ Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 573 (1994).

²⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁸ These laws are collected in the appendix, which updates and supersedes the compilation in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

²⁹ Only a few of these provisions contemplate civil unions. See *supra* note 15.

³⁰ Koppelman, *Public Policy*, *supra* note 13, at 965-70.



couples in other states.”³¹ Under the blanket nonrecognition rule, a state’s courts would never recognize any same-sex union for any purpose whatsoever. Those who have proposed this rule do not seem to have understood just how unprecedented a measure they are proposing.

The closest historical analogue to the radical moral disagreement over same-sex relationships is the divide between those states that permitted and those that forbade marriage between whites and blacks. For this reason, the miscegenation cases deserve particularly close examination. Miscegenation prohibitions were in force as early as the 1660s, but only after the Civil War did they begin to function as a central sanction in the system of white supremacy. “At one time or another, 41 American colonies and states enacted them”³²

The miscegenation taboo was held in the southern states with great tenacity; it was close to the psychological core of racism.³³ “[A]lthough such marriages were infrequent throughout most of U.S. history, an enormous amount of time and energy was nonetheless spent in trying to prevent them from taking place.”³⁴ When they defended the prohibition, southern courts were at least as passionate in their denunciations as modern opponents of same-sex marriage:

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid

³¹ *Id.* at 924. This formulation appears in two executive orders issued a few days apart by Governors Fob James, Jr. of Alabama and Kirk Fordice of Mississippi, declaring that they would not recognize same-sex marriages. *Id.* at 924 n.7 (citing Ala. Gov., Exec. Order No. 24 (Aug. 29, 1996) (declaring that same-sex marriage in another state “shall not be recognized as a valid marriage, shall produce no civil effects nor confer any of the benefits, burdens or obligations of marriage”); Miss. Gov., Exec. Order No. 770 (Aug. 22, 1996) (same)).

³² Pascoe, *supra* note 10, at 49.

³³ See generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 220-34 (1994).

³⁴ Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, FRONTIERS, 1991 No.1, at 5, 6 (1991).

them, should be prohibited by positive law, and be subject to no evasion.³⁵

The southern states typically went far beyond the recent legislation prohibiting same-sex marriage by making interracial marriage a felony. And often it was specifically *marriage*, and not merely interracial sex, that was criminalized. In some states, it was necessary to prove cohabitation in order to convict for miscegenation;³⁶ in others, the prosecutor was required to prove an actual marriage.³⁷ One conviction was reversed because, although the ceremony had taken place, the officiating notary's commission had expired!³⁸

³⁵ *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878). Similar statements by leading legal authorities are ubiquitous. See, e.g., *Pace v. State*, 69 Ala. 231, 232 (1881) ("Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government."), *aff'd*, 106 U.S. 583 (1883); *Green v. State*, 58 Ala. 190, 195 (1877) ("And surely there can not be any tyranny or injustice in requiring both [races] alike[] to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."); *State v. Gibson*, 36 Ind. 389, 404 (1871) ("The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures." (quoting *W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (1867))); *Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889) (referring to "the very pronounced convictions of the people of this state as to the demoralization and debauchery involved in such alliances"); *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (arguing that the state's legitimate purposes in prohibiting miscegenation are "to preserve the racial integrity of its citizens," to prevent "the corruption of blood" or creation of "a mongrel breed of citizens," and "the obliteration of racial pride"); W.C. RODGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS § 74, at 49 (1899) (describing the purpose of miscegenation laws as "to keep pure and unmixed the blood of the two races, to the end that the paramount excellence of the one may not be lowered by an admixture with the other").

³⁶ For cases reversing convictions on this basis, see *Gilbert v. State*, 23 So. 2d 22 (Ala. Ct. App. 1945); *Jackson v. State*, 129 So. 306 (Ala. Ct. App. 1930); *Metcalf v. State*, 78 So. 305 (Ala. Ct. App. 1918); *Hardin v. State*, 339 S.W.2d 423 (Ark. 1960); *Poland v. State*, 339 S.W.2d 421 (Ark. 1960); *Wilson v. State*, 13 S.W.2d 24 (Ark. 1929); *Hovis v. State*, 257 S.W. 363 (Ark. 1924); *Wildman v. State*, 25 So. 2d 808 (Fla. 1946). A conviction was affirmed, on evidence that the couple had lived together for many years, in *Parramore v. State*, 88 So. 472 (Fla. 1921). See also *State v. Brown*, 108 So. 2d 233, 235 (La. 1959) (describing the statute that prohibits "customary or repeated acts of sexual intercourse, and not merely an isolated case of intercourse").

³⁷ See *Green v. State*, 58 Ala. 190 (1877) (upholding an interracial marriage conviction); *Moore v. State*, 7 Tex. Ct. App. 608, 609 (1880) ("[T]he fact of marriage is an essential ingredient, and must be positively averred and proved. A mere cohabitation within this State, without a previous intermarriage, does not bring the offence within the statute." (internal citation omitted)); *Frasher v. State*, 3 Tex. Ct. App. 263, 280 (1877) (stating that the marriage certificate was properly admitted in evidence).

³⁸ *Williams v. State*, 125 So. 690, 692 (Ala. Ct. App. 1930).



Today, on the other hand, even the states most strongly opposed to same-sex marriage have never attempted to make it a crime to enter into such marriages. Moreover, even before laws against consensual sodomy were invalidated by the U.S. Supreme Court,³⁹ they were almost never enforced. It would be hard to argue that the southern states' public policy against miscegenation was *less* strong than modern public policies against same-sex marriage.

Yet even in this charged context, the southern states did not make a blunderbuss of their own public policy. Their decisions concerning the validity of interracial marriages were surprisingly fact-dependent. They did not utterly disregard the interests of the parties to the forbidden marriages or of the states that had recognized their marriages, but weighed these against the countervailing interests of the forum. Where those forum interests were attenuated, southern courts sometimes upheld marriages between blacks and whites.

These cases are the most useful precedent for assessing the extra-territorial validity of same-sex marriages because they deal with the same problem we face today: a deep moral disagreement about the value of a certain kind of marriage, reflected in widely varying state laws. If we suspend, for the sake of argument, our objections to the substantive laws in question, we may find a certain wisdom in their rules. The Jim Crow judges were horrifyingly wrong about many things, but they did understand the problem of moral pluralism in a federal system, and we can learn something important from the solutions that they devised.

II. FOUR TYPES OF MARRIAGE CASES

The authorities on interracial marriage consider four different categories of situations in which the recognition question might arise.

A. *Evasive Marriages*

The first category, "evasive" marriages, consists of cases in which parties have traveled out of their home state for the express purpose of evading that state's prohibition of their marriages and thereafter immediately returned home. Such marriages will be considered invalid if they violate the strong public policy of the couple's home state.

³⁹ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

The law with respect to evasive marriages is quite clear. “States ha[ve the] right to govern their own residents.”⁴⁰ In the interracial marriage cases, these marriages were almost never recognized.⁴¹ This antievasion principle was applied, however, only in cases where the parties were domiciliaries of the forum at the time of marriage.⁴²

Discerning public policy will be easy in the forty states that have legislation on the books, enacted after 1992, declaring that same-sex marriages are void or prohibited. In the other states, the outcome will be uncertain. The public policy doctrine is an anomaly in the conflict of laws and is rarely invoked. Absent a statute, it is not clear how a public policy could be shown. It is clear that a mere difference between forum law and foreign law is not sufficient; if it were, then there could never be any conflicts analysis, because forum law would always be applied.⁴³ The answer depends on a close reading of state law sources. One source that might have once been helpful is the existence of a state sodomy law, but all such laws have now been declared unconstitutional and void.⁴⁴

B. *Migratory Marriages*

The second category, “migratory” marriages, consists of cases in which the parties had not intended to evade the laws of any state when they married, but contracted marriages valid where they lived, and subsequently moved to states where their marriages were prohibited. An example would be a same-sex couple who were residents of Massachusetts when they married, and who later moved to Pennsylvania. These are hard cases, and it is not clear how they ought to be addressed. It is clear that, absent a statutory ban on same-sex marriage, the state’s public policy will not be strong enough to justify withholding recognition. Even if there is such a statute, the state’s interest may not be strong enough to outweigh the couple’s interest in the continuing validity of their marriage.

The prevailing position in American law is that the mere fact of migration cannot void an originally valid marriage. Most states follow

⁴⁰ Koppelman, *Public Policy*, *supra* note 13, at 953.

⁴¹ *See id.* at 952-54.

⁴² Where the parties had different domiciles with different policies at the time of celebration, authority was “sparse” and the commentators were divided. *See* Rebecca Bailey-Harris, *Madame Butterfly and the Conflict of Laws*, 39 AM. J. COMP. L. 157, 175 (1991).

⁴³ *See* Koppelman, *Public Policy*, *supra* note 13, at 934-37.

⁴⁴ *See Lawrence*, 539 U.S. at 578.

either the *First* or the *Second Restatement of Conflict of Laws*.⁴⁵ The *First Restatement* holds that a marriage, “which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere” in cases of polygamy, incest as defined by the domicile, “marriage between persons of different races where such marriages are at the domicile regarded as odious,” or other marriages governed by evasion statutes.⁴⁶ The *Second Restatement* made this rule less stringent, providing that, in order for another state to void a marriage, that state must have a “strong public policy” against the marriage and “the most significant relationship to the spouses and the marriage at the time of the marriage.”⁴⁷

The interracial marriage cases are, however, less clear on this question. The difficulty with recognition in those cases was, of course, that it meant that the “Southern states would have to tolerate some interracial cohabitation within their borders after all.”⁴⁸ Only two cases arose in which an interracial couple’s out-of-state marriage was challenged when they moved to the forum state, and these cases reached opposite results.⁴⁹

⁴⁵ See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 373 (1992). Borchers’s study focuses on torts, which is the area in which most conflicts litigation occurs. *Id.* at 369. There is little recent authority on the marriage question, but the general approach of these states provides some guidance. Borchers finds that fifteen states follow the First Restatement, twenty-four follow the Second Restatement, and the rest follow other approaches or are difficult to classify. *Id.* at 373-74.

⁴⁶ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934). The language relating to interracial marriage is, of course, obsolete.

⁴⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates 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.” *Id.*

⁴⁸ Koppelman, *Public Policy*, *supra* note 13, at 955.

⁴⁹ See *id.* at 956-59 (discussing *State v. Ross*, 76 N.C. 242 (1877), in which a North Carolina court recognized an interracial South Carolina marriage, and *State v. Bell*, 66 Tenn. 9 (1872), in which a Tennessee court refused to recognize an interracial Mississippi marriage). Additionally, there were two relevant statutes, also reaching opposite results, but ambiguities in the language of each make it uncertain whether they even applied to the question of changed domicile. See *id.* at 955-56 (contrasting a 1906 Louisiana statute exempting interracial couples from criminal prosecution if “the parties . . . acquired a domicile” in the state where they were married, with the 1879 Texas Penal Code, which punished interracial couples regardless of where they were married).

The basic problem presented when states disagree radically about the proper scope of marriage is that the choice of law involves a tension between two strong sets of demands, which the courts typically attempt to balance. First, states want to determine for themselves what the precise contours of their marriage laws are to be. The importance of this interest has become attenuated in recent years, but the same-sex marriage issue has shown that many states—indeed, every state legislature that has spoken on this issue—still take it very seriously. States’ interests in regulating the marital relationships of their own domiciliaries does not always weigh against same-sex marriage, of course. It is as important for Massachusetts to be able to say that its citizens *can* enter into same-sex marriages as it is for Utah to be able to say that its citizens *cannot* do so.

Second, individuals want to be certain of their status. “Because marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeated redetermination of the validity.”⁵⁰ This interest is far more pronounced now than it was at the time of the miscegenation cases because the country is far more mobile than it once was. With the advent of the automobile and the airplane, many people cross state lines every day, often on their way to and from their jobs. It would be ridiculous to have people’s marital status blink on and off like a strobe light as they jet across the country.

How should courts balance these interests? In recent years, as we have seen, the “overwhelming tendency”⁵¹ has been toward recognition, and courts addressing marriage recognition questions “typically are more concerned with personal than with governmental interests.”⁵² This, however, is probably at least in part an artifact of the diminishing importance of the public policies involved. Some states have statutes voiding marriages of domiciliaries who marry elsewhere in order to avoid the forum’s restrictions, but these statutes say nothing about the marriages of nondomiciliaries and immigrants into the forum.

A rule that same-sex marriages are void the moment one of the parties changes her domicile would have absurd results. The fullest consideration of this problem appears in *Baindail v. Baindail*,⁵³ an Eng-

⁵⁰ EUGENE F. SCOLES & PETER F. HAY, CONFLICT OF LAWS 432 (2d ed. 1992).

⁵¹ RICHMAN & REYNOLDS, *supra* note 21, at 398.

⁵² *Id.* at 399.

⁵³ [1946] P. 122, [1946] 1 All E.R. 342 (Eng. C.A.).



lish case in which an English woman discovered that her husband had previously contracted a Hindu marriage in India—"a fact in his personal history," the court dryly noted, "which he did not think it necessary to reveal."⁵⁴ When she sought to annul the marriage, he cited several cases that seemed to indicate that potentially polygamous marriages were not regarded as marriages at all by English law and argued that he was therefore legally a single man at the time of his English marriage.⁵⁵ The court conceded that this was "a question which is not covered by authority"⁵⁶ but found conclusive the prospect that, if it adopted the husband's argument, "this English lady would find herself compelled in India [should he choose to return there] either to leave her husband or to share him with his Indian wife."⁵⁷ Under these circumstances, "effect must be given to common sense and decency."⁵⁸ The annulment was granted. *Baindail* was one of the cases that began the erosion of Britain's blanket rule of nonrecognition for potentially polygamous marriages—an erosion that is now complete.⁵⁹

The *Baindail* case shows the absurdity of a rule that an otherwise valid existing marriage can wink out of existence when a party enters a state (and wink back into existence when he leaves?).⁶⁰ The consequence would be multiple marriages, and enormous uncertainty about spousal rights and inheritance.⁶¹

⁵⁴ *Baindail*, [1946] 1 All E.R. at 344.

⁵⁵ *Id.*

⁵⁶ *Id.* at 347.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Koppelman, *Public Policy*, *supra* note 13, at 994-96.

⁶⁰ For further discussion of the absurdity of such a rule, see Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 14 YALE J.L. & FEMINISM (forthcoming 2005) (manuscript at 5-6). Such a rule would mean, among other things, that other states would become havens for avoiding obligations validly entered into pursuant to Massachusetts law. See Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. (forthcoming 2005) (manuscript at 6). In evasion cases, these difficulties are avoided by the rule that such marriages are void from their inception. That solution is obviously not available in migratory cases.

⁶¹ Joseph Story's warnings about the dangers of withholding recognition from foreign marriages are, in this context, difficult to improve upon:

A more sensible approach would hold that such marriages remain valid but that the law of the new domicile may determine which incidents of the marriage may be enjoyed in that domicile. Scoles and Hay observe that “the significance of the status [of marriage] and its relevance arises in conflict of laws litigation almost exclusively concerning questions regarding the incidents of marriage, such as succession or claim to property, or a claim for support, or a claim for damages in tort.”⁶² Moreover, “in recent choice of law cases, the courts have begun to recognize that the enjoyment of different incidents of marriage involves different policies.”⁶³

The earlier migratory cases that took a hard line against recognition appear to have followed this approach. Herbert Goodrich, writing in 1927, explained that “[c]ertain incidents of the marriage relationship may be refused recognition if they involve a violation of public policy or good morals of the law of the forum.”⁶⁴ On this account, even the couple that was imprisoned remained married; they

Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it infinite mischiefs must ensue. Suppose, for instance, a marriage celebrated in France, according to the law of that country, should be held void in England, what would be the consequences[?] Each party might marry anew in the other country. In one country the issue would be deemed legitimate; in the other illegitimate. The French wife would in France be held the only wife, and entitled as such to all the rights of property appertaining to that relation. In England, the English wife would hold the same exclusive rights and character. What, then, would be the confusion in regard to the personal property of the parties, in its own nature transitory, passing alternately from one country to the other! Suppose there should be issue of both marriages, and then all the parties should become domiciled in England or France, what confusion of rights, what embarrassments of personal and conjugal relations must necessarily be created!

JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 121, at 112-13 (Boston, Hilliard, Gray & Co. 1834) (footnote omitted).

⁶² SCOLES & HAY, *supra* note 50, at 434.

⁶³ *Id.* at 433.

⁶⁴ HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS § 115, at 266 (1927); *see also* *Yarborough v. Yarborough*, 290 U.S. 202, 218 n.10 (1933) (Stone, J., dissenting) (interpreting a migratory miscegenation case as holding that “[w]ithout denying the validity of a marriage in another state, the privileges flowing from marriage may be subject to the local law”).

simply were not permitted the incident of cohabitation in certain states.⁶⁵

How can one determine whether any particular incident is available in a state with a strong public policy, stated in its statutes, against same-sex marriage?⁶⁶ A sensible approach would be to distinguish between those incidents that can be conferred by contract, such as those pertaining to inheritance or to making medical decisions for one's partner, from those that can only be conferred by operation of law, such as the right to file a joint tax return or the right to a homestead exemption.⁶⁷ If a given right is one that the parties could have achieved under private contract under the forum's law, then the forum cannot coherently be said to have a public policy against them enjoying that incident. One conflicts rule is particularly relevant here: no fundamental public policy is involved when states have different formalities regarding the formation of a contract, such as different approaches to Statute of Frauds questions.⁶⁸ If a foreign same-sex marriage simply provides, under a different formal procedure, rights

⁶⁵ A similar interpretation can be offered for *State v. Brown*, 23 N.E. 747 (Ohio 1890), in which a man was prosecuted for intercourse with his niece, whom he had married in another state where they were then domiciled. *Id.* at 749-50. The court held:

[W]e are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy, because they have assumed, in another state or country where it was lawful, the relation which led to the acts prohibited by our laws.

Id. at 750. The last part of the quoted sentence appears to concede that the couple *has* assumed the relation of man and wife; presumably, neither would have been permitted to come to Ohio alone and there marry someone else. Nonetheless, their kinship status meant that they could not lawfully engage in sexual intercourse within the borders of Ohio.

⁶⁶ In earlier writings, I regarded this question as a deeply uncertain one. See KOPPELMAN, *GAY RIGHTS*, *supra* note 13, at 122-25; Koppelman, *Public Policy*, *supra* note 13, at 984-88. Here I revise my position.

⁶⁷ One peculiarity of applying the incidents approach in the marriage context is that the incident of marriage that was most important in the earlier cases was the right to sexual intercourse. The central public policy of miscegenation law was the urgent imperative of keeping black penises out of white vaginas. Any state purpose of preventing sexual conduct is now mooted by *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶⁸ See SCOLES & HAY, *supra* note 50, at 669.

that might have been conferred by forum law, then there is no public policy against enforcing those rights.⁶⁹

There is, however, one set of rights that cannot be conferred by contract, but that should remain undisturbed if the couple migrates into the forum.⁷⁰ As a general matter, if rights of third parties, created by the operation of state law, are involved, those third-party rights should not be annulled by the unilateral decision to move. Most importantly, parent-child relationships should not be annulled in this way. If a same-sex couple, or one member of the couple, migrates to a state that does not recognize same-sex marriage, and there is a child or children to whom the pertinent adult has parental rights and obligations, those rights and obligations should persist even after migration. A different rule would implicate the constitutional rights of the children, who can reasonably claim that they have a constitutional right to their relationships with their parents.⁷¹

C. Visitor Marriages

The third category is “visitor” marriages, which consists of cases where couples are temporarily visiting states that do not recognize their marriages. This is the type of case that most urgently demands clarity because it will arise more frequently than any of the others. In the modern United States, nearly everyone sometimes travels across state lines, and the proportion is probably even higher in states as small as Massachusetts and Vermont. Though there is little authority that addresses this precise question, such marriages should always be recognized.

⁶⁹ Thus, for example, if a Massachusetts couple moves to Illinois, and one spouse dies and leaves no inheritance to the other, the Illinois courts should give the survivor the amount of the elective share that a surviving spouse is entitled to under Illinois law. See 755 ILL. COMP. STAT. ANN. 5/2-8 (West 1992). Two unrelated persons can enter into a contract whereby one promises to leave a bequest to the other, and if supported by consideration, courts enforce such contracts by awarding “the value of the property which was to come to the promisee.” THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 48, at 218 (2d ed. 1953); see also *Doney v. Koehler (In re Estate of Fritz)*, 406 N.W.2d 475, 478-79 (Mich. Ct. App. 1987). Thanks to my colleague Robert Sitkoff for this example.

⁷⁰ Another is rights of inheritance, which are only asserted when one party dies and the marriage is over. In such cases, the couple is not attempting to continue to live as a recognized entity within the state, and so the state’s interest in refusing recognition is attenuated. See *In re May’s Estate*, 114 N.E.2d 4, 5 (N.Y. 1953); *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411, 422 (N.Y. Sup. Ct. 2003).

⁷¹ See Seth Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPAC L. REV. 161, 182-89 (1996).

It is in these cases that a blanket rule of nonrecognition would have the harshest consequences. Consider the position of a same-sex couple who make their home in Massachusetts. They do not seek to evade any other state's laws. They simply have done what their own state's laws authorize them to do. What is their status to be within the federal system?

The blanket nonrecognition rule would place such a couple in a difficult position. They would lose all the rights arising out of their marriage as soon as they crossed the border into any state that had such a rule. Moreover, even if they never left home, they would be treated as unmarried if their status should become relevant to litigation that takes place in another state.

The consequences would be nastier than any proponent of nonrecognition probably contemplated. To begin with the most extreme case: suppose a lesbian couple is married and raising a child together in California, and that the child's biological mother takes the child on a weekend trip to another state.⁷² While there, the mother and child are both seriously injured in an automobile accident. As soon as the other spouse learns the news, she gets onto an airplane and soon arrives at the hospital. Under the blanket nonrecognition rule, this is what she would be told:

You may not visit either of these patients because only family members may visit patients here, and you are not a family member of either of these people in any respect which our state recognizes. You may not participate in medical decisions for either of them. If the mother dies, you will not have any parental rights in the child. If there is no surviving biological relative, we will regard the child as an orphan and place him in foster care.

⁷² Vermont and California, in nearly identical language, provide that the child of either party to a civil union shall be regarded as the child of both. California law states:

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

CAL. FAM. CODE § 297.5(d) (West 2004). Vermont law states:

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

VT. STAT. ANN. tit. 15, § 1204(f) (2002). An obvious consequence is that, in order for the spouse of the biological mother to assert parental rights in a legal proceeding, he or she must plead the existence of the civil union.

None of the various approaches to conflict of laws that are followed in the United States requires this result, although each is uncertain enough that it cannot be foreclosed.⁷³ All one can say is that no other type of marriage in American history has been treated so badly.

The only authority on this question that I have been able to find arises in dictum in an 1879 marriage evasion case, *Ex parte Kinney*,⁷⁴ in which a man convicted of miscegenation sought a writ of habeas corpus in federal court, alleging that his federal rights had been violated. *Kinney* is the only miscegenation case that contains any discussion of constitutional limitations deriving from federalism (rather than from the Equal Protection Clause of the Fourteenth Amendment).

The defendant and his partner had traveled from Virginia to the District of Columbia, married there, and then returned to Virginia, where they were convicted of miscegenation and each sentenced to five years in prison at hard labor. Kinney claimed “that a marriage lawful in the District of Columbia is lawful everywhere in the United States, enabling those so married to live together as man and wife in any part of the United States, and that any state law forbidding them to do so is contrary to the constitution and void.”⁷⁵ The court rejected the claim, holding that the marriage was a fraud on the laws of Virginia. It took a hard line on the question of migratory marriages, declaring that Kinney’s claim would be rejected even in a closer case, involving “citizens of another state, lawfully married in that domicile, afterward migrating thence in good faith into this state.”⁷⁶ The Constitution would not forbid criminal prosecution even then, because “special privileges enjoyed by citizens in their own states are not secured to them in other states.”⁷⁷ The right of interracial marriage is “a right legally enjoyed in the District but not given here.”⁷⁸

But the *Kinney* court went on to declare that Virginia could not enforce its law against nondomiciliaries nor exclude altogether interracial couples domiciled in the District of Columbia. “That such a

⁷³ See generally Whitten, *supra* note 12. Unfortunately, one court has already managed to reach this result, holding that, because Virginia does not recognize same-sex relationships, a parental tie recognized in Vermont can be severed by the other parent unilaterally transporting the child to Virginia. The case is on appeal. See Christina Nuckols, *Two Women, Two States, One Child*, VIRGINIAN-PILOT, Dec. 13, 2004, at A1.

⁷⁴ 14 F. Cas. 602 (C.C.E.D. Va. 1879) (No. 7825).

⁷⁵ *Id.* at 602.

⁷⁶ *Id.* at 606.

⁷⁷ *Id.* (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), *overruled in part* by *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944)).

⁷⁸ *Id.*



citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because these are privileges following a citizen of the United States”⁷⁹ The reference to “temporary stoppage” clearly implies that Virginia might have to tolerate within its borders sexual intercourse between a black man and a white woman.

The reasoning of *Kinney* is a fairly straightforward application of principles of federalism. It is well settled that there is a constitutional right to travel. “We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”⁸⁰ On this basis, the Court invalidated a one dollar tax on persons who wanted to leave a state. If this is impermissible, then a fortiori the right to travel precludes the much heavier burden of dissolving one’s closest family relations as the price of interstate travel. The marriages of visitors should be recognized for all purposes, regardless of the public policy of the forum state.

In practice, the analysis will not often differ from that in the migratory cases because most of the rights of marriage that cannot be conferred by contract can only be asserted in the state of one’s domicile: the right to file a joint tax return, for example. An important exception is the right to file a wrongful death suit. Suppose that a person from Massachusetts is killed by a drunk driver in Illinois and seeks to file a suit for wrongful death. What result?

Actions for wrongful death are brought by the decedent’s estate, but the wrongful death statutes typically designate certain family members who can recover and preclude recovery by those who fall outside the named group.⁸¹ The viability of a suit will thus sometimes depend on whether the decedent’s marriage to a person of the same sex is recognized by the forum. Under these circumstances, the marriage should be recognized.

D. *Extraterritorial Marriages*

Finally, the fourth category consists of “extraterritorial” cases in which the parties have never lived within the state, but in which the

⁷⁹ *Id.* at 606.

⁸⁰ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868).

⁸¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 947-49 (5th ed. 1984).

marriages are relevant to litigation conducted there. For example, after the death intestate of one spouse, the other may seek to inherit property that was located within the forum state.

On this question the case law is unanimous. The marriages were routinely upheld on the reasoning that, the purpose of the law being the prevention of interracial cohabitation within the forum, no harm would be done by recognizing the marriage after its dissolution by death for purposes of allowing the survivor to inherit the decedent's property in the state or allowing the children to inherit as legitimate offspring. All deemed it dispositive that their states' laws were not intended to have any extraterritorial application. Typical was the pronouncement of the Mississippi Supreme Court in 1948:

The manifest and recognized purpose of this statute was to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife. Where, as here, this did not occur, to permit one of the parties to such a marriage to inherit property in this state from the other does no violence to the purpose of [the miscegenation laws]. What we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized.⁸²

The current wave of anti-same-sex-marriage statutes is not unprecedented. Similar wording was ubiquitous in the miscegenation statutes, which usually declared interracial marriages "void."⁸³ The cases I have just described, which held that the miscegenation laws did not reach extraterritorial marriages not involving cohabitation in the state, all involved statutes using this term.⁸⁴ Even if it is assumed that the new laws prohibit recognition of civil unions, they should not be understood to go farther than the miscegenation laws. If words such as "void" did not mandate blanket recognition in the miscegenation cases, it should not do so in the same-sex marriage cases either.

⁸² *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948).

⁸³ See 1 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* 204-09 (1931) (compiling statutes). For earlier surveys to the same effect, see 1 FREDERIC J. STIMSON, *AMERICAN STATUTE LAW* § 6112-13, at 667-69 (Boston, Charles C. Soule 1886); Note, *Intermarriage with Negroes—A Survey of State Statutes*, 36 *YALE L.J.* 858, 863 (1927).

⁸⁴ See *Whittington v. McCaskill*, 61 So. 236 (Fla. 1913) (noting that the state constitution declared interracial marriages "forever prohibited" and statute deemed them "utterly null and void"); *Succession of Caballero (Mrs. Conte) v. Executor*, 24 La. Ann. 573, 582 (1872) (Wyly, J., dissenting) (discussing LA. CIV. CODE art. 95 (1825) (amended 1894), which declared interracial marriages "forbidden," "void," and a "nullity"); *Miller*, 36 So. 2d at 141 (noting that the state constitution declared such marriages "unlawful and void").

CONCLUSION

Thus far, there is little case law on recognition of foreign civil unions, and all of the cases involve evasive marriages. A New York court found that the surviving spouse in a Vermont civil union could bring a wrongful death action.⁸⁵ A Georgia court declined to recognize a Vermont civil union in a case in which both parties were Georgia domiciliaries, though the court did not notice the significance of domicile.⁸⁶ A Connecticut court construed Connecticut law to deny it subject matter jurisdiction to dissolve a Vermont civil union entered into by a Connecticut domiciliary.⁸⁷ The last two of these cases included language that suggested a blanket rule of nonrecognition, but they did so unreflectively, without noticing the practical or constitutional difficulties that such a rule would entail. An Iowa judge approved an uncontested divorce between two lesbians who had been in a Vermont civil union.⁸⁸ The question of migratory, visitor, or extra-territorial marriages has not yet arisen.

The cases that are likely to be most troublesome for states that disfavor same-sex marriage will involve visitor marriages, since they have the strongest claim to recognition for all purposes. The constitutional and other legal arguments for recognition have already been discussed. Those with moral objections to homosexual conduct may also want to contemplate one other consideration. The Sodom story in the book of Genesis⁸⁹ is often taken to be a categorical condemnation of homosexual conduct, but it is equally a condemnation of inhospitality toward visitors. States that are transfixed by one danger should not thoughtlessly fall into the other.

⁸⁵ *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 416-17 (Sup. Ct. 2003).

⁸⁶ *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. App. Ct. 2002).

⁸⁷ *Rosengarten v. Downes*, 802 A.2d 170, 174-75 (Conn. App. Ct. 2002).

⁸⁸ Frank Santiago, *Iowa Judge OKs Lesbian Divorce*, DES MOINES REG., Dec. 12, 2003, at 1A, available at 2003 WLNR 12869636.

⁸⁹ See *Genesis* 19:1-8; *Judges* 19:16-30. For an overview of contending interpretations, see THOMAS E. SCHMIDT, *STRAIGHT & NARROW?: COMPASSION & CLARITY IN THE HOMOSEXUALITY DEBATE* 30-32, 86-89 (1995).

APPENDIX: STATE ANTI-SAME-SEX-MARRIAGE STATUTES

The following is a compilation of all the state statutes barring same-sex marriage that are now on the books in the United States. They fall into two categories. The largest group is the mini-DOMAs, laws barring recognition of same-sex marriage that were passed subsequent and in reaction to the 1993 Hawaii Supreme Court decision that indicated that the denial of marriage to same-sex couples would be subject to strict scrutiny.⁹⁰ There are forty states with mini-DOMAs: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. Five of these, Florida, Georgia, Ohio, Texas, and West Virginia, indicate that they will not even recognize “judicial proceedings” arising from same-sex marriage. Most of these laws apply only to foreign marriages, but those of Arkansas, Georgia, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Utah, and Virginia, bar recognition of relationships similar to marriage as well, evidently meaning marriage-like statuses such as California domestic partnerships and Connecticut and Vermont civil unions. Three states have pre-1993 statutes barring same-sex marriage: Maryland (1973), New Hampshire (1987), and Wyoming (1977). Connecticut does not directly address the issue, but its adoption law declares that the state’s public policy limits marriage to a man and a woman. Same-sex marriages are recognized, and licenses continue to be issued, in Massachusetts. There is no authority on the question in five states: New Jersey, New Mexico, New York, Rhode Island, and Wisconsin.

⁹⁰ *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).



ALA. CODE § 30-1-19 (2004). Alabama Marriage Protection Act; marriage defined; marriage between individuals of same sex invalid.

(a) This section shall be known and may be cited as the “Alabama Marriage Protection Act.”

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.

(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.

(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.

Passed 1998.

ALASKA CONST. art. 1, § 25. Marriage.

To be valid or recognized in this State, a marriage may exist only between one man and one woman.

Effective 1999.

ALASKA STAT. § 25.05.013 (Michie 2004). Same-sex marriages.

(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.

(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Effective 1996.

ARIZ. REV. STAT. ANN. § 25-101 (West 2000). Void and prohibited marriages.

C. Marriage between persons of the same sex is void and prohibited.

Amended 1996.

ARIZ. REV. STAT. ANN. § 25-112 (West 2000). Marriages contracted in another state; validity and effect.

A. Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101.

B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, except marriages that are void and prohibited by § 25-101.

C. Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.

Amended 1996.

ARK. CONST.⁹¹

SECTION 1: Marriage

Marriage consists only of the union of one man and one woman.

SECTION 2: Marital Status

Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman.

SECTION 3: Capacity, rights, obligations, privileges, and immunities.

The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligation, privileges, and immunities of marriage.

Passed 2004 by ballot measure.

⁹¹ This provision has not yet been assigned a specific citation. *See* Arkansas Ballot Measure No. 4 (2004).

ARK. CODE ANN. § 9-11-208 (Michie 2002). License not issued to persons under age or to persons of the same sex.

(a) No license shall be issued to persons to marry unless and until the female shall attain the age of sixteen (16) years and the male the age of seventeen (17) years and then only by written consent by a parent or guardian until the male shall have attained the age of eighteen (18) years and the female the age of eighteen (18) years.

(b) It shall be the declared public policy of the State of Arkansas to recognize the marital union only of man and woman. No license shall be issued to persons to marry another person of the same sex and no same-sex marriage shall be recognized as entitled to the benefits of marriage.

(c) Marriages between persons of the same sex are prohibited in this state. Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.

(d) However, nothing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.

Amended 1997.

ARK. CODE ANN. § 9-11-107 (Michie 2002). Validity of foreign marriages.

(a) All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and in which the parties then actually resided shall be valid in all the courts in this state.

(b) This section shall not apply to a marriage between persons of the same sex.

Amended 1997.

ARK. CODE ANN. § 9-11-109 (Michie 2002). Validity of same-sex marriages.

Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void.

Amended 1997.

CAL. FAM. CODE § 299.2 (West 2004). Recognizing same sex unions from another jurisdiction as a valid domestic partnership.

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

Passed 2003.

CAL. FAM. CODE § 308.5 (West 2004). Between man and woman only.

Only marriage between a man and a woman is valid or recognized in California.

Passed 2000 by initiative measure.

COLO. REV. STAT. § 14-2-104 (2003). Formalities.

(1) Except as otherwise provided in subsection (3) of this section, a marriage is valid in this state if:

(a) It is licensed, solemnized, and registered as provided in this part 1; and

(b) It is only between one man and one woman.

(2) Notwithstanding the provisions of section 14-2-112, any marriage contracted within or outside this state that does not satisfy paragraph (b) of subsection (1) of this section shall not be recognized as valid in this state.

(3) Nothing in this section shall be deemed to repeal or render invalid any otherwise valid common law marriage between one man and one woman.

Amended 2000.

CONN. GEN. STAT. ANN. § 46a-81r (West 2004). Sexual orientation discrimination: Construction of statutes.

Nothing in sections 4a-60a, 45a-726a, 46a-51, 46a-54, 46a-56, 46a-63, 46a-64b, 46a-65, 46a-67, 46a-68b, and 46a-81a to 46a-81q, inclusive, subsection (d) of section 46a-82, subsection (a) of section 46a-83, and sections 46a-86, 46a-89, 46a-90a, 46a-98, 46a-98a and 46a-99 [the laws protecting gays from discrimination] shall be deemed or construed (1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, (2) to authorize the promotion of homosexuality or bisexuality in educational institutions or require the teaching in educational institutions of homosexuality or bisexuality as an acceptable lifestyle, (3) to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of sections 4a-60a, 45a-726a, 46a-51, 46a-54, 46a-56, 46a-63, 46a-64b, 46a-65, 46a-67, 46a-68b, and 46a-81a to 46a-81q, inclusive, subsection (d) of section 46a-82, subsection (a) of section 46a-83, and sections 46a-86, 46a-89, 46a-90a, 46a-98, 46a-98a and 46a-99, (4) to authorize the recognition of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society.

Passed 1991.

CONN. GEN. STAT. ANN. § 45a-727a (West 2004). State policy re best interests of child; public policy re marriage.

The General Assembly finds that:

(1) The best interests of a child are promoted by having persons in the child's life who manifest a deep concern for the child's growth and development;

(2) The best interests of a child are promoted when a child has as many persons loving and caring for the child as possible;

(3) The best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family; and

(4) It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman.

Passed 2000.

DEL. CODE ANN. tit. 13, § 101 (1999). Void and voidable marriages.

(a) A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender.

....

(d) A marriage obtained or recognized outside the State between persons prohibited by subsection (a) of this section shall not constitute a legal or valid marriage within the State.

Amended 1996.

FLA. STAT. ANN. § 741.04(1) (West 2004). Marriage license issued.

No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person unless there shall be first presented and filed with him or her an affidavit in writing, signed by both parties to the marriage, . . . made and subscribed before some person authorized by law to administer an oath, reciting the true and correct ages of such parties; unless both such parties shall be over the age of 18 years, except as provided in s. 741.0405; and unless one party is a male and the other party is a female.

Amended 1977.

FLA. STAT. ANN. § 741.212 (West Supp. 2005). Marriages between persons of the same sex.

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location



respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term “marriage” means only a legal union between one man and one woman as husband and wife, and the term “spouse” applies only to a member of such a union.

Passed 1997.

GA. CONST. art. 1, § 4, para. 1. Recognition of marriage.

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such relationship.

Passed 2004 by the voters.

GA. CODE ANN. § 19-3-30 (2004). Issuance, return, and recording of license.

(b)(1) No marriage license shall be issued to persons of the same sex.

Amended 1996.

GA. CODE ANN. § 19-3-3.1 (2004). Marriages between persons of same sex prohibited; marriages not recognized.

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

Passed 1996.

HAW. CONST. art. I, § 23.

The legislature shall have the power to reserve marriage to opposite-sex couples.

Passed 1998 by the voters.

HAW. REV. STAT. ANN. § 572-1 (Michie Supp. 2003). Requisites of Valid Marriage Contract.

In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that

Amended 1994.

HAW. REV. STAT. ANN. § 572-1.6 (Michie Supp. 2003). Private solemnization not unlawful.

Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in



this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of Hawaii.

Passed 1994.

IDAHO CODE § 32-209 (Michie 1996). Recognition of foreign or out-of-state marriages.

All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

Passed 1996.

750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999). Same-sex marriages; public policy.

Same-sex marriages; public policy. A marriage between 2 individuals of the same sex is contrary to the public policy of this State.

Passed 1996.

750 ILL. COMP. STAT. ANN. 5/212 (West 1999). Prohibited marriages.

(a) The following marriages are prohibited:

...

(5) a marriage between 2 individuals of the same sex.

Amended 1996.

IND. CODE ANN. § 31-11-1-1 (West 1999). Same sex marriages prohibited.

(a) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Passed 1997.

IOWA CODE ANN. § 595.2 (West 2001). Gender – Age.

1. Only a marriage between a male and a female is valid.

Amended 1998.

KAN. CONST. art. 15, sec. 16.

(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

Passed 2005 by the voters.

KAN. STAT. ANN. § 23-101 (2003). Nature of marriage relation.

(a) The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. . . .

Amended 1996.

KAN. STAT. ANN. § 23-115 (2003). Validity of marriages contracted without state.

All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

Amended 1996.

KY. CONST. § 233A

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

Passed 2004 by the voters.

KY. REV. STAT. ANN. § 402.040 (Michie 1999). Marriage in another state.

(1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy.

(2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.

Passed 1998.

KY. REV. STAT. ANN. § 402.045 (Michie 1999). Same-sex marriage in another jurisdiction void and unenforceable.

(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky.

(2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.

Passed 1998.

LA. CONST. art. XII, § 15. Defense of Marriage.

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

Amended 2004 by the voters.

LA. CIV. CODE ANN. art. 89 (West Supp. 2005). Impediment of same sex.

Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code.⁹²

Effective 1988. Amended 1999.

LA. CIV. CODE ANN. art. 96 (West 1999). Civil effects of absolutely null marriage; putative marriage.

An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.

When the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage.

A marriage contracted by a party in good faith produces civil effects in favor of a child of the parties.

A purported marriage between parties of the same sex does not produce any civil effects.

Effective 1988.

⁹² Book IV of the Louisiana Civil Code deals with conflict of laws, and Title II of that section, which comprises articles 3519-22, addresses matters of status. Article 3519 provides that "[t]he status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue[.]" and that state is determined by considering, inter alia, "the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue[.]" and "the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability." LA. CIV. CODE ANN. art. 3519 (West 1999). Article 3520(A) provides that public policy can invalidate a marriage, but only if it is the public policy of the most interested state under article 3519. LA. CIV. CODE ANN. art. 3520(A) (West Supp. 2005). However, article 3520(B), quoted *infra* p. 2178, evidently modifies this rule.



LA. CIV. CODE ANN. art. 3520(B) (West Supp. 2005). Marriage.

A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

Amended 1999.

H. Con. Res. 124, 1996 Reg. Sess. (La. 1996).

WHEREAS, the traditional marriage has become an issue in light of the recent judicial decision in the state of Hawaii, which overturned that state's marriage laws and allowed persons of the same sex to marry; and

WHEREAS, there is widespread concern that under the "full faith and credit" clause of the United States Constitution, this decision may impact marriage laws in other states across the nation; and

WHEREAS, the state of Louisiana has manifested through its laws and in civilian theory, that the institution of marriage is one that sustains order and morality in our communities and preserves the posterity and well-being of our larger society; and

WHEREAS, our Civil Code defines marriage as a legal relationship between a man and a woman created by civil contract; and

WHEREAS, a marriage between persons of the same sex is a legal impediment to the contract of marriage in the state of Louisiana; and

WHEREAS, legislation has been introduced in the United States Congress, entitled 'The Defense of Marriage Act,' which aims to protect the traditional definition of marriage as a legal union between one man and one woman, and prevent mandatory recognition of same sex marriages in other states; and

WHEREAS, this most important institution of our society must be protected and preserved at all costs.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana expresses the sense of the legislature regarding the traditional marital unit and the traditional definition of marriage in the state of Louisiana.



ME. REV. STAT. ANN. tit. 19-A, § 650 (West 1998). Findings and purposes.

All municipal clerks and courts of this State shall have a duty and shall be legally required to construe the provisions of Maine's marriage laws in accordance with the following findings and purposes:

1. Findings. The people of the State of Maine find that:

A. The union of one man and one woman joined in traditional monogamous marriage is of inestimable value to society; the State has a compelling interest to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children; and that the State has the compelling interest in promoting the moral values inherent in traditional monogamous marriage.

2. Purposes. The purposes of this chapter are:

A. To encourage the traditional monogamous family unit as the basic building block of our society, the foundation of harmonious and enriching family life;

B. To nurture, sustain and protect the traditional monogamous family unit in Maine society, its moral imperatives, its economic function and its unique contribution to the rearing of healthy children; and

C. To support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts.

Passed 1997.

ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998). Prohibited marriages; exceptions.

1-A. Certain marriages performed in another state not recognized in this State. Any marriage performed in another state that would violate any provisions of subsections 2 to 5 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

....

5. Same sex marriage prohibited. Persons of the same sex may not contract marriage.

Amended 1997.



MD. CODE ANN., FAM. LAW § 2-201 (1999). Valid marriages.

Only a marriage between a man and a woman is valid in this State.

Amended 1984.

MICH. CONST. art. I, § 25. Marriage.

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Passed 2004 by the voters.

MICH. COMP. LAWS ANN. § 551.1 (West Supp. 2004). Marriage between same sex, invalidity.

Sec. 1. Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Passed 1996.

MICH. COMP. LAWS ANN. § 551.271 (West Supp. 2004). Marriages solemnized in another state validated; exclusion of same sex marriages.

Sec. 1. (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent as if solemnized within this state and according to its laws.

(2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws.

Amended 1996.

MICH. COMP. LAWS ANN. § 551.272 (West Supp. 2004). Recognition of marriage by state, same sex marriage invalid.

Sec. 2. This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

Amended 1996.

MICH. COMP. LAWS ANN. § 551.3 (West Supp. 2004). Incapacity; persons man prohibited from marrying.

Sec. 3. A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, or another man.

Amended 1996.

MICH. COMP. LAWS ANN. § 551.4 (West Supp. 2004). Incapacity; persons woman prohibited from marrying.

Sec. 4. A woman shall not marry her father, brother, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree, or another woman.

Amended 1996.

MINN. STAT. ANN. § 363A.27 (West 2004). Construction of law.

Nothing in this chapter shall be construed to:

(1) mean the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle;

(2) authorize or permit the promotion of homosexuality or bisexuality in education institutions or require the teaching in education institutions of homosexuality or bisexuality as an acceptable lifestyle;

(3) authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of this chapter; or

(4) authorize the recognition of or the right of marriage between persons of the same sex.

Passed 1993.

MINN. STAT. ANN. § 517.01 (West Supp. 2005). Marriage a civil contract.

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

Amended 1997.

MINN. STAT. ANN. § 517.03 (West Supp. 2005). Prohibited marriages.

Subdivision 1. General. (a) The following marriages are prohibited:

....

(4) a marriage between persons of the same sex.

(b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.

Amended 1997.

MISS. CONST. art. 14, § 263A. Marriage.

Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.

Passed 2004 by the voters.

MISS. CODE ANN. § 93-1-1 (1999). Incestuous marriages void.

(2) Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

Amended 1997.

MO. CONST. art. I, § 33.

That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.

Passed 2004 by the voters.

MO. ANN. STAT. § 451.022 (West 2003). Marriage, public policy, validity—marriage licenses, issued, when

1. It is the public policy of this state to recognize marriage only between a man and a woman.

2. Any purported marriage not between a man and a woman is invalid.

3. No recorder shall issue a marriage license, except to a man and a woman.

4. A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.

Amended 2001.



MONT. CONST. art. XIII, § 7. Marriage.

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

Passed 2004 by the voters.

MONT. CODE ANN. § 40-1-401 (2003). Prohibited marriages—contracts.

(1) The following marriage[is] prohibited:

....

(d) a marriage between persons of the same sex.

....

(4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy.

Amended 1997.

NEB. CONST. art. I, § 29. Marriage; same-sex relationships not valid or recognized.

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Passed 2000 by initiative.

NEV. CONST. art. I, § 21. Limitation on recognition of marriage.

Only a marriage between a male and female person shall be recognized and given effect in this state.

Passed 2002 by initiative.

N.H. REV. STAT. ANN. § 457:1 (2001). Marriages Prohibited; Men.

No man shall marry his mother, his father's sister, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's

daughter, sister's daughter, father's brother's daughter, mother's brother's daughter, father's sister's daughter, mother's sister's daughter, or any other man.

Amended 1987.

N.H. REV. STAT. ANN. § 457:2 (2001). Marriages Prohibited; Women.

No woman shall marry her father, her father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son, sister's son, father's brother's son, mother's brother's son, father's sister's son, mother's sister's son, or any other woman.

Amended 1987.

N.C. GEN. STAT. § 51-1.2 (2003) Marriages between persons of the same gender not valid.

Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.

Passed 1995.

N.D. CONST. art. XI, § 28.

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Passed 2004 by the voters.

N.D. CENT. CODE § 14-03-01 (2004). What constitutes marriage—Spouse defined.

Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife.

Amended 1997. Effective 2000.



N.D. CENT. CODE § 14-03-08 (2004). Foreign marriages recognized—Exception.

Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.

Amended 1997. Effective 2000.

Recognition of Foreign Marriages, ch. 145, sec. 3, §§ 14-03-01, 14-03-08, 1997 N.D. Laws 3.

EFFECTIVE DATE. If the legislature of another state enacts a law under which a marriage between two individuals, other than between one man and one woman, is a valid marriage in that state or the highest court of another state holds that under the law of that state a marriage between two individuals, other than between one man and one woman, is a valid marriage, the governor of this state shall certify that fact to the legislative council. The certification must include the effective date of the other state's legislation or the date of the court decision. Sections 1 and 2 of this Act are effective as of the earlier of the effective date of that law or the date of that decision.

Passed 1997. Effective July 1, 2000, the date that Vermont granted the benefits of marriage to same-sex couples forming a civil union.

OHIO CONST. art. XV, § 11. Defense of Marriage.

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

Passed 2004 by initiative.



OHIO REV. CODE ANN. § 3101.01 (West 2005). Persons who may marry; same sex marriages against public policy; recognition or extension by state of specific statutory benefits of legal marriage to nonmarital relationships against public policy.

(A) Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman. . . .

. . . .

(C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117. of the Revised Code;

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Passed 2004.



OKLA. CONST. art. II, § 35. Marriage defined—Construction of law and Constitution—Recognition of out-of-state marriages—Penalty.

A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Passed 2004 by referendum.

OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001). Recognition of marriage between persons of same gender prohibited.

A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

Passed 1996.

OKLA. STAT. ANN. tit. 43, § 3 (West Supp. 2005). Who may marry.

A. Any person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex.

Amended 1975.

OR. CONST. art. XV, § 5a.

It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

Passed 2004 by initiative.

23 PA. CONS. STAT. ANN. § 1704 (West 2001). Marriage between persons of the same sex.

It is hereby declared to be the strong and long standing public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

Passed 1996.

S.C. CODE ANN. § 20-1-10 (West Supp. 2004). Persons who may contract matrimony.

(A) All persons, except mentally incompetent persons and persons whose marriage is prohibited by this section, may lawfully contract matrimony.

(B) No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or another man.

(C) No woman shall marry her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or another woman.

Amended 1996.

S.C. CODE ANN. § 20-1-15 (West Supp. 2004). Prohibition of same sex marriage.

A marriage between persons of the same sex is void ab initio and against the public policy of this State.

Passed 1996.



S.D. CODIFIED LAWS § 25-1-1 (Michie 1999). Marriage defined—Consent and solemnization required.

Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone does not constitute a marriage; it must be followed by a solemnization.

Amended 1996.

TENN. CODE ANN. § 36-3-113 (2001). Marriage between one man and one woman only legally recognized marital contract.

(a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.

(b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.

(c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.

(d) If another state or foreign jurisdiction issues a license for persons to marry which marriages are prohibited in this state any such marriage shall be void and unenforceable in this state.

Passed 1996.

TEX. FAM. CODE ANN. § 2.001 (Vernon 1998). Marriage License.

(a) A man and a woman desiring to enter into a ceremonial marriage shall obtain a marriage license from the county clerk of any county of this state.

(b) A license may not be issued for the marriage of persons of the same sex.

Passed 1997.

TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004–2005). Recognition of Same-Sex Marriage or Civil Union.

(a) In this section, “civil union” means any relationship status other than marriage that:

(1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and

(2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:

(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

(2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Passed 2003.

UTAH CONST. art. I, § 29. Marriage.

(1) Marriage consists only of the legal union between a man and a woman.

(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Passed 2004 by the voters.

UTAH CODE ANN. § 30-1-2 (1998). Marriages prohibited and void.

The following marriages are prohibited and declared void:

....

(5) between persons of the same sex.

Amended in 1993.

UTAH CODE ANN. § 30-1-4 (1998). Validity of foreign marriages—Exceptions.

A marriage solemnized in any other country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage:

(1) that would be prohibited and declared void in this state, under Subsection 30-1-2 (1), (3), or (5); or

(2) between parties who are related to each other within and including three degrees of consanguinity, except as provided in Subsection 30-1-1(2).

Amended 1996.

UTAH CODE ANN. § 30-1-4.1 (2005). Marriage recognition policy.

(1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.

(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

(2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.

Passed 2004.

VT. STAT. ANN. tit. 15, § 8 (2002). Marriage definition.

Marriage is the legally recognized union of one man and one woman.

Passed 1999.

VA. CODE ANN. § 20-45.2 (Michie 2004). Marriage between persons of same sex.

A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or

jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.

Amended 1997.

VA. CODE ANN. S 20-45.3 (Michie 2004). Civil unions between persons of the same sex.

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Passed 2004.

WASH. REV. CODE § 26.04.010 (West Supp. 2004–2005). Marriage contract—void marriages.

(1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.

Amended 1998.

WASH. REV. CODE § 26.04.020 (West Supp. 2004–2005). Marriage contract—void marriages.

(1) Marriages in the following cases are prohibited:

....

(c) When the parties are persons other than a male and a female.

....

(3) A marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section.

Amended 1998.

W. VA. CODE ANN. § 48-2-104 (Michie 2004). Contents of the application for a marriage license.

....

(c) Every application for a marriage license must contain the following statement: "Marriage is designed to be a loving and lifelong union between a woman and a man.

"The laws of this state affirm your right to enter into this marriage and to live within the marriage free from violence and abuse. Neither of you is the property of the other. Physical abuse, sexual abuse, battery and assault of a spouse or other family member, and other provisions of the criminal laws of this state are applicable to spouses and other family members, and these violations are punishable by law."

Amended 2001.

W. VA. CODE ANN. § 48-2-603 (Michie 2004) Certain acts, records, and proceedings not to be given effect in this state.

A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.

Amended 2001.

WYO. STAT. ANN. § 20-1-101 (Michie 2003). Marriage a civil contract.

Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.

Amended 1977.

