COMMENT

WAGGING THE DOG—IF THE STATE OF HAWAII ACCEPTS SAME-SEX MARRIAGE WILL OTHER STATES HAVE TO?: AN EXAMINATION OF CONFLICT OF LAWS AND ESCAPE DEVICES

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INTRODUCTION

What do you think about same-sex marriage? Ask a group of friends this question and you will quickly realize that there are few fence-sitters regarding this issue—you are either for it or against it.

Few questions stir such heated debate, and why not? The issue of same-sex marriage and its ultimate acceptance or rejection will have a profound effect on our society as we know it. Add to the discussion of same-sex marriage the "dismal swamp" of conflict of laws, and the debate becomes explosive.

A conflict of laws arises when a transaction or occurrence that is the subject of a cause of action has contacts with more than one state or country; as the laws of every forum differ, the determination of which law shall apply to a particular cause of action often has a direct and profound effect on the outcome of the case. In a conflict of laws situation, granting comity to a foreign state's laws instead of applying the law of the forum results in a judgment that would not be possible if the forum were ruling on a purely domestic case.

In the context of same-sex marriage, such a conflict would arise if a same-sex couple legally married pursuant to one state's laws were to move to another state and file a cause of action to have their same-sex marriage recognized. The forum state would need to decide whether to apply its own laws, which presumably might not recognize same-sex marriage, or to grant comity to the laws of the state where the marriage was celebrated. If the forum state applies its own laws, the case would be dismissed; if the forum applies the laws of the state of celebration, however, the union would be recognized. Thus, the decision of which law to apply considerably affects the outcome of the case.

To date, numerous law review articles have lauded the legal recognition of same-sex marriage, proffering that the correct application

2. See generally Roger C. Crampton et al., Conflict of Laws Cases—Comments—Questions v (5th ed. 1993).
of conflict of laws rules all but ensures that once one state recognizes same-sex marriage, other states will be required to recognize out-of-state same-sex marriages. Without taking a position on the propriety of same-sex marriage, this Comment, contends that states could refuse to recognize such unions through legitimate application of conflict of laws rules. Part II of this Comment discusses the recent Hawaii state court decision in *Baehr v. Miike*, in which the Hawaii Circuit Court held that the Hawaii state constitution guarantees the right of same-sex couples to marry. Next, Part III discusses the regulation of marriage as a sovereign power of individual states. Part IV argues that the Full Faith and Credit Clause does not solve the question of interstate validation of same-sex marriages and that states must therefore turn to a conflict of laws analysis to determine recognition of such unions. Finally, Part V illustrates how the legitimate application of existing conflict of laws rules could lead states to refuse to recognize same-sex marriages performed in other states.

I. *BAEHV. MIKE*

Pending litigation in Hawaii has brought the issues of same-sex marriage and conflict of laws to the forefront. Depending on the Hawaii court’s ultimate decision in *Baehr v. Miike*, state courts and legislatures across the country may be forced to address the issue of same-sex marriage and the impact that Hawaii’s law addressing such unions could have on other states.

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4. See Cordell, supra note 3, at 264-71 (concluding that out-of-state same-sex marriages should be valid in forum state as long as parties did not lack mental capacity and were old enough at time marriage was performed); Note, In Sickness and In Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages, 109 HARV. L. REV. 2038, 2041 (1996) (arguing that lex loci celebrationis should govern recognition of same-sex marriage, thus leading a forum to recognize same-sex marriages performed in foreign state); Anthony Dominic D'Amato, Note, Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages, 1995 U. ILL. L. REV. 911, 941-43 (concluding that after applying conflict of laws rules and policy arguments, states should recognize certain same sex marriages performed outside the forum); cf. Habib A. Balian, Note, 'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status, 68 S. CAL. L. REV. 597, 401 (1995) (arguing that Full Faith and Credit Clause may require states to recognize same-sex marriages performed pursuant to other state’s laws).


7. See, e.g., James Kunen, Hawaiian Courtship; Gay Marriage May Become Legal in the Islands—Without Necessarily Coming to a Chapel Near You, TIME, Dec. 16, 1996, at 44 (discussing De-
In *Baehr*, three same-sex couples filed suit against the Director of the Hawaii Department of Health\(^8\) for refusing to issue marriage licenses to the couples solely on the ground that the couples were of the same sex.\(^9\) The plaintiffs alleged that the Hawaii marriage license law\(^10\) was unconstitutional because it discriminated against same-sex couples on the basis of gender.\(^11\) In 1991, the Hawaii Circuit Court granted the State's motion for judgment on the pleadings and dismissal for failure to state a claim upon which relief could be granted.\(^12\) Plaintiffs filed their notice of appeal in October, 1991.\(^13\)

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\(^8\) At the time the original cause of action was filed, the Hawaii Director of Health was John C. Lewin. Director Lewin was succeeded by Lawrence H. Miike while this case was still pending. Director Miike's name was automatically substituted for former-Director Lewin.


\(^10\) See HAW. REV. STAT. § 572-1 (1985) (amended 1994). The Hawaii marriage license statute specifically referred to applicants for a marriage license in terms of one party being male and the other being female. See id. Section 572-1 provides that to make a marriage contract valid, it is necessary that:

1. The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

2. The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

3. The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

\(^11\) See id. (referring to parties to a marriage contract as "man" and "woman," "brother" and "sister," "uncle" and "niece," and "aunt" and "nephew").

\(^12\) See *Baehr*, 852 P.2d at 48. The circuit court held that Lewin was "entitled to judgement
On appeal, the Hawaii Supreme Court in its plurality opinion held that the circuit court’s judgment on the pleadings as a matter of law was erroneously granted.\textsuperscript{14} The Hawaii Supreme Court further recognized that while there is a fundamental right to marriage,\textsuperscript{15} there is no fundamental right to same-sex marriage under the Hawaii Constitution.\textsuperscript{16} Unlike the circuit court, however, the Hawaii Supreme Court did not find that the plaintiffs were without any potential remedy. The Hawaii Supreme Court held that the couples were entitled to an evidentiary hearing to determine if the Hawaii marriage license statute comports with the equal protection clause of the Hawaii Constitution, which is broader than the Equal Protection Clause of the United States Constitution.\textsuperscript{17}

Because the Hawaii Constitution’s equal protection clause specifically states that a person cannot be denied the equal protection of


\textsuperscript{14} See Baehr v. Lewin, 852 P.2d 44, 52-54 (Haw. 1993). The Hawaii Supreme Court held that the circuit court made evidentiary findings of fact without the benefit of having any evidentiary record before it. \textit{See id.} at 53.

\textsuperscript{15} \textit{See id.} at 55. The court in \textit{Baehr} held that article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights recognized under the United States Constitution, including the United States Supreme Court’s holding that the right to marry is a fundamental right. \textit{See id.} In \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942), the Supreme Court first recognized marriage as a fundamental right by linking the right to marriage to the right to procreate, because “[m]arriage and procreation are fundamental to the very existence and survival of the race.” \textit{Id.} at 541; \textit{see also} Loving v. Virginia, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . . .”). In rejecting Virginia’s anti-miscegenation statute, the Court in \textit{Loving} stressed that the right to marry is “one of the ‘basic civil rights of [men and women].’” \textit{Id.} (quoting \textit{Skinner}, 316 U.S. at 541); \textit{see also} Zablocki v. Redhail, 434 U.S. 374, 384 (1978); O’Neill v. Dent, 364 F. Supp. 565, 568 (E.D.N.Y. 1973) (“[T]he right to marry underlies the purposes of the Constitution, although not mentioned therein, and is a fundamental right afforded protection by the First, Fifth, Ninth and Fourteenth Amendments of the United States Constitution.”).

\textsuperscript{16} \textit{See Baehr}, 852 P.2d at 57. In holding that the Hawaii Constitution does not recognize a fundamental right for same-sex couples to marry, the court stated:

\begin{quote}
We do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.
\end{quote}

\textit{Id.} at 48.

\textsuperscript{17} See \textit{id.}. The court held that the applicant couples were “free to press their equal protection claim.” \textit{Id.} The equal protection clause of the Hawaii State Constitution is broader than the similar clause contained in the United States Constitution. \textit{Compare HAW. CONST. ART. I, § 5} (stating that “[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry”), \textit{with U.S. CONST. Amend. XIV, § 1} (stating that a state may not “deny to any person within its jurisdiction the equal protection of the laws”).
the laws because of their sex, 18 the court rejected application of the "rational basis" test 19 or "intermediate scrutiny" 20 to determine the constitutionality of the Hawaii marriage license statute. The Hawaii Supreme Court concluded that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the 'strict scrutiny' test." 21 Under strict scrutiny, the court presumes the challenged statute to be unconstitutional unless the state can prove that the suspect category is "justified by compelling state interests and . . . the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights." 22 The case was remanded to the Hawaii Circuit Court for further proceedings to determine if the State could show a compelling state interest for refusing to issue marriage licenses to same-sex couples. 23

In December, 1996, the Hawaii Circuit Court held that the State had failed to show a compelling state interest for the sex-based classification of HRS § 572-1, and further failed to establish that HRS § 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights. 24 The State of Hawaii immediately appealed the ruling and Circuit Court Judge Chang stayed his ruling pending appeal. 25 Following the Hawaii Circuit Court's decision, the state legislature in 1997 passed a resolution to allow the Hawaiian elector-

18. See supra note 17 and accompanying text (discussing the respectively broader and narrower Equal Protection Clauses of the Hawaii State Constitution and the United States Constitution).
19. See Baehr, 852 P.2d at 63-64 (stating that the first step in determining whether a statute violates the State's equal protection clause is to determine whether the statute should be subjected to "strict scrutiny" or a "rational basis test" (citing Nagle v. Board of Ed., 629 P.2d 109, 111 (Haw. 1981))). A statute will be subject to the rational basis test provided that "fundamental rights" or a "suspect" classification is not at issue. See id. at 64 ("'Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest.'" (quoting Estate of Coates v. Pacific Eng'g, 791 P.2d 1257, 1260 (Haw. 1990))).
20. See id. at 65-66 (noting that the Hawaii courts have already "unequivocally established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a per se matter, to some form of 'heightened' scrutiny, be it 'strict' or 'intermediate,' rather than mere 'rational basis' analysis." (citing Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978))). The United States Supreme Court has held that sex-based classifications are subject to "intermediate scrutiny" under the U.S. Constitution. See Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important government objectives and must be substantially related to achievement of those objectives.").
22. Id.
23. See id. at 68. In order to meet strict scrutiny, "the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." Id.
25. See id.
ate to amend the Hawaii state constitution and ban same-sex marriage in the state. In light of this proposed constitutional amendment, the state asked the Hawaii Supreme Court to wait until after Election Day 1998 to rule on the state's appeal to the Circuit Court's ruling in *Baehr*. If the Hawaii Supreme Court ultimately determines that the marriage license statute is unconstitutional and recognizes same-sex marriages, proponents of same-sex marriage insist that other states must recognize such marriages under the Full Faith and Credit Clause, or alternatively that conflict of laws rules should be invoked to expand same-sex marriage beyond the boundaries of the sovereign State of Hawaii. Although requirements for marriage within a particular state traditionally have been governed by the laws of that state, in most instances, marriages performed in one state are presumed to be valid in all other states even if the marriage does not comport with the marriage requirements of the forum state. There are significant exceptions to this general rule, however, and the issue of same-sex marriage will ultimately test the boundaries of this presumption of validity.

II. REGULATION OF MARRIAGE IS A SOVEREIGN RIGHT OF THE INDIVIDUAL STATES

The Tenth Amendment of the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The United States Constitution does not grant the federal government the right to regulate marriage. Thus, this right has long been recognized as a sovereign right of the individual states. The court in *Baehr* recognized that

28. See supra notes 3-4 and accompanying text (arguing for legalization of same-sex marriages and interstate recognition of such marriages).
29. See *Baehr*, 852 P.2d at 58 ("The power to regulate marriage is a sovereign function reserved exclusively to the respective states."); see also infra notes 33-41 and accompanying text (discussing sovereignty of states in deciding marriage requirements and the traditional treatment of marriage).
30. See infra notes 52-54 and accompanying text (discussing the "presumption of validity" of marriages performed outside the forum state).
31. See infra Part V (discussing exceptions to general rule of validation of out-of-state marriages).
32. U.S. CONST. amend. X.
33. See Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("Within the limits of her political power [a state] may, of course, enforce her own policy regarding the marriage relation—
by its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution.  

Although the passage of the Defense of Marriage Act ("DOMA") signified the federal government's rejection of same-sex marriages under federal law and prohibited any requirement compelling a state to validate same-sex marriages performed in another state, the power to determine who may enjoy the marital relationship in a particular state remains a sovereign power of the individual states. Although this Comment does not fully explore the constitutionality of

34. Baehr, 852 P.2d at 48.  
36. See id. § 3. The Defense of Marriage Act clarifies that for the purpose of federal law, marriage does not encompass same-sex marriage:  
In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.  

Id. Consequently, even if Hawaii were to recognize same sex marriages, and even if those marriages were recognized by some states, these same-sex marriages would not be valid for federal purposes—for example, for federal income tax status.  
37. The Defense of Marriage Act provides in part that:  
No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.  

Id. § 2(a).  
DOMA, the reader should be aware that the ability of this statute to pass constitutional muster is hotly contested.39

In response to the potential consequences of Baehr, many states have either passed laws or are considering legislation to bar recognition of out-of-state same-sex marriages.40

III. THE FULL FAITH AND CREDIT CLAUSE DOES NOT RESOLVE THE SAME-SEX MARRIAGE VALIDATION QUESTION

The Full Faith and Credit Clause of the United States Constitution states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Proponents of interstate recognition of same-sex marriage assert that this language requires states to give full faith and credit to such marriages performed in other states.41

The Full Faith and Credit Clause does not, however, require the interstate recognition of same-sex marriages. Pursuant to federal law42 and judicial interpretation,43 the Full Faith and Credit Clause has traditionally been recognized as requiring states to give full faith and credit to other states’ court judgments; however, the Supreme Court has distinguished public acts and conflicting statutes, “the extrastate effect of which Congress has not prescribed,” acknowledging

39. See Anna Snider, Forum on Same-Sex Marriage Forebodes Statehouse Debate, N.J. L.J., Apr. 14, 1997, at 1 (stating that opponents of DOMA claim that Congress does not have the power to cancel out the Full Faith and Credit Clause, while proponents of the law argue that Congress has plenary authority to define the Full Faith and Credit Clause); cf. Balian, supra note 4, at 408 (arguing that marital decrees fall within ambit of Full Faith and Credit Clause).
40. See David W. Dunlap, Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door, N.Y. TIMES, Mar. 6, 1996, at A13 (citing state efforts to pass legislation rejecting same-sex marriage). Utah and South Dakota have already passed such legislation, while at least twenty other states, including California, Alaska, Alabama, Colorado, Georgia, Idaho, Illinois, Iowa, Kentucky, Maryland, Missouri, New York, Nevada, Rhode Island, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming are considering legislation to ban same-sex marriage. See id.
41. U.S. CONST. art. IV, § 1.
42. See Balian, supra note 4, at 408-10.
43. See 28 U.S.C. § 687 (1994) (“[J]udgments shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”).

[T]he judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States. Id.; see also Fauntleroy v. Lum, 210 U.S. 230, 230 (1908) (holding that if judgment of one state is final, it cannot be impeached either in or out of state by showing it was based on mistake of law).
that "'some accommodation of the conflicting interests of the two states is necessary.'"

With regard to the impact of the Full Faith and Credit Clause on recognition of another state's laws, the Court held that:

Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.46

Thus, conflicting state laws have been subject to a balancing of state interests under the Full Faith and Credit Clause, while judgments have been automatically enforced. Under the newly enacted Defense of Marriage Act, however, Congress has prescribed the extrastate effect of the public acts, records and judicial proceedings of a state relative to same-sex marriages.47 Thus, for the purpose of same-sex marriages, Congress has decreed that neither the public acts or records, nor the judicial proceedings of a state must be afforded per se validity under a Full Faith and Credit analysis.48

Prior to the enactment of DOMA, same-sex couples could circumvent a state statute that refused to recognize their out-of-state same-sex marriage by obtaining a declaratory judgment in the state where the marriage was performed;49 declaratory judgments are typically considered final judgments for purposes of Full Faith and Credit analysis.50 DOMA, however, limits the effect of a state's judicial proceedings with regard to extending Full Faith and Credit to same sex marriages.51 Pursuant to DOMA, a state can refuse to recognize a same-sex marriage performed in another state, even if the couple obtained a declaratory judgment in the state where the marriage was performed.

Should a forum state refuse to grant Full Faith and Credit to an out-of-state same-sex marriage, the forum could then turn to a conflict of laws analysis to determine the validity of the marriage in ques-

47. See supra notes 36-38 and accompanying text (discussing Defense of Marriage Act).
48. See id.
49. See Balian, supra note 4, at 426 (stating that marital decrees would be considered a judgment for Full Faith and Credit purposes and would, therefore, be automatically enforceable by other states).
50. See CRAMTON ET AL., supra note 2, at 454 (noting that declaratory judgments fall within parameters of Full Faith and Credit Clause and are conclusive as to matters declared).
51. See supra note 36 and accompanying text.
tion. Under existing conflict of laws rules, the forum could refuse to recognize the marriage.

IV. CONFLICT OF LAWS ANALYSIS COULD LEAD STATES TO INVALIDATE OUT-OF-STATE SAME-SEX MARRIAGES

A. Lex Loci Celebrationis: The General Rule of Validation

In the first Restatement of Conflict of Laws, *lex loci celebrationis*, which is the traditional conflict of laws rule for validity of marriages, provides that states should rely on the law of the state in which the marriage was celebrated to determine its validity. Under this "general rule of validation," marriages performed in one state will be recognized in the forum state as long as the marriage was valid under the laws of the state where it was celebrated.

Although marriages performed out-of-state enjoy a presumption of validity, this general rule of validation is not absolute. Courts have taken exception when marriages are accompanied by certain circumstances, including incest, violation of minimum age requirements, remarriage, and polygamy.

52. RESTATEMENT OF CONFLICT OF LAWS § 121 (1934) [hereinafter RESTATEMENT].


54. See supra note 52, § 121; see also ALBERT EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 138 (1962) ("Current doctrine and court language assume a 'governing' law of the place of celebration."); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS OF LAW § 220 (1986) (discussing the *lex loci celebrationis* choice of law rule for interstate validation of marriage); RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.1A (3d ed. 1986) (summarizing the traditional rule of the place of celebration for determining the validity of a marriage performed outside the forum state); Hovermill, supra note 53, at 453-55 (discussing choice of law rule as applied by state courts).

55. See infra notes 56-59 and accompanying text (outlining exceptions to general rule of validation).

56. See Osoinach v. Watkins, 180 So. 577, 581 (Ala. 1938) (refusing to recognize an out-of-state marriage that violated Alabama's statute prohibiting incestuous marriages); Catalano v. Catalano, 170 A.2d 726, 728-29 (Conn. 1961) (holding that marriage performed in another state was violative of Connecticut marriage law prohibiting incestuous marriages and was, therefore, invalid in Connecticut).

57. See Smith v. Smith, 11 S.E. 496, 498-99 (Ga. 1890) (refusing to validate out-of-state marriage that violated Georgia's minimum age requirement for marriage); Wilkins v. Zelichowski, 140 A.2d 65, 69 (N.J. 1958) (finding marriage violating New Jersey's age requirement was not valid in the forum state even though valid in the state of celebration).

58. Many of the decisions invalidating out-of-state marriages of divorced persons are older, though still significant. See Wilson v. Cook, 100 N.E. 222, 223-24 (Ill. 1912) (invalidating out-of-state marriage performed within one year of divorce decree); In re Estate of Rogers, 569 P.2d 536, 538 (Okla. 1977) (stating that out-of-state marriage is voidable if it occurs within six months after divorce); Knoll v. Knoll, 176 P. 22, 23 (Wash. 1918) (holding foreign marriage void if within six months of divorce).

59. Courts have consistently invalidated polygamous marriages. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.18 (2d ed. 1992). See generally WEINTRAUB, supra note 54, §
The Restatement (Second) of Conflict of Laws generally follows the rule of validation, though the forum may apply its own laws if it determines that it is the state with the "most significant relationship" to the spouses and the marriage. This approach is discussed in greater detail in Part IV.B.

Supporters of interstate recognition of same-sex marriage argue that under this general rule of validation, a forum state would be forced to recognize the same-sex marriages performed in other states under either the traditional lex loci celebrationis rule or the Second Restatement's most significant relationship approach. The general rule of validation has noteworthy escape devices, however, that could lead a forum state to refuse to recognize same-sex marriages.

1. Marriage evasion statutes

The first exception to the traditional rule of validation recognizes a forum state's right to enact clear statutory language expressing that the otherwise applicable conflict of laws rules do not apply to certain types of marriages, and that such marriages performed in other states will not be recognized by the forum. Both the first and second Restatement's marriage evasion statutes recognize a forum state's right to enact clear statutory language expressing that the otherwise applicable conflict of laws rules do not apply to certain types of marriages, and that such marriages performed in other states will not be recognized by the forum.

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5.1A (discussing cases in which courts have invalidated out-of-state marriages for being violative of the forum state’s marriage requirements).

60. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971) (hereinafter RESTATEMENT (SECOND)) (outlining Second Restatement most significant relationship approach and § 6 factors); Hovermill, supra note 53, at 454-55 (discussing the general rule of validation).

61. See RESTATEMENT (SECOND) § 283(1) (“The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage . . ..”). Section 6 of the Restatement (Second) outlines numerous factors to consider in determining the place of the most significant relationship. Under section 6(1), courts should first look to any statutory directive on choice of law for the issue in question. See id. § 6(1). If the forum has no such directive, several other factors should be considered by a state in determining the applicable rule of law, including:

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

Id. § 6(2).

62. See infra notes 100-08 and accompanying text (discussing the most significant relationship approach).

63. See supra note 4 and accompanying text (citing law review articles arguing that same-sex marriages performed in other states must be recognized by forum).

64. See WEINTRAUB, supra note 54, § 5.1A (discussing such statutes and decisions of courts interpreting them). The Uniform Marriage Evasion Act, 9 U.L.A. 480 (1942), was an example of one such statute. This statute provided that when domiciliaries of a state that prohibited their marriage traveled to another state to marry, their marriage was void and would not be recognized by the state where the parties were domiciled. The states that adopted this or simi-
Such marriage evasion statutes are present in only a minority of states; as discussed above, however, proposed legislation banning recognition of same-sex marriage is on the rise. Given these legislative efforts to ban recognition of out-of-state same-sex marriages, this exception to the general rule of validation may become more significant than it traditionally has been.

2. The public policy exception

The second, more widely invoked exception to the general rule of validation of out-of-state marriages is that based on public policy, an exception recognized in both the first and second Restatements.

The public policy exception under the traditional rules precludes suits "upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." 60

65. See Restatement, supra note 52, § 132. Section 132 provides in part:

A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

... (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.

Id. Comment e of § 132 indicates that such marriage evasion statutes do not necessarily need to be narrowly drawn to have effect. This comment provides in part that such a statute may provide in specific words or be so interpreted that if parties domiciled in a state and intending to continue to be domiciled there, go to another state in order to circumvent the law of the domicile, "such marriage shall be ... void for all purposes in the state of the domicil." Id. § 132 cmt. e; see Restatement (Second), supra note 60, § 6(1) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.").


67. In response to concerns about possible recognition of same-sex marriage in other states, this year state legislators in thirty states introduced legislation to ban recognition of same-sex marriages within the boundaries of those thirty states. See supra note 7 and accompanying text (reporting political hostility toward same-sex marriage).

68. See Hovermill, supra note 53, at 493 nn.34-37 (noting that Uniform Marriage Evasion Act, 9 U.L.A. 480 (1942), was adopted by only five states before it was withdrawn from list of recommended Uniform Acts in 1943).

69. See Restatement (Second), supra note 60, § 90 (recognizing public policy exception); Restatement, supra note 50, § 612 (precluding suits "upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum").

70. See Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364, 366 (Va. 1939) ("[A] marriage valid where celebrated is valid everywhere ... [except those m]arriages deemed contrary to the laws of nature ... [and] marriages positively forbidden by statute because contrary to local public policy.").
At first blush, this exception appears to have the potential to swallow the rule of validation. It has not done so, however, because courts have narrowly construed the term public policy. The fact that the forum state's laws are different from the laws of the place of celebration, or that the forum has simply not legislated on the matter, does not alone justify invocation of the exception. Traditionally, courts have only invoked the public policy exception in cases where the other state's law violates the forum state's strong public policy. Judge Cardozo provided now famous commentary on the test for issues serious enough to invoke the public policy exception:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

With regard to same-sex marriage, a forum state's courts would first assess the public policy supporting the state's marriage statutes. A statute containing express language invalidating same-sex marriage and explicitly stating that such invalidation applies to mar-

71. See RESTATEMENT, supra note 52, § 612.
72. See supra notes 56-59 and accompanying text (discussing various circumstances under which courts have invalidated marriages in part based on public policy grounds).
73. See Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605, 608 (Md. 1985) (“We fully agree that merely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy and thus unenforceable in our courts.”); Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (“Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that the public policy forbids us to enforce the foreign right.”); Robertson v. Estate of McKnight, 609 S.W.2d 534, 537 (Tex. 1980) (“Although the policies of Texas and New Mexico differ... that does not mean that the New Mexico rule is so contrary to our public policy that our courts will refuse to enforce it.”).
74. See LEFLAR ET AL., supra note 54, § 45 (discussing strong public policy basis for refusing to hear foreign actions).
75. Loucks, 120 N.E. at 202.
76. See Miller v. American Ins. Co., 124 F. Supp. 160, 162-63 (W.D. Ark. 1954) (finding that state statute prohibiting certain arbitration provisions was sufficient to state the forum’s public policy on domestic contracts, but was not dispositive of the forum’s policy toward out-of-state contracts); Etheridge v. Shaddock, 706 S.W.2d 395, 396 (Ark. 1986) (stating that in order to invoke the public policy exception, the forum’s law must expressly state an intention to void foreign laws that are ordinarily applied under the traditional conflict of laws rule).
77. A state's intent to invalidate same-sex marriages within the state may be insufficient to ensure that the forum's courts will invalidate such marriages performed outside the forum. See Johnson v. Lincoln Square Props., Inc., 571 So. 2d 541, 542 (Fla. Dist. Ct. App. 1990) (recognizing out-of-state common law marriages even though state law declared such marriages void); In re Estate of Loughmiller, 629 P.2d 156, 158-61 (Kan. 1981) (validating out-of-state marriage of first cousins despite Kansas statute declaring such marriages void); Leszinske v. Poole, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990) (validating foreign marriage between uncle and niece despite state law declaring such marriages absolutely void); In re May's Estate, 114 N.E.2d 4, 6 (N.Y. 1953) (recognizing out-of-state marriage between niece and uncle, even
riages celebrated both in and out of state would be indicative of a policy strong enough to invoke the exception.\textsuperscript{78}

It may be unnecessary, however, for statutes to be so specific in order to be a strong indicator of public policy. Courts have inferred public policy from weaker indications of statutory intent,\textsuperscript{79} and the second Restatement advises that the forum "apply its own legal principles to determine whether a given policy is a strong one . . . ."\textsuperscript{80} Thus, courts that are willing to infer intent may be able to find a strong public policy based on statutory language even if the legislative history or intent does not expressly address the subject of out-of-state same-sex marriage.\textsuperscript{81}

Courts may also look to the history and traditions of the forum and society generally for indications of public policy regarding same-sex marriages. While some commentators have argued that our society has a long history of same-sex marriage, the examples cited are sporadic at best and have never included state-sanctioned same-sex marriages.\textsuperscript{82} Such examples are so infrequent that they provide little support for claims that American society has a long history of same-sex marriage and patently ignore the centuries-long history of heterosexual marriage in American culture. This history and tradition is often clearly depicted in the caselaw of a forum, providing additional

\begin{footnotesize}
\textsuperscript{78} Some courts have validated out-of-state marriages if the statute declaring such marriages as void articulates a specific intention to apply such prohibitions to out-of-state marriages. \textit{See} State v. Graves, 307 S.W.2d 545, 548 (Ark. 1957) ("The intent must find clear and unmistakable expression."); Allen v. Storer, 600 N.E.2d 1263, 1266 (Ill. App. Ct. 1992) (noting that statute did not expressly address invalidation of out-of-state marriages); \textit{Loughmiller}, 629 P.2d at 158 (requiring that statute contain express language in order to void valid out-of-state marriage); \textit{May's Estate}, 114 N.E.2d at 6 (noting that statute did not expressly regulate out-of-state marriages).

\textsuperscript{79} \textit{See} Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961) (finding prohibitions in marriage statute and criminalization of incestuous marriages sufficient to invalidate out-of-state marriages); Laikola v. Engineered Concrete, 277 N.W.2d 653, 656 (Minn. 1979) (finding valid out-of-state common law marriage void for public policy based on forum law invalidating such marriages); Stein v. Stein, 641 S.W.2d 856, 858 (Mo. Ct. App. 1982) (holding that state law invalidating common law marriages was sufficient to void valid out-of-state common law marriages).

\textsuperscript{80} \textit{Restatement (Second)}, supra note 60, § 283 cmt. k.

\textsuperscript{81} \textit{See} Osoniach v. Watkins, 180 So. 577, 580 (Ala. 1938) (finding marriage void for public policy where forum's statute did not allow incestuous marriages, even though statute had no statement specifically voiding such marriages performed in other states); \textit{Catalano}, 170 A.2d at 728-29 (inferring intent to invalidate out-of-state incestuous marriage from statute invalidating all such marriages within forum); \textit{Laikola}, 277 N.W.2d at 656; \textit{Stein}, 641 S.W.2d at 857 (inferring intent to void out-of-state common law marriages from statutes prohibiting such marriages in the forum).

\textsuperscript{82} \textit{See} Cordell, supra note 3, at 260-61 (citing the late nineteenth century same-sex union of a key figure in the Zuni (Native American) community and the practice of "passing" whereby women have dressed in men's clothes and passed as men, and also describing flourishing lesbian subculture in Harlem in 1920s, including large wedding ceremonies, replete with bridesmaids and attendants).
\end{footnotesize}
evidence of the forum's public policy regarding same-sex marriage. For example, a state court might have held prior to statutory enactment that such forum does not recognize same-sex marriage, or simply defined marriage as being between a man and a woman.84

Looking beyond the forum's caselaw, the institution of marriage, which is repeatedly protected by the Supreme Court, has never included homosexual relations and consistently is defined by the Court as an act between a man and a woman.85 Moreover, federal and state courts considering the issue of same-sex marriage consistently have held that, by definition, marriage does not include the union of members of the same sex.86

The existence of sodomy statutes in the forum state provides additional evidence of a state's public policy against homosexual relationships.87 Courts understandably could infer from such statutes that a

84. See id. at 287 ("The long tradition of marriage, understood as the union of male and female, testifies to a contrary political, cultural, religious and legal consensus."); In re Estate of Cooper, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1995) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and, rearing of children within a family, is as old as the book of Genesis." (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))); see also infra note 86 and accompanying text (listing numerous cases where federal and state courts have held that marriage does not encompass same-sex marriage).
86. See id. at 38 (stating that every federal and state court that has considered the issue has concluded that marriage does not include same-sex relations); see also Adams v. Howerton, 486 F. Supp. 1119, 1122, 1124 (C.D. Cal. 1980) (holding that marriage necessarily involves contract, status and relationship between persons of different sexes); Dean v. District of Columbia, 653 A.2d 307, 313-17 (D.C. 1995) (finding that gender-based terminology in statute reflects legislative understanding that marriage is inherently a male-female relationship); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (holding that same-sex couple cannot be married because of their incapability of entering into marriage relationship as term is defined); Baker v. Nelson, 191 N.W.2d 185, 185-86 & n.1 (Minn. 1971) (holding that Minnesota does not allow marriage between persons of same sex and that such marriages are prohibited); Frances B. v. Mark B., 355 N.Y.S.2d 712, 716 (Kings Co. Sup. Ct. 1974) (noting that marriage has always been a contract between man and woman); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Queens Co. Sup. Ct. 1971) (holding that marriage ceremony between male and other male who had undergone surgery to become female did not create marriage contract); Cooper, 592 N.Y.S.2d at 798-99 (finding that terms "marriage" and "spouse" necessarily and exclusively involve contract between persons of different sexes); DeSanto v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (noting long-time assumption and common usage of marriage as being between man and woman, thus prohibiting same-sex marriage); Slayton v. Texas, 633 S.W.2d 934, 937 (Tex. App. 1982) (holding that, in Texas, it is not possible for marriage to exist between persons of same sex); Singer v. Hara, 522 P.2d 1187, 1189, 1191-92 (Wash. Ct. App. 1974) (holding that legislature has not authorized same-sex marriages).
forum has a similar public policy against same-sex marriages.\textsuperscript{88} Although the existence of sodomy laws alone may not be sufficient to ascertain whether a strong public policy exists,\textsuperscript{89} examination of the forum's statutes, legislative history and express provisions, caselaw, and the history and traditions of the forum and society generally could provide a forum's court with ample evidence that the forum has a strong public policy against same-sex marriage.\textsuperscript{90} Given indications of such a strong public policy, courts quite reasonably could invoke the public policy exception and refuse to validate same-sex marriages.

3. Characterization

Another common way that a court may escape the rigidity of the general rule of validation is through characterization of the case.\textsuperscript{91} How the court decides to characterize a case could be considered outcome-determinative; for the purposes of conflict of laws analysis, certain characterizations often lead to the use of one forum's laws, while alternative characterizations may lead to use of another state's laws.\textsuperscript{92}

An example of how characterization of a claim can effect the outcome of a cause of action is illustrated by the following scenario: a passenger buys a train ticket in state A for a train ride from state A to state B, and the passenger is injured when the train is involved in an accident in state B. Assume that tort law in state A favors the passenger and state B's tort law favors the train company. Assume also that state A's contract law favors the passenger and state B's contract law favors the train company. If the resulting suit were characterized as a tort, the outcome of the suit would be governed by the law of the place of the wrong\textsuperscript{93} (state B), and the train company wins. If, how-

\textsuperscript{88} See id.
\textsuperscript{89} See supra notes 76-77 and accompanying text (discussing cases where courts upheld out-of-state marriages that violated forum state statute because statute did not impart clear intent, and out-of-state marriages did not violate a strong public policy of the forum).
\textsuperscript{90} Because no two forum states share the same caselaw, statutes, history and traditions, each forum will need to determine individually whether the recognition of same-sex marriages performed in other states violates a strong public policy of the forum.
\textsuperscript{91} See CRAMTON ET AL., supra note 2, at 43 (noting that problem of categorization of cases, known as characterization, presents particularly difficult questions when cases address a conflict of laws issue because such cases already involve at least two different bodies of law, each of which may use same concepts to mean different things). This problem is exacerbated by conflict of laws rules, which are few in number and thus, very broad. See id. at 43-48 (reviewing relevant caselaw impacted by characterization of issue).
\textsuperscript{92} See id. at 43 (illustrating that different characterizations often give rise to different outcomes).
\textsuperscript{93} Both Restatements treat tort cases similarly. Compare RESTATEMENT, supra note 52, § 377 (stating that tort cases are governed by lex loci delicti (the law of the place of wrong)), with
ever, the very same case were characterized as a contract for safe passage, the governing law would be the law of the place of making the contract (state A), and the passenger would win. From this simplistic example, it becomes clear that the outcome of conflict of laws cases may be affected by the way the cases are characterized.

This scenario suggests that state courts hearing same-sex marriage cases could similarly alter the outcome of cases by characterizing them in different ways. For example, marriage cases otherwise governed by the law of the state of celebration could be designated by a court to be a domestic status case, under which circumstances that court could more readily apply the law of its own forum. By characterizing these cases in such a way, the forum could apply its own laws to the cause of action, which would lead to dismissal of same-sex marriage recognition cases in forum states where same-sex marriage is not authorized.

Similarly, if the parties seeking to have their marriage recognized were domiciled in the forum at the time of the marriage and went to another state to get married, the forum could apply its law by characterizing the cause of action seeking validation of a same-sex marriage as a case involving the parties' capacity to bring suit. A party's capacity to bring suit on a cause of action is governed by the laws of the party's domicile if the courts consider it a procedural issue. Thus, by characterizing such a case as procedural, the forum would apply its laws instead of the laws of the state of celebration, thus ensuring

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RESTATEMENT (SECOND), supra note 60, § 145 (stating that tort cases are to be governed by law of state with most significant relationship to the issue, and that contracts used to determine place of most significant relationship include, among others, place where injury occurred).

94. Under both Restatements, contract cases are generally governed by the law of the forum in which the contract was made. Compare RESTATEMENT, supra note 52, § 332 (stating that contract validity is governed by lex loci contractus (the law of the place of making)), with RESTATEMENT (SECOND), supra note 60, §§ 186-188 (stating generally that contract issues are to be governed first by any choice of law provisions in contract, but if there are none, they are to be governed by the state with the most significant relationship to contract). The various factors to be considered in determining place of most significant relationship include place of contracting, place of negotiations and place of performance, among others. See id. Note also that when determining the place of most significant relationship under Restatement (Second), the section 6 factors are also taken into account. See supra note 61 and accompanying text (listing § 6 factors).

95. See supra note 54 and accompanying text (examining traditional choice of law rule).

96. See RESTATEMENT, supra note 52, § 54(2) ("A state has jurisdiction over the domestic status of persons domiciled within the state."). Comment c clarifies that "[d]omestic status is the status of husband and wife . . . ." Id. § 54(2) cmt. c.

97. See Haumschild v. Continental Cas. Co., 95 N.W.2d 814, 815-16 (Wis. 1959) (holding that issue was not one of tort but one of capacity to bring suit, and that such capacity is more properly determined by reference to law of state of domicile); CRAMPTON ET AL., supra note 2, at 50-58.

98. See CRAMPTON ET AL., supra note 2, at 50-58.
that the forum would not be bound by the same-sex marriage recognition statutes or cases of another state.

B. Most Significant Relationship Approach

While the Restatement (Second) of Conflict of Laws gives a presumption of validity to marriages celebrated outside the forum state, as discussed above, its “most significant relationship” test is a more flexible approach, allowing factors beyond the place of celebration of the marriage to be considered in determining the place of the most significant relationship.

Under the most significant relationship approach, a forum state would have a strong argument that it had a much more significant relationship to the family and the spouses than a foreign state does. The forum state automatically has an interest because the parties are availing themselves of the resources of the forum’s court, and are attempting to effect the definition of marriage in the forum.

This argument would be particularly persuasive if the spouses were domiciliaries of the forum at the time of their marriage and simply went to Hawaii to take advantage of that state’s marriage statutes, or if the couple later moved from Hawaii to become domiciliaries of the forum. In such instances, Hawaii would have limited interest in the status of the couple’s marriage, particularly when a couple never lives in Hawaii, and simply returns to their home state after the marriage is performed.

C. Interest Analysis and the “False Conflict”

Some states reject both Restatements’ approaches to conflict of laws and instead use Governmental Interest Analysis to determine which state’s law should apply to a cause of action. One unique aspect of Governmental Interest Analysis is the weeding out of “false

99. See supra note 54 and accompanying text (discussing the general rule that, barring exceptions, a marriage valid in the place of its celebration will be valid everywhere).

100. See Thomas M. Keane, Note, Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages, 47 STAN. L. REV. 499, 513-14 (1995) (stating that Second Restatement’s most significant relationship approach is more flexible than traditional lex loci celebrationis, and that Restatement (Second) § 6 considers invalidation under more general public policy exception); Sondrea Joy King, Note & Comment, Y’all Cain’t Do That Here: Will Texas Recognize Same-Sex Marriages Validly Contracted in Other States?, 2 TEX. WESLEYAN L. REV. 515, 533-34 (1996) (citing case in which Texas court cited lex loci celebrationis as too formalistic and mechanical, opting to use most significant relationship approach).

101. See supra note 61 and accompanying text (discussing most significant relationship approach and listing § 6 factors used to help determine place of most significant relationship).

102. See id.

103. See id.
conflicts.” A false conflict arises when both parties to a cause of action are residents of the same state. Because both parties are from the same state, false conflict cases do not involve conflicting interests of the separate states. Thus, the forum is justified in using its own law if both parties are from the forum, under which circumstances it would apply its laws to the cause of action and would then determine if its laws permitted same-sex marriage. These cases would be treated like any other domestic forum case involving same-sex marriage.

True conflicts arise where one party is from one state and the other party is from another. In such cases, Governmental Interest Analysis typically applies the Restatement (Second) Conflict of Laws. Thus, Governmental Interest Analysis differs from the Second Restatement only in that it allows states to weed out the false conflicts by applying the forum’s laws if both parties are from the forum.

The case of a same-sex couple seeking to have their out-of-state marriage recognized by a forum state represents a false conflict. The parties would seek to have their marriage validated either because they were residents of another state that allows same-sex marriage and they then moved to the forum, or because they are residents of the forum and went to another state to be married. Under either scenario, both parties would be from the forum at the time suit was filed; thus the forum would be justified in applying its law to the cause of action.

CONCLUSION

If Hawaiians do not ratify the constitutional amendment in November, and if the Hawaii Supreme Court ultimately determines that its state constitution gives same-sex couples the right to marry, states will not be forced to recognize same-sex marriages performed in Hawaii.

104. See generally CRAMTON ET AL., supra note 2, at 147 (explaining that “false conflicts” are those in which both parties come from same state); Brainedr Currie, Married Women’s Contracts: A Study In Conflict-of-Laws Method, 25 U. CHI. L. REV. 227, 232 (1958) (eliminating purely domestic case from typology of conflict of laws cases).

105. See supra text accompanying note 24; cf. Note, supra note 4, at 2041 (rejecting Currie’s false conflict approach to allowing forum to apply its law); Keane, supra note 100, at 510 (discussing false conflicts and Currie’s method of forum selection).

106. See supra note 100, at 510 (discussing false conflicts and Currie’s method of forum selection). But see Note, supra note 4, at 2041 (rejecting Currie’s false conflict approach to allowing forum to apply its law).

107. See CRAMTON ET AL., supra note 2, at 148-50 (discussing conflict of law rules for true conflicts under Currie’s Interest Analysis and Governmental Interest Analysis).

108. See id.
The Defense of Marriage Act has redefined the effect that a state’s judgment or law permitting same-sex marriage will have on other states. This Act preserves federalism in the regulation of marriage by ensuring that no state will be forced to recognize such marriages; marriage has traditionally been defined by the individual states and should continue to be so regulated.

States may look to conflict of laws rules to determine the effect of another state’s same-sex marriages. Although commentators have overwhelmingly posited that conflict of laws rules will force other states to recognize these marriages, the preceding review of the escape devices and exceptions to these rules clearly shows that states are free to invalidate same-sex marriages within their borders. In addition, many states have enacted or are seeking to enact a new breed of marriage evasion statutes that reject out-of-state same-sex marriages. In short, Hawaii’s acceptance of same-sex marriage, if it occurs, will not necessarily bring such marriages to a state near you.