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Beyond Interstate Recognition in the Same-Sex Marriage Debate

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The national same-sex marriage debate has been dominated for the past decade by the interstate recognition issue. This Article seeks to shift the focus of the debate to same-sex marriage prohibitions themselves and their incompatibility with several limitations of federal constitutional law.

After showing the legal irrelevance of the federal Defense of Marriage Act to the interstate recognition issue, the Article addresses the proper resolution of that choice-of-law issue through the lens of a well-known New York Court of Appeals decision. In that case, despite New York's ban on uncle-niece marriage, the New York high court — one of the most respected state supreme courts over the years in choice-of-law matters — applied Rhode Island law to uphold the validity of an uncle-niece marriage in Rhode Island between two New Yorkers. On its face, the case appears

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to offer powerful support for recognizing an out-of-state same-sex marriage that is valid where formed, but as the Article demonstrates, the court's choice of law is so difficult to defend that it actually militates against interstate recognition of same-sex marriage.

However, as the Article's juxtaposition of the uncle-niece and same-sex marriage recognition issues highlights, same-sex marriage recognition is not simply a matter of choice of law. While the Constitution leaves states free to allow or ban uncle-niece marriage, states do not have such latitude in legislating about same-sex marriage. The Article maintains that prohibitions on same-sex marriage violate the Due Process, Equal Protection, and Establishment Clauses.

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INTRODUCTION

For more than a decade, a debate has raged in the United States over interstate recognition of same-sex marriage. In particular, should a state that prohibits same-sex marriage recognize such a marriage when two of its residents of the same sex return home after getting married in a jurisdiction that permits same-sex marriage?

*Baehr v. Lewin*¹ sparked the contemporary debate, and subsequent state and federal legislative action intensified it. Addressing a challenge to Hawaii's ban on same-sex marriage, the Hawaii Supreme Court in *Baehr* in 1993 stopped short of invalidating the prohibition. However, in remanding on state constitutional grounds for a determination whether the Hawaii law met the exceptionally demanding standard of necessary to a compelling state interest,² the court sent a strong signal that the law's days were numbered and that in the near future Hawaii would become the first state in the United States to authorize same-sex marriage.

In response, various states soon enacted laws providing that they would not recognize a same-sex marriage performed in a jurisdiction where such marriages are allowed.³ Not to be outdone, Congress in 1996 weighed in on the matter with the Defense of Marriage Act.⁴ Congress refrained from telling states whether they should or should not recognize same-sex marriages performed elsewhere. However, as

¹ 852 P.2d 44 (Haw. 1993).

² *Id.* at 68.

³ See David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3 (1998).

⁴ The Act's provision regarding interstate recognition is codified at 28 U.S.C. § 1738C (2000) and states:

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.

The Act also includes a provision, codified at 1 U.S.C. § 7 (2000), that defines the words "marriage" and "spouse" for purposes of interpreting those words when they appear in "any Act of Congress" or in "any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." *Id.* According to the Act, "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.*

suggested by both the Act's less than neutral title and its separate provision defining "marriage" and "spouse" in traditional terms for purposes of interpreting those words as they appear in any federal law,⁵ Congress's sympathies were clearly with the anti-recognition forces. Invoking its power under Article IV, Section 1 to implement the constitutional command of full faith and credit,⁶ Congress provided that no state is obliged to recognize a same-sex marriage formed in a state that permits such marriages. Under the Act, the choice-of-law decision whether to determine the validity of a same-sex marriage by the law of the state of celebration or by the law of the couple's state of residence is entirely a matter of policy for each state to decide.

The Hawaii high court's decision in *Baehr* could not help but spur debate about, and litigation challenging, the constitutionality of other states' laws barring same-sex marriage. After all, what may have seemed like little more than a theoretical possibility — judicial invalidation of same-sex marriage prohibitions — had now been made to seem very concrete, immediate, and real. Intentionally or not, however, Congress in the Defense of Marriage Act and the state legislatures that passed laws mandating nonrecognition succeeded in pushing the recognition issue to the forefront of national debate and drawing attention away from constitutional questions of the sort litigated in *Baehr*. The primary focus became the choice-of-law decision that the Act purported to free of any possible full faith and credit constraints and that the state nonrecognition laws, which multiplied in number after passage of the Act,⁷ resolved in favor of

⁵ See 1 U.S.C. § 7 (2000), discussed *supra* note 4.

⁶ U.S. CONST. art. IV, § 1 ("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.")

⁷ See ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 180-81 (2005); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165-94 (2005). In his article, which includes an appendix giving the text of all state laws barring same-sex marriage, Professor Koppelman counts forty states as having nonrecognition statutes. *Id.* at 2165. However, a dozen of the states included in Professor Koppelman's count have statutes prohibiting same-sex marriage but not expressly addressing the recognition issue, and as Professor Wolff has observed, there are good reasons for courts not to interpret statutes to mandate nonrecognition unless the statutes mandate it expressly. See Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2240-44 (2005).

applying invalidating home-state law.⁸

Ultimately, Hawaii did not take the bold step that seemed so likely to follow from *Baehr*. Before the case was decided on remand, the Hawaii electorate adopted by referendum a constitutional amendment eliminating the possibility of same-sex marriage.⁹ However, in 2003, Massachusetts went where neither Hawaii nor any other state had gone before. By judicial decision, it authorized same-sex marriage in the state.¹⁰ In *Goodridge v. Department of Public Health*, the

⁸ In and of themselves, the many state nonrecognition statutes enacted since the Defense of Marriage Act became law attest to the great attention that political actors have devoted to the recognition issue in recent years. By the same token, the various law review symposia since 1996 focusing on the recognition issue offer tangible evidence of the great importance attached to the recognition issue in recent years in legal circles. These symposia include: *Symposium*, 16 QUINNIPIAC L. REV. 1 (1996); *Symposium, Current Debates in the Conflict of Laws — Recognition and Enforcement of Same-Sex Marriage*, 153 U. PA. L. REV. 2143 (2005); *Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA*, 38 CREIGHTON L. REV. 233 (2005); *Symposium, Interjurisdictional Marriage Recognition*, 32 CREIGHTON L. REV. 1 (1998); *Symposium on Interjurisdictional Recognition of Civil Unions, Domestic Partnerships, and Benefits*, 3 AVE MARIA L. REV. 393 (2005).

⁹ HAW. CONST. art. I, § 23. For detailed discussion of the Hawaii case and of the political forces that ultimately rendered it moot, see JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* (2002).

¹⁰ A few years earlier, the Vermont Supreme Court had come close. In *Baker v. State*, 744 A.2d 864 (Vt. 1999), it held that the Vermont Constitution guarantees same-sex couples the same legal rights as married opposite-sex ones. It stopped short, however, of requiring the state to allow same-sex marriage. The court made clear that the state could limit marriage to opposite-sex couples as long as same-sex couples otherwise enjoyed the same legal rights, and the Vermont legislature quickly acted upon this suggestion by enacting a law, codified at VT. STAT. ANN. tit. 15, §§ 1201-07 (2002), that allows same-sex couples to enter into civil unions. For discussion of *Baker*, see ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 141-53 (2002). In 2005 Connecticut adopted civil union legislation modeled after Vermont's. 2005 Conn. Acts 10 (Reg. Sess.), available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00010-R00SB-00963-PA.htm>. On October 25, 2006, as this Article was going to press, the New Jersey Supreme Court in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), essentially came to the same conclusions under the New Jersey Constitution as the Vermont high court had reached in *Baker* under the Vermont Constitution. The court in *Lewis* held that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." *Id.* at 221.

It also held, however, that the state is not obliged to give same-sex couples the right to marry. According to the court, "The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure." *Id.* Although all seven members of the court joined the first holding noted above, three dissented from the second holding. In the dissenters' view, same-sex couples are no less entitled to the "right to the title of

Massachusetts Supreme Judicial Court held that the state's statutory ban on same-sex marriage violates the state constitution's individual liberty and equality guarantees.¹¹ As a remedy for the constitutional violation, the court "refined the common-law meaning of marriage" and "construe[d] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."¹²

As a first step toward resolving how a state should respond when a resident same-sex couple gets married outside the state and returns to live in the state, Part I of this Article attempts to show the legal irrelevance to the issue of both the Defense of Marriage Act and the Full Faith and Credit Clause. To be sure, as a thinly veiled statement of opposition to same-sex marriage by the Congress of the United States, the Defense of Marriage Act may well have an effect on public opinion. In terms of affecting legal rights or limitations, however, the Act is a nullity, and the Full Faith and Credit Clause is similarly beside the point.

The Article then turns to the choice-of-law decision that the Defense of Marriage Act purports to insulate from constitutional attack.¹³ Part

marriage" than they are entitled to any other right enjoyed by opposite-sex couples. *Id.* at 224 (Poritz, C.J., joined by Long and Zazzali, JJ., concurring in part and dissenting in part).

¹¹ 798 N.E.2d 941, 968 (Mass. 2003).

¹² *Id.* at 969. Several months after *Goodridge*, the state legislature voted in favor of a constitutional amendment banning same-sex marriage, but the proposed amendment ultimately failed. In Massachusetts a constitutional amendment is not adopted unless and until it has been approved by majority vote in two consecutive joint legislative sessions and by a majority of voters in the following election. See Raphael Lewis, *Passage of Marriage Amendment in Doubt*, BOSTON GLOBE, May 16, 2005, at A1. When the state legislature addressed the proposed amendment for the second time, it voted heavily against the amendment. See Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

In March 2006 the Massachusetts high court held that under a 1913 Massachusetts statute, same-sex couples from states that prohibit same-sex marriage cannot marry in Massachusetts. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). The long-ignored statute, which was enacted with interracial marriages largely in mind, prevents nonresidents from marrying in Massachusetts if the marriage would be barred by their home-state law. Perhaps, the statute will be successfully challenged based on the federal Constitution's constraints on discrimination against out-of-staters, see U.S. CONST. art. IV, § 2 (Privileges and Immunities Clause); *id.* amend. XIV, § 1 (Equal Protection Clause), or the state legislature may decide to repeal it. In 2004 the state Senate passed a bill to repeal the statute, but the state House took no action on the bill. See Pam Belluck & Katie Zezima, *Massachusetts Court Limits Gay Unions*, N.Y. TIMES, Mar. 31, 2006, at A10.

¹³ In light of the many states whose legislatures have taken this choice-of-law decision for themselves by enacting nonrecognition statutes, see *supra* notes 3, 7, 8 and accompanying text, I should note that my analysis in this Article applies to the

It approaches the question of the appropriate choice of law in the same-sex marriage context by examining in detail *In re May's Estate*, a well-known choice-of-law decision of the New York Court of Appeals in 1953.¹⁴ The case required the court to decide the validity of an uncle-niece marriage formed many years earlier in Rhode Island between two New Yorkers. Faced with the question of whether to choose the validating law of Rhode Island or the invalidating law of New York, the New York high court opted for the former and upheld the marriage.

Since Benjamin Cardozo's years as judge and chief judge of the New York high court, if not earlier, the New York Court of Appeals has been one of the two or three most respected and influential state supreme courts in matters of conflict of laws. Cardozo's explanation in 1918 in *Loucks v. Standard Oil Co.* of the scope of the public policy doctrine may well be the most quoted statement on choice of law by any U.S. court.¹⁵ By the same token, when the New York high court in 1963 in *Babcock v. Jackson* became the first state supreme court to break openly with the traditional place-of-wrong rule for tort cases and focus instead on state interests, it issued what is still probably the single most important opinion in U.S. choice of law.¹⁶ It is hardly

choice-of-law decision at issue regardless of whether the decision is made judicially or legislatively. Thus, if a state legislature has enacted, or is contemplating enacting, a law dictating the choice of law for cases involving an out-of-state same-sex marriage, the analysis that follows speaks to the appropriateness of the legislative choice of law no less than it speaks to the appropriateness of a judicial choice of law.

¹⁴ 114 N.E.2d 4 (N.Y. 1953).

¹⁵ Writing for the court, Cardozo limited the scope of the public policy doctrine to instances when applying nonforum law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). Numerous courts have quoted Cardozo's rendition of the doctrine, *see, e.g.*, *Casanova Club v. Bisharat*, 458 A.2d 1, 4 (Conn. 1983); *Lilienthal v. Kaufman*, 395 P.2d 543, 547 (Or. 1964), and many commentators have as well, *see, e.g.*, EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 3.15, at 143 (4th ed. 2004); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 3.6, at 107-08 (4th ed. 2001). It is also not uncommon for courts and commentators to accompany their quotation of the statement with a characterization of it as "oft-quoted," *Lilienthal, supra*, 395 P.2d at 547, "classic," SCOLES, *supra*, § 3.15, at 143, or something else along those lines.

¹⁶ Dean Symeonides, the author since 1994 of the "Annual Survey of American Choice-of-Law Cases" published in the *American Journal of Comparative Law*, takes this view of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), without any qualifier such as my "probably." SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW* 131 n.468 (2003) ("*Babcock* is the single most important case in modern American conflicts law."). For other testimonials to *Babcock's* historic importance, see the various contributions to

surprising, therefore, that the New York Court of Appeals' opinion in *May's Estate* has achieved considerable prominence as support both for the widely applied place-of-celebration rule and for the potency of that rule even in the face of a challenge to marital validity based on weighty forum public policy.¹⁷

In terms of interstate recognition of same-sex marriage, *May's Estate* would appear to be formidable precedent for the proponents of recognition to cite.¹⁸ The New York statute categorically barring uncle-niece marriage took a position toward such marriages shared at the time of *May's Estate* by every state but two.¹⁹ Uncle-niece marriage has long been widely disapproved in the United States as incestuous and immoral and as posing special risks of abnormal children and of an unhealthy imbalance of power between spouses.²⁰ Surely, if an uncle-niece marriage valid where celebrated merits recognition in a state that disallows such marriages, same-sex marriage — whatever disadvantages its detractors may believe it entails — deserves interstate recognition as well.

This logic assumes, however, that *May's Estate* is rightly decided,

Symposium on Conflict of Laws: Celebrating the 30th Anniversary of Babcock v. Jackson, 56 ALB. L. REV. 693 (1993).

¹⁷ For commentary invoking *May's Estate* as support for the rule and its potency, see, for example, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmts. j-k (1971); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 221, at 610 & n.5 (4th ed. 1986); SCOLES ET AL., *supra* note 15, §§ 13.2, 13.11, 13.12; WEINTRAUB, *supra* note 15, § 5.1A. More than 50 years since it was decided, *May's Estate* remains a principal case in various conflict of laws casebooks. See LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 60-65 (5th ed. 2002); PETER HAY ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 801-04 (12th ed. 2004); GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS 250-53 (4th ed. 2005); DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS 793-95 (2d ed. 2002). (By “principal” case, I mean a case presented in the casebook as it appears in the reporter, except to the extent that the editor or editors of the casebook have made deletions.)

¹⁸ For commentary citing *May's Estate* as support for interstate recognition of same-sex marriage, see, for example, MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 123-24 & n.104 (1997); Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 71-72 n.65 (1996); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 485 & n.250, 493 (1994).

¹⁹ See *May's Estate*, 114 N.E.2d at 8 (Desmond, J., dissenting) (citing Georgia along with Rhode Island as the minority of two).

²⁰ See JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 2.08, at 52-53 (2d ed. 2001); WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 17-18 (2001); Frederic P. Storke, *The Incestuous Marriage — Relic of the Past*, 36 U. COLO. L. REV. 473, 476-78 (1964).

and that is very far from clear. After laying out in Part II.A the colorful and rather remarkable facts of *May's Estate*, and summarizing the reasoning of the New York Court of Appeals, I argue in Part II.B that the court's opinion is highly unconvincing on its own terms.

At the time of the New York Court of Appeals' decision, dissatisfaction was building among courts and scholars with the traditional choice-of-law approach of territorial rules — place of wrong in tort cases, place of making in contract cases, place of celebration in marriage cases, etc. Alternative approaches suggested by commentators were pressing for, and covertly receiving, judicial recognition in New York and elsewhere.²¹ The traditional rules formally reigned supreme, however, and express judicial adoption of such alternatives would not occur for another decade. In keeping with the realities of judicial decisionmaking during this period of transition, I examine in Part II.C whether the New York Court of Appeals' validation of the uncle-niece marriage under Rhode Island law may be defensible in terms of considerations not articulated by the court but increasingly in vogue at the time. I suggest that the court's choice of Rhode Island law may be understandable in terms of one or more of these considerations. I deny, however, that it is defensible in terms of any of them.

In prior writings I have strongly criticized the traditional choice-of-law rules as well as a number of approaches that have won increasing judicial favor over the past forty or so years.²² Building upon those criticisms, I have also proposed a choice-of-law approach that I believe courts most reasonably would follow.²³ I complete my analysis of *May's Estate* by considering in Part II.D whether the court's decision is valid under my proposed approach, and I conclude that it is not.

Having thoroughly deconstructed *May's Estate* in Part II, I look in Part III at the implications of that deconstruction for the issue of interstate recognition of same-sex marriage. I acknowledge at the outset that my analysis in Part II appears to militate strongly against interstate recognition of same-sex marriage. I go on to argue, however, that the Defense of Marriage Act notwithstanding, the issue

²¹ See SIMSON, *supra* note 17, at 14; Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 679-81 (1963).

²² For example, see Gary J. Simson, *Leave Bad Enough Alone*, 75 IND. L.J. 649 (2000), and Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978) [hereinafter Simson, *State Autonomy*].

²³ Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279 (1991), reprinted in A CONFLICT-OF-LAWS ANTHOLOGY 271 (Gene R. Shreve ed., 1997).

of interstate recognition of same-sex marriage does not turn on choice-of-law considerations. Instead, as becomes more apparent when the issues of recognition of uncle-niece marriage and recognition of same-sex marriage are juxtaposed, it turns on principles of constitutional law.

Part III maintains that laws prohibiting same-sex marriage are constitutionally deficient in three respects. First, such laws violate the Due Process Clause²⁴ by interfering unjustifiably with some persons' fundamental right to marry. Second, they violate the Equal Protection Clause²⁵ by classifying without adequate justification on the basis of a classification — sexual orientation — that should be regarded as suspect. Third, they violate the Establishment Clause²⁶ by endorsing a particular religious precept and by coercing compliance with that precept. Although my due process and equal protection arguments build to some extent on ones others have made, they differ from prior arguments in ways that I believe significantly strengthen the case for judicial invalidation. My argument for an Establishment Clause violation is more unique but, as I hope to show, at least as persuasive.

I. THE DEFENSE OF MARRIAGE ACT, AND FULL FAITH AND CREDIT TO SISTER-STATE LAWS

Article IV, Section 1 of the Constitution provides in full: "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."²⁷ The first sentence, the Full Faith and Credit Clause, has long been understood to require a certain measure of respect for sister-state law, whether of legislative, executive, or judicial origin.²⁸ The clause also has long

²⁴ U.S. CONST. amend. XIV, § 1. In citing the Due Process Clause of the Fourteenth Amendment, I am assuming, in line with current realities, that the same-sex marriage prohibition is state law. If Congress were to enact a law prohibiting same-sex marriage, the Due Process Clause of the Fifth Amendment, *id.* amend. V, would be the one in point.

²⁵ *Id.* amend. XIV, § 1.

²⁶ *Id.* amend. I. Although the Establishment Clause, standing alone, is only a constraint on the federal government, it has been held to apply to state and local law as a matter of Fourteenth Amendment due process. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

²⁷ U.S. CONST. art. IV, § 1.

²⁸ See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943); Elliot E. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 602-03 (1953).

been understood to be self-executing. It imposes, in and of itself, certain obligations of interstate respect. Congressional action under the second sentence is not necessary to activate such obligations.²⁹ However, like Section 5 of the Fourteenth Amendment, which authorizes Congress to “enforce” the self-executing commands of the Fourteenth Amendment’s Due Process and Equal Protection Clauses,³⁰ the second sentence of Article IV, Section 1 does give Congress some latitude to supplement constitutional constraints with statutory ones.³¹

Relying on its power under Article IV, Section 1, Congress in the Defense of Marriage Act of 1996 provided that no state is obliged to recognize a same-sex marriage celebrated in a state that permits such marriages.³² As the House Judiciary Committee report recommending passage of the legislation made clear, the Act is predicated on two assumptions: (1) the Full Faith and Credit Clause may be interpreted by the courts to require a state opposed to same-sex marriage to honor a marriage celebrated in a state authorizing such marriages; and (2) Congress’s Article IV, Section 1 implementation power enables it to

The Full Faith and Credit Clause also, of course, applies to sister-state judgments, and it has been interpreted as imposing very strong constraints in that realm. See *Durfee v. Duke*, 375 U.S. 106 (1963); *Fauntleroy v. Lum*, 210 U.S. 230 (1907); William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

²⁹ See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154-55 (1932); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause — Its History and Purpose*, 34 OR. L. REV. 224, 237-39 (1955).

³⁰ Section 1 of the Fourteenth Amendment provides that “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” and Section 5 provides that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, §§ 1, 5.

³¹ For discussion of Congress’s power to implement the Full Faith and Credit Clause with regard to sister-state law, see WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 90-107 (1942); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 125-27, 200-01 (1963).

³² 28 U.S.C. § 1738C (2000). The Act has generated considerable debate among commentators as to both its wisdom and constitutionality. Leading contributions to that debate include: KOPPELMAN, *supra* note 10, at 127-40; STRASSER, *supra* note 18, at 127-58; Patrick J. Borchers, *Interstate Recognition of Nontraditional Marriages*, in *MARRIAGE AND SAME-SEX UNIONS: A DEBATE* 331 (Lynn D. Wardle et al. eds., 2003); Maurice Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998).

nullify an obligation of interstate recognition that the Supreme Court may interpret the Full Faith and Credit Clause to mandate.³³

Both assumptions are dubious at best. With regard to the second assumption, although there does not appear to be any Supreme Court decision on Congress's Article IV, Section 1 implementation power that is directly on point, the Court's case law on Congress's implementation powers under Section 5 of the Fourteenth Amendment³⁴ seems to leave little doubt as to how the Court would view the exercise of power at issue. Thirty years prior to the enactment of the Defense of Marriage Act, the Court in *Katzenbach v. Morgan* made clear that Congress's Section 5 power to enforce the Fourteenth Amendment's equal protection, due process, and other guarantees did not include authority to "restrict, abrogate, or dilute these guarantees" as the Court has interpreted them to apply "of [their] own force."³⁵ In enacting the Defense of Marriage Act, however, Congress attempted to use the analogous Full Faith and Credit implementation power in just such a debilitating way. It sought to diminish the force of the Full Faith and Credit Clause if the clause were ultimately interpreted by the courts to mandate interstate recognition of same-sex marriages. Furthermore, the year after Congress enacted the Defense of Marriage Act, the Court discussed Congress's Section 5 power in a way that should have left no doubt in the minds of the members of Congress that their exercise of authority in passing the Defense of Marriage Act was of a sort that could not stand. In holding in *City of Boerne v. Flores* that the federal Religious Freedom Restoration Act "exceeded" Congress's Section 5 power,³⁶ the Court was emphatic that *Marbury v. Madison*³⁷ and the basic principle of judicial review would be subverted if Congress's Section 5 power were understood to allow Congress to change the Fourteenth Amendment's meaning as interpreted by the courts.³⁸

³³ See H.R. REP. NO. 104-664, at 2, 25-27 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906, 2929-31. There was no Senate report, and H.R. 3396 — the bill that the House reported out — became the final legislation.

³⁴ Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The "provisions of this article" most notably include the limitations on state government imposed by the Due Process and Equal Protection Clauses in Section 1. *Id.* amend. XIV, § 1.

³⁵ 384 U.S. 641, 651-52 n.10 (1966).

³⁶ 521 U.S. 507, 536 (1997).

³⁷ 5 U.S. (1 Cranch) 137 (1803).

³⁸ See *Boerne*, 521 U.S. at 519, 529. Because the Religious Freedom Restoration Act's constraints on federal lawmaking, unlike its constraints on state and local

As to the first assumption, there is not the slightest doubt that under the Supreme Court's interpretation of the Full Faith and Credit Clause, a state has no obligation to look to another state's law to decide the validity of an out-of-state marriage contracted by its residents. As early as 1939, the Supreme Court made clear that a choice of forum law supported by a state's interest in the well-being of a resident party satisfies full faith and credit constraints.³⁹ Moreover, in *Carroll v. Lanza* in 1955 and even more obviously in *Allstate Insurance Co. v. Hague* in 1981,⁴⁰ the Court discussed the requisite forum interest so loosely and expansively that it has become apparent that the command of full faith and credit to sister-state laws has been stripped of almost all force.⁴¹ As a practical matter, as long as a choice of forum law is based on the traditional rules,⁴² governmental interest analysis,⁴³ Professor Leflar's five factors,⁴⁴ the Second Restatement,⁴⁵ or

lawmaking, were not based on Congress's Section 5 power, see *id.* at 516, it was implicitly left standing as applied to federal law. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (upholding claim under Religious Freedom Restoration Act for religion-based exception to federal Controlled Substances Act). In the interest of candor and consistency, I should note that I believe that the Court in *Boerne* erred in striking down the Religious Freedom Restoration Act as applied to state and local law and in denying that Section 5 empowers Congress to expand the protections that the Fourteenth Amendment's due process and other individual rights guarantees provide of their own force. See Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 445 n.16 (1996). I therefore have some personal misgivings in citing the Court's reasoning in *Boerne* to criticize the foundations of the Defense of Marriage Act. I have no such difficulty, however, relying on the principle stated in *Katzenbach*, and that principle is sufficient to establish that Congress lacked the power that it presumed to exercise in enacting the Defense of Marriage Act.

³⁹ See *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939).

⁴⁰ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-20 (1981); *Carroll v. Lanza*, 349 U.S. 408, 412-13 (1955).

⁴¹ See Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 274-76 (1996); Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading von Mehren*, 36 CORNELL INT'L L.J. 125, 126-27 (2003). For the view that, the Supreme Court to the contrary notwithstanding, the Full Faith and Credit Clause should be interpreted as a formidable constraint on choice of law, see Simson, *State Autonomy*, *supra* note 22, at 66-80.

⁴² For the American Law Institute's influential version of the rules, see RESTATEMENT OF CONFLICT OF LAWS (1934). For a brief discussion of the traditional rules and their current status, see SIMSON, *supra* note 17, at 13-15.

⁴³ Widely acknowledged as the principal creative force behind governmental interest analysis, Professor Brainerd Currie described and defended that approach in detail in CURRIE, *supra* note 31.

⁴⁴ The five factors are articulated and explained in Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

any other conflicts approach that does not seem entirely idiosyncratic,⁴⁶ the consistency of the choice of law with the Court's understanding of the Full Faith and Credit Clause seems clear.⁴⁷

In short, Congress in the Defense of Marriage Act doubly erred. It exercised authority that it did not have in the first place to nullify an interpretation of the Full Faith and Credit Clause that, by all indications, the Supreme Court (and any state and federal courts reasonably familiar with the Court's full faith and credit decisions) would never make. Neither the Act nor the Full Faith and Credit Clause has anything of consequence to say about whether a court should recognize an out-of-state same-sex marriage of the forum state's residents.

II. *IN RE MAY'S ESTATE* AND INTERSTATE RECOGNITION OF UNCLE-NIECE MARRIAGE

If the New York Court of Appeals' decision in 1953 in *In re May's Estate* is sound, the proponents of interstate recognition of same-sex marriage have a weighty precedent to cite in support of their view. As discussed below, however, there is much more to the decision in that case than meets the eye.

⁴⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). For an overview of the Second Restatement approach, see SIMSON, *supra* note 17, at 167-69.

⁴⁶ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the one case in recent decades in which the Supreme Court has found that a choice of law violates the Full Faith and Credit Clause, involved a state choice-of-law approach that fairly qualifies as idiosyncratic. The class action in *Phillips Petroleum* was brought in Kansas state court against Phillips — a corporation incorporated in Delaware with its principal place of business in Oklahoma — by 28,100 royalty owners with rights to leases from which Phillips produced gas. The Supreme Court unanimously rejected a due process challenge to Kansas's jurisdiction to adjudicate the class action. With only one Justice dissenting, however, the Court held unconstitutional (under both the Full Faith and Credit and Due Process Clauses) the Kansas courts' application of Kansas law to all the claims in the action. In applying Kansas law to all the claims, the Kansas Supreme Court had maintained that "[w]here a state court determines that it has jurisdiction over a nationwide class action . . . the law of the forum should be applied unless compelling reasons exist for applying a different law." *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984). In reversing, the United States Supreme Court gave short shrift to this distinctive forum-preference approach and held that the Kansas courts could not apply forum law to the numerous claims that involved neither a Kansas royalty owner nor a gas lease on Kansas land.

⁴⁷ For a recent survey indicating the particular choice-of-law approach used by each state in tort and contract cases, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 944 (2005).

A. *The Factual and Legal Backdrop, and the Court's Choice of Law*

May's Estate is anything but an average, run-of-the-mill estates case.⁴⁸ Fannie May, who married Sam May in 1913 and had six children with him, died without a will in 1945.⁴⁹ The choice-of-law question that ultimately made its way to the New York Court of Appeals arose out of a petition in 1951 by Alice May Greenberg, one of the decedent's four daughters and the eldest of the six children,⁵⁰ to be named administratrix of her mother's estate. Two of the other daughters supported the petition, but Sam May, supported by the remaining daughter and by the couple's two sons, contested it. Sam maintained that under New York statutory law he, as a surviving spouse, had priority over any of the children to administer the estate.⁵¹

Alice's petition challenged her father's right to administer the estate by denying that Sam was in fact a surviving spouse. She maintained that Sam and Fannie were never lawfully married because, as uncle and niece, their marriage was barred as incestuous by New York law.⁵² According to a New York statute, uncle-niece marriages were void, and the parties to such a marriage were subject to criminal penalties of \$50 to \$100 in fines and up to six months in prison.⁵³

The events that ultimately culminated in a decision by New York's highest court began in December 1912, when Sam May left his home in Wisconsin and came to New York City, where he stayed with the family of Fannie Rappaport, his niece.⁵⁴ The following month Sam

⁴⁸ Unless otherwise indicated in the footnotes, my source for the facts of *May's Estate* is the New York Court of Appeals' opinion in the case, *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

⁴⁹ Although the New York Court of Appeals' opinion does not expressly state that Fannie May died intestate, the record on appeal to the high court makes it clear. Record on Appeal at 4, 14, *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

⁵⁰ *Id.* at 6 (listing children's ages in 1951, ranging from twenty-one to thirty-seven).

⁵¹ According to Sam's brief in the court of appeals, Alice filed her petition "in an effort to prevent her father from disposing of real property owned by her father and mother by the entirety. The petitioner leases one of the two apartments existing on this property. Her father occupies the other." Respondents' Brief at 3, *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (appended to Record on Appeal, *supra* note 49).

⁵² As noted by the Court of Appeals, Fannie was Sam's niece "by the half blood." *May's Estate*, 114 N.E.2d at 4. In other words, Sam was the half brother of one of Fannie's parents.

⁵³ The statute in existence at the time remains in force verbatim. N.Y. DOM. REL. LAW § 5 (McKinney 1999 & Supp. 2005).

⁵⁴ Respondents' Brief, *supra* note 51, at 2.

and Fannie, both born in Russia twenty-six years earlier,⁵⁵ traveled together to Rhode Island to get married. By statutory law dating back to the eighteenth century, Rhode Island bars uncle-niece marriages along with others that it regards as incestuous.⁵⁶ It also has long made an exception, however, for “any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion”⁵⁷ — an exception that has had the effect of exempting Jewish uncle-niece marriages from the general prohibition.

Under the rabbinic approach to Biblical interpretation, an act is not a crime under Jewish law unless the Bible expressly prohibits it and specifies a punishment for it.⁵⁸ Thus, even though the Bible explicitly addresses and criminalizes aunt-nephew marriages,⁵⁹ its silence on uncle-niece marriage has been taken as tacit permission for such unions.⁶⁰ Of course, one may very reasonably argue that the Bible’s

⁵⁵ Record on Appeal, *supra* note 49, at 37 (copy of marriage certificate).

⁵⁶ “An Act regulating Marriage and Divorce” of 1749, as reenacted or amended in 1798, provided in section 1 that:

[N]o man or woman shall intermarry within the degrees hereafter named; that is to say, No man shall marry His . . . Brother’s daughter, Sister’s daughter. . . . No woman shall marry Her . . . Father’s brother, Mother’s brother. And if any man or woman shall hereafter intermarry within the degrees aforesaid, every such marriage shall be null and void.

2 THE FIRST LAWS OF THE STATE OF RHODE ISLAND 477-78 (John D. Cushing ed., 1983) [hereinafter FIRST R.I. LAWS]. The preceding language, with only minor, nonsubstantive changes, remains the law of Rhode Island. R.I. GEN. LAWS §§ 15-1-1 to 15-1-3 (2003 & Supp. 2005).

⁵⁷ The quoted language is from R.I. GEN. LAWS § 15-1-4 (2003) and conforms to the language in effect at the time of *May’s Estate*. Section 7 of the eighteenth century statute discussed *supra* note 56 contained virtually identical language. The only difference was that it said “allowed of by” rather than “allowed by.” 2 FIRST R.I. LAWS, *supra* note 56, at 481.

⁵⁸ I am indebted to Rabbi Perry Rank for explaining to me the rabbinic approach and its application to the issue of Jewish uncle-niece marriages. See E-mail from Rabbi Perry R. Rank, President, The Rabbinical Assembly of Conservative Judaism, to Gary J. Simson, Professor of Law, Cornell Law School (July 12, 2005, 19:43 EST) (on file with author); E-mail from Gary J. Simson, Professor of Law, Cornell Law School, to Rabbi Perry R. Rank, President, The Rabbinical Assembly of Conservative Judaism (May 8, 2005, 15:12 EST) (on file with author).

⁵⁹ *Leviticus* 18:12-14.

⁶⁰ See E-mails cited *supra* note 58. As pointed out both by Rabbi Rank in his E-mail and by the rabbi who testified on Sam May’s behalf in Surrogate’s Court, see Record on Appeal, *supra* note 49, at 32 (testimony of Rabbi H. Zeidel Rappaport), a rabbi will not marry an uncle and niece in a jurisdiction that prohibits such marriages. The applicable rabbinic principle, “dina de-malkhuta dina” — “the law of the land is the law” — is discussed in 6 ENCYCLOPEDIA JUDAICA 51-55 (1971).

silence on uncle-niece marriages should not be regarded as especially telling and that a prohibition on uncle-niece marriages should be recognized by analogy to the express prohibition on aunt-nephew ones. However, the strict textualism of the rabbinic approach leaves no room for such departures from the Bible's words.

Sam and Fannie stayed in Rhode Island for two weeks after they were married there by a rabbi. They then returned to New York, which their marriage certificate had listed as their state of residence,⁶¹ and lived together in New York until Fannie's death in 1945.

Alice's petition was granted in Surrogate's Court, but the Appellate Division reversed and the New York Court of Appeals affirmed the Appellate Division's decision.⁶² Writing for a 5-1 majority, with one

As an aside, it is perhaps worth noting that the last name of the rabbi who testified on Sam's behalf was the same as Fannie's maiden name. The rabbi who had married Sam and Fannie in 1913 had died in 1939. Record on Appeal, *supra* note 49, at 24. In keeping with his earlier decision to marry within the family, Sam apparently stayed within the family for this choice as well.

⁶¹ In testifying in Surrogate's Court, Sam maintained that he was still a Wisconsin resident at the time of the marriage. Record on Appeal, *supra* note 49, at 17, 18, 29. By his account, when he came from Wisconsin to live with Fannie's family in New York City:

I wanted to go back to Wisconsin. We went to look around. I didn't like New York City. I didn't want to stay. We looked around Providence, Rhode Island. We thought if we could find anything we would settle in Providence, Rhode Island. We stayed until we could get married and then went back to New York.

Id. at 19.

Perhaps Sam's testimony that he had not, by the time of his marriage, formed an intent to settle in New York was entirely genuine. It is at least conceivable, however, that the testimony reflected to some extent a legal strategy designed to get the court to see the case as one in which New York did not have as great a stake as it might appear. Cf. RESTATEMENT OF CONFLICT OF LAWS § 18 (1934) ("A person cannot change his domicile by removal to a new dwelling-place without an intention to make the new dwelling-place his home.").

In any event, the testimony did not persuade the Surrogate. He fully discounted it in light of Sam and Fannie's marriage certificate, which, based on Sam's representations, listed New York City as Sam's residence. See Record on Appeal, *supra* note 49, at 43 (opinion by Surrogate Sterley). In addition, the Court of Appeals gave no indication in its opinion that it regarded Sam as anything but a New York resident at the time of his marriage. Its only reference to Sam's residence at that time was a brief mention that the marriage certificate listed his residence as New York. *In re May's Estate*, 114 N.E.2d 4, 5 (N.Y. 1953). In keeping with the Surrogate's and Court of Appeals' disposition of the issue, I take as a given throughout this Article that Sam was a New York resident when he and Fannie got married.

⁶² Although hearing transcripts may not be most people's idea of entertaining reading, the transcript of the surrogate court's hearing is hard to beat in that regard.

member of the high court not participating in the case, Chief Judge Lewis held that Sam was a surviving spouse, within the meaning of New York's estate administration laws, because he was lawfully married under Rhode Island law. In deciding the validity of the marriage under Rhode Island, rather than New York, law, the court relied upon the place-of-celebration rule.

As the court noted, both its prior precedents and the *Restatement of Conflict of Laws* generally made the place-of-celebration rule controlling on questions of marital validity.⁶³ In keeping with these sources, however, the court recognized that the place-of-celebration rule sometimes should give way. More specifically, the court identified three types of cases in which the rule would not prevail, but found that the case at hand fell into none of the three categories.⁶⁴

First, the court acknowledged that if there were "a statute expressly regulating within the domiciliary State marriages solemnized abroad," the New York courts would have no choice but to resolve the validity of a marriage of New York domiciliaries according to the law made applicable by the statute.⁶⁵ State principles of separation of powers and legislative supremacy would render the court's common-law place-of-celebration rule beside the point. New York, however, had no such choice-of-law statute.⁶⁶

Drawing in particular on its 1881 decision in *Van Voorhis v. Brintnall*, the court also recognized two longstanding judge-made exceptions to the common-law rule: "cases within the prohibition of positive law; and cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law."⁶⁷ In deciding whether or not the positive-law exception applied, the court

For a sense of the tenor of the proceedings, consider the following brief excerpt:

Q. [Sam's attorney] As a result of that union you had six children?

A. [Sam] That is right. We sent them all through college too.

Mrs. Clark [Alice's attorney]: I object to that.

The Court: Sustained.

Record on Appeal, *supra* note 49, at 28.

⁶³ See *May's Estate*, 114 N.E.2d at 6 (citing RESTATEMENT OF CONFLICT OF LAWS §§ 121, 131, 132 (1934); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 24 (1881); and two subsequent nineteenth century decisions by the New York Court of Appeals).

⁶⁴ *Id.* at 6-7.

⁶⁵ *Id.* at 6.

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881)).

acknowledged that New York had a marriage statute that not only declared uncle-niece marriages incestuous but also criminalized them. The court maintained, however, that “it is important to note that the [New York] statute does not by express terms regulate a marriage solemnized in another State.”⁶⁸ Moreover, the court went on to treat the statute’s lack of such express terms as dispositive of the question whether the positive-law exception applies. “[W]e conclude,” said the court, “that absent any New York statute expressing clearly the Legislature’s intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no ‘positive law’ in this jurisdiction which serves to interdict the 1913 marriage in Rhode Island of the respondent Sam May and the decedent.”⁶⁹

The court disposed of the possible applicability of *Brintnall*’s other, natural-law exception in one lengthy sentence:

As to the application of the second exception to the marriage here involved — between persons of the Jewish faith whose kinship was not in the direct ascending or descending line of consanguinity and who were not brother and sister — we conclude that such marriage, solemnized, as it was, in accord with the ritual of the Jewish faith in a State whose legislative body has declared such a marriage to be “good and valid in law,” was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law.⁷⁰

It therefore only remained for the court to follow the dictates of the place-of-celebration rule, and the court did so, applying Rhode Island law and affirming Sam’s right to administer Fannie’s estate.

Judge Desmond was the sole dissenter. He pointed out at the start the longstanding and widespread antipathy in the United States to uncle-niece marriages. The United States at the time consisted of forty-eight states, and by Judge Desmond’s count, all but two categorically barred such marriages by statute. Only Rhode Island, with its allowance for Jewish uncle-niece marriages, and Georgia, which apparently permitted uncle-niece marriage in general, did not treat all such marriages as void.⁷¹ The principal thrust of the dissenting opinion, however, was that the New York statute stated a

⁶⁸ *Id.*

⁶⁹ *Id.* at 7.

⁷⁰ *Id.*

⁷¹ *Id.* at 8 (Desmond, J., dissenting).

“strong public policy” that the New York courts were obliged to apply to a marriage, wherever celebrated, between two New York residents.⁷² In Judge Desmond’s view, the majority opinion failed to give the positive-law exception to the place-of-celebration rule its due.

B. *The Opinion on Its Own Terms*

Although Chief Judge Lewis’s opinion in *May’s Estate* was joined by all but one of the state high court judges who heard the case, the opinion as written is seriously flawed. In particular, its handling of the positive-law and natural-law exceptions that the court’s precedent establishes as grounds for departing from the place-of-celebration rule is considerably less than persuasive.

In finding that the positive-law exception did not apply in the case at hand, the court treated as determinative the fact that New York did not have a choice-of-law statute expressly ordering the application of New York’s prohibition of uncle-niece marriage to out-of-state uncle-niece marriages between New York residents.⁷³ As the court noted earlier in the opinion, however, its prior case law recognized three independent bases for not adhering to the place-of-celebration rule: (1) a choice-of-law statute in the forum state requiring nonadherence to the rule under particular circumstances; (2) the positive-law exception; and (3) the natural-law exception.⁷⁴ By making the applicability of the positive-law exception turn entirely on the existence or nonexistence of a choice-of-law statute, the court interpreted the exception in a way that stripped it of any independent significance and rendered it superfluous.

The court’s reasoning in finding the natural-law exception inapplicable did not necessarily drain that exception of all vitality. At a minimum, though, it did imply that the exception is extremely narrow and of very limited practical importance. The court appeared to reason that (1) because the Rhode Island legislature permits Jewish uncles and nieces to marry, such marriages cannot be so morally offensive as to be “regarded generally with abhorrence,”⁷⁵ and (2) absent such general abhorrence, there is no violation of natural law. Under that reasoning, it would seem that as long as a state has expressly or implicitly indicated by statute that it does not regard a certain type of marriage as incestuous, such a marriage celebrated in

⁷² See *id.* at 8-9.

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ *Id.* at 7.

that state could not be refused recognition under the natural-law exception. The fact that every other state (or, as in the case at hand, every other state except apparently Georgia) condemns such marriages as incestuous would be beside the point.

The court's discussion of the inapplicability of the natural-law exception referred specifically to lawmaking by the state-of-celebration's "legislative body."⁷⁶ Though finding the exception inapplicable, the court therefore at least arguably left room for the exception to apply to a type of marriage that the state of celebration as a matter of common, rather than statutory, law treats as not incestuous. Even if intended, however, this common law versus statutory law distinction has little practical significance. As noted in the dissenting opinion, virtually all states by the time of *May's Estate* had enacted statutes specifying the types of marriage that they regarded as incestuous.⁷⁷ If the state of celebration does not regard a particular type of marriage as incestuous, it therefore almost certainly would indicate that by statute, rather than by common law.

The court's reasoning as to the applicability of the natural-law exception also at least arguably left room for the exception to apply with greater force when the place of celebration is outside the United States. The *May's Estate* court held the natural-law exception inapplicable to a marriage celebrated in a "State"⁷⁸ that authorizes such marriages by statute. Assuming, for purposes of argument, that the court intended that "State" be understood as limited to the states of the United States, *May's Estate* allowed the natural-law exception to have a significance in cases involving the validity of a marriage celebrated outside the United States that it would not have in cases involving a United States marriage.

Ultimately, however, even if special importance is assigned to the court's use of the words "legislative body" and "State" in its discussion of the natural-law exception, the court's reasoning in finding the natural-law and positive-law exceptions inapplicable in the case at hand is highly problematic. Taken at face value, it strips the state judiciary of any real authority to reject on public policy grounds the application of another state's incestuous marriage laws to New Yorkers.

As the first conflicts Restatement indicated at the time of *May's Estate* and as the subsequently adopted Second Restatement would

⁷⁶ *Id.*

⁷⁷ *Id.* at 8 (Desmond, J., dissenting).

⁷⁸ *Id.* at 7 (majority opinion).

affirm a number of years later,⁷⁹ there has been broad agreement for many years among courts and scholars that courts at times should give priority to the public policy of the state of the married couple's domicile over the law of the place of celebration. To be sure, the majority opinion in *May's Estate* recognized a court's authority — indeed, obligation — to depart from the place-of-celebration rule on behalf of forum public policy when a forum-state statute expressly directs it to do so. Choice-of-law statutes of this sort, however, are the exception rather than the rule,⁸⁰ and the lack of any real judicial authority to invoke forum public policy leaves a significant gap.

The court's reasoning is troubling not only in terms of a general need for some type of public policy exception in this realm but also in terms of the need for such an exception in this case. Concededly, a public policy exception is subject to abuse, and the law reports offer more than a few instances of courts' seizing on the exception in tort, contract, and other cases to inject forum public policy into cases where it does not belong.⁸¹ *May's Estate*, however, does not appear to be such a case. Instead, it appears to be the type of case for which the exception was made.

⁷⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) & cmt. k (1971); RESTATEMENT OF CONFLICT OF LAWS § 132(b) (1934).

⁸⁰ In 1912 the Conference of Commissioners on Uniform State Laws approved the Uniform Marriage Evasion Act. Under section one of the Act, if one or both parties to a marriage reside, and intend to continue to reside, in the forum state at the time of marriage, a court is obliged to treat as void an out-of-state marriage of a sort prohibited by forum law. The Act also includes a section barring a marriage in the forum state that is prohibited in a state in which at least one of the parties resides and intends to remain. The commissioners ultimately withdrew the Act in 1943, but as of 1964, five states had adopted the Act in full, and nine others and the District of Columbia had an evasion statute modeled to some degree after section one of the Act. See Storke, *supra* note 20, at 483-85. According to the comment to section 210 of the Uniform Marriage and Divorce Act, sections 207 and 210 "are inconsistent" with the Uniform Marriage Evasion Act, and any state adopting the Uniform Marriage and Divorce Act "should repeal" the Uniform Marriage Evasion Act if it previously adopted that Act. UNIF. MARRIAGE & DIVORCE ACT § 210 cmt. (amended 1973), 9A U.L.A. 194 (1998). As of 2005, eight states had adopted the Uniform Marriage and Divorce Act. 9A U.L.A. 37 tbl. (Supp. 2005). One of the eight had adopted the Uniform Marriage Evasion Act in full, and another had enacted an evasion statute modeled after section one of the Act. Compare 9A U.L.A. 37 tbl. (Supp. 2005) (listing states that have adopted the Uniform Marriage and Divorce Act), with Storke, *supra* note 20, at 484-85 & nn.68, 69 (listing states that adopted the Uniform Marriage Evasion Act prior to its withdrawal or that enacted a statute based on the Act's first section).

⁸¹ Consider, for example, the difficulty of defending the courts' invocation of the public policy exception in *Hudson v. Von Hamm*, 259 P. 374 (Cal. App. 1927), *Gibson v. Fullin*, 374 A.2d 1061 (Conn. 1977), and *Fox v. Postal Tel. Cable Co.*, 120 N.W. 399 (Wis. 1909).

Chief Judge Lewis's opinion for the majority notwithstanding, the difference between New York and Rhode Island law on the question of uncle-niece marriages was nothing less than fundamental. New York, like almost every other state, categorically prohibited uncle-niece marriages. It had banned them by statute since 1893,⁸² characterizing them in condemnatory terms as "incestuous" and imposing criminal penalties on violators.⁸³ It is hardly a stretch to say that New York would regard as highly offensive the application to its residents of another state's law that permits such unions.

Indeed, it is especially reasonable to ascribe a strong public policy objection to New York when the law of the place of celebration not only permitted New Yorkers to enter into a marital relationship regarded as incestuous in New York but limited its assistance to only certain New Yorkers on the basis of religion. A New York court very sensibly would have regarded the Rhode Island law's religion-based exception as deeply offensive to New York's longstanding commitment to the principles that government should not favor or disfavor people because of their religion and that the state should not endorse the precepts of one or another religion.⁸⁴

If the conflict of laws in *May's Estate* were before the New York Court of Appeals today, one would hope that the court would react negatively toward the religious basis of the Rhode Island exception not only on public policy grounds but on federal constitutional grounds as well. Under the Supreme Court's current understanding of the

⁸² Prior to 1893, New York's incestuous marriage statute barred marriages between "parents and children including grand-parents and grand-children of every degree, ascending and descending, and between brothers and sisters of the half, as well as of the whole, blood." 2 N.Y. REV. STAT. ch. 8, tit. 1, art. 1, § 3 (1890). In 1893, the legislature amended the statute to extend its prohibition to marriages "between uncles and nieces or aunts and nephews." 1893 N.Y. LAWS, Act of May 5, 1893.

⁸³ See N.Y. DOM. REL. LAW § 5 (McKinney 1999), which duplicates verbatim the statute as it stood at the time of *May's Estate*.

⁸⁴ See N.Y. CONST. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . ."). In light of the latter provision, one may fairly ask (1) whether New York would be barred by the New York Constitution from carving out a Jewish exception like Rhode Island's and (2) if so, whether a New York court is therefore barred from applying the Rhode Island exception. For reasons along the lines of those offered in the text below regarding federal constitutional constraints, I am inclined to answer the first question "yes." On the view that the New York courts would interpret article I, section 3 and other limitations on legislative action as applicable only to legislative action in New York, I am inclined to answer the second question "no." For present purposes, however, it seems unnecessary to try to resolve either question here.

Establishment Clause,⁸⁵ there is undoubtedly room for some state accommodations of religion.⁸⁶ In particular, a law that lifts a state-imposed burden on some people's ability to engage in the free exercise of their religion is seen as a permissible accommodation, rather than unconstitutional endorsement, of religion.⁸⁷ The Rhode Island exception, however, is nothing of the sort. It cannot be justified as a burden-lifting measure because there is no burden on free exercise to lift. Although Jewish law allows for uncle-niece marriages, Jews are not under the slightest religious obligation to enter into such marriages, and a state law denying them the opportunity to do so imposes no burden on their ability to practice their faith. By deferring to Jewish law in the way that it does, the Rhode Island exception does not simply accommodate Judaism. It unconstitutionally endorses it.

The Supreme Court's case law on the Establishment Clause largely dates from 1947, when the Court held as a matter of Fourteenth Amendment due process that the clause binds states and their political subdivisions.⁸⁸ In 1953, the year that *May's Estate* was decided, the Supreme Court's interpretation of the clause was still quite

⁸⁵ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). Commentary generally discussing the Court's Establishment Clause approach includes: DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 107-46 (2003); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 185-232 (2d ed. 2005); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001); and Simson, *supra* note 38, at 462-92.

⁸⁶ See, e.g., *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005) ("[We have] reaffirmed that 'there is room for play in the joints' between the Establishment and Free Exercise Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief [by the First Amendment] can be expected to be solicitous of that value in its legislation. . . ."); *Wallace v. Jaffree*, 472 U.S. 38, 82-84 (1985) (O'Connor, J., concurring in judgment) (addressing the "challenge" of "how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion").

⁸⁷ Although I have argued that permissible accommodations should be limited to ones lifting a state-imposed burden that *violates* the Free Exercise Clause, see Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 913-15 (1987), the Supreme Court rather clearly takes a broader view. See cases cited *supra* note 86. For the text of the Free Exercise Clause, see U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."). The clause has been held to apply to state and local governmental action by virtue of the Fourteenth Amendment's Due Process Clause. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁸⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

undeveloped, and the New York Court of Appeals, which made no mention of the Establishment Clause in *May's Estate*, almost certainly did not see the Establishment Clause problems raised by the Rhode Island exception as being as formidable as I now claim.⁸⁹ Nonetheless, it is not unfair to suggest that (1) the New York Court of Appeals should have recognized that the exception was treading perilously close to constitutionally forbidden ground and (2) based on that recognition, the New York high court should have been especially eager to apply New York law on public policy grounds.⁹⁰

C. Hidden Agendas

Although the New York high court's reasoning in *May's Estate* does not provide a cogent justification for the court's choice of Rhode Island law, it would be myopic to decide the validity of the court's choice of law simply in terms of the court's express reasoning. As various courts and commentators have observed, many choice-of-law decisions expressly made under the traditional conflicts rules — place-of-wrong, place-of-making, place-of-celebration, and the like — are best understood as consciously manipulative of the rules to achieve unarticulated ends.⁹¹ If the choice of Rhode Island law in *May's Estate* were defensible in terms of unarticulated ends, the court's opinion

⁸⁹ The key Supreme Court precedents as of *May's Estate* were: *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding by 6-3 vote “released time” program involving religious instruction to public school students in religious centers off public school grounds); *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948) (invalidating by 8-1 vote “released time” program involving religious instruction to public school students in public school classrooms); and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding by 5-4 vote law providing for reimbursement to parents of money spent to send their children on public buses to religious schools). The New York courts at the time of *May's Estate* reasonably could have read the language in the majority opinions in *Everson* and *McCullum* as rather strongly affirming principles of church-state separation. However, with its rejection of an Establishment Clause challenge and its striking assertion that “We are a religious people whose institutions presuppose a Supreme Being,” *Zorach*, 343 U.S. at 313, Justice Douglas's majority opinion in *Zorach* surely could have made the New York courts that adjudicated *May's Estate* less than confident that Rhode Island's Jewish exception overstepped Establishment Clause bounds.

⁹⁰ For more on the Establishment Clause, see *infra* Part III.C.

⁹¹ Courts and commentators taking this view include: *Clark v. Clark*, 222 A.2d 205, 207 (N.H. 1966); *Wilcox v. Wilcox*, 133 N.W.2d 408, 411-12 (Wis. 1965); Albert A. Ehrenzweig, *The Lex Fori — Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Joseph Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949); and Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

could still be faulted for lack of candor and for failure to provide adequate guidance to lower courts for sound decisionmaking in the future, but the defects in reasoning in the opinion as written would be considerably less troubling. As discussed below, however, the court's choice of Rhode Island law is difficult to defend not only in terms of the court's express reasoning but in terms of possible unarticulated reasons as well.

1. Governmental Interests

One possibility to consider is that the court's choice of Rhode Island law can be satisfactorily explained in terms of a comparison of New York and Rhode Island's "governmental interests." Concededly, the New York Court of Appeals' decision in *May's Estate* preceded by several years Professor Brainerd Currie's series of innovative and influential articles strongly criticizing the traditional conflicts rules and proposing an alternative methodology predicated on analyzing governmental interests.⁹² In addition, the high court's decision in *May's Estate* preceded by a decade its trendsetting opinion in *Babcock v. Jackson*, which, as noted earlier, expressly rejected in a tort case the customary reference to the place-of-wrong rule and instead employed an analysis focusing on governmental interests.⁹³

Nonetheless, it is hardly incongruous to inquire whether the court's choice of law in *May's Estate* is best understood and appropriately defended in terms of governmental interests. Although Currie was the first conflicts scholar to propose a broadly applicable choice-of-law approach featuring the analysis of governmental interests, he was by no means the first scholar to argue for serious attention in choice of law to governmental interests. For example, in a well-known 1946 article, Professor Paul Freund had already broached this important idea.⁹⁴ In addition, although *Babcock* was the first state high court decision that openly embraced an interest-based approach, the U.S. Supreme Court, as early as its 1935 decision in *Alaska Packers Ass'n v. Industrial Accident Commission*,⁹⁵ had made governmental interests central to the enforcement of the Constitution's full faith and credit

⁹² The articles are collected in CURRIE, *supra* note 31.

⁹³ *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), discussed *supra* text accompanying note 16.

⁹⁴ Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

⁹⁵ 294 U.S. 532 (1935).

and due process limitations on choice of law.⁹⁶ With these earlier developments in mind, courts and scholars have suggested that numerous cases predating Currie's interest-analysis writings and *Babcock* were based in actuality not on the traditional rules that they expressly applied, but rather on an unarticulated sense of governmental interests.⁹⁷ It therefore seems only appropriate to consider whether the choice of law in *May's Estate* is defensible in interest-analysis terms.

a. *Rhode Island*

As defined by Currie, "interest" refers to a state's stake in the particular case at hand in applying the policy or policies underlying its local law⁹⁸ (also often referred to as its "internal" or "domestic" law, as opposed to its "whole" or "conflicts" law).⁹⁹ In enacting the Rhode Island law at issue, the Rhode Island legislature rather obviously was pursuing a policy of allowing certain Jewish couples — those whose union is permitted by their religion but is of a sort generally forbidden by Rhode Island law — to enjoy marital autonomy and the fruits of marriage. If one assumes, along with Currie,¹⁰⁰ that a state has an interest in the application of its policies only when such application would benefit one or more of the state's residents, the Rhode Island policy at hand did not give rise to an interest in *May's Estate* because its application would not benefit any Rhode Island residents. In 1953,

⁹⁶ The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. According to the Due Process Clause of the Fifth Amendment, which is implicitly limited to acts of the federal government, "No person shall . . . be deprived of life, liberty, or property without due process of law." *Id.* amend. V. The Fourteenth Amendment's Due Process Clause, which applies to acts of state government (and its political subdivisions), provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

⁹⁷ Judicial and scholarly suggestions to this effect appear in *Reich v. Purcell*, 432 P.2d 727, 729-30 (Cal. 1967); *Babcock*, 191 N.E.2d at 282-83; *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 803-05 (Pa. 1964); CURRIE, *supra* note 31, at 132-33, 180-81; WEINTRAUB, *supra* note 15, §§ 6.16, 6.17; and Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 659, 670 & n.35 (1959).

⁹⁸ CURRIE, *supra* note 31, at 183-84.

⁹⁹ The Second Restatement generally uses "local" in preference to "internal" or "domestic." For example, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 4, 8 (1971). For commentary using the various terms, see DAVID D. SIEGEL & PATRICK J. BORCHERS, *CONFLICTS IN A NUTSHELL* § 18 (3d ed. 2005); WEINTRAUB, *supra* note 15, § 2.13A.

¹⁰⁰ CURRIE, *supra* note 31, at 85-87.

when the high court decided *May's Estate*, application of the Rhode Island policy would surely benefit Sam May. If recognized as a surviving spouse, he would be named administrator of his wife's estate, with the economic and other rewards that would entail.¹⁰¹ In 1953, however, as at the time of his marriage forty years earlier, Sam was a resident not of Rhode Island, but of New York.

Although there is no Rhode Island interest based on the policy discussed above, it may be argued that the Rhode Island law was enacted with one or more additional policies in mind and that one or more of those policies gives rise to an interest. As discussed below,¹⁰² although the available legislative history is quite limited, it suggests at least two such policies: to signal to Jews inside and outside of Rhode Island that Rhode Island offers a hospitable environment for Jews; and to signal to people in Rhode Island and elsewhere of all religious faiths that Rhode Island respects religious diversity and assigns importance to having a religiously diverse citizenry.

The available legislative history specific to Rhode Island's Jewish exception to its incestuous marriage laws appears to be sparse.¹⁰³ A compilation entitled *The First Laws of the State of Rhode Island*¹⁰⁴ indicates that the special exception for Jews was in place by 1798 at the latest and may have been part of Rhode Island law during the

¹⁰¹ The issue before the New York courts in *May's Estate* was limited to who should be named to administer the estate. See *In re May's Estate*, 114 N.E.2d 4, 5 (N.Y. 1953) (indicating scope of proceedings); 117 N.Y.S.2d 345, 349 (App. Div. 1952) (same); Record on Appeal, *supra* note 49, at 42, 47 (unpublished opinion of N.Y. Surr. Ct. 1952) (same). The issue of who should recover in intestacy and how much was not before the courts. As a practical matter, if Sam were recognized as a surviving spouse for purposes of determining who should administer Fannie's estate, he almost certainly would also be recognized as a surviving spouse in later proceedings to determine who should recover in intestate succession from Fannie's estate and how much. At least in theory, however, one does not necessarily follow the other. A statute designating who should be named to administer an estate does not have the identical purposes as a statute designating who is entitled to recover in intestacy and how much. It is therefore conceivable that a court could properly find that someone is a surviving spouse under the first statute but not under the second, or vice versa. Cf. Willis L.M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953) (discussing different meanings of "residence" in different contexts). Accordingly, in discussing the benefits to Sam in being named administrator, I do not assume that he necessarily would share in the estate as a surviving spouse.

¹⁰² See *infra* notes 103-13 and accompanying text.

¹⁰³ If there is more to be found than I recount below, it is surely well hidden. It would have eluded not only my research efforts, but also and more importantly those of Jean Callihan, the Cornell Law Library's exceptionally able Head of Reference Services.

¹⁰⁴ FIRST R.I. LAWS, *supra* note 56.

colonial period as early as 1749.¹⁰⁵ The statutory language of the exception at the time of *May's Estate* was virtually identical to the language used when the exception was first created.¹⁰⁶ By 1798, and perhaps contemporaneously with its creation of the latter exception, the Rhode Island legislature had also carved out an exception for Jews from a statute establishing rules as to how marriages should be solemnized.¹⁰⁷ Interestingly, especially with regard to the religious diversity purpose suggested above, the statutory provision carving out that additional exception also expressly covered another religious minority — Quakers.¹⁰⁸

¹⁰⁵ 2 *id.* at 477, 481. The compilation reprints “An Act Regulating Marriage and Divorce,” which includes the Jewish exception as a proviso at the very end of the act — the final sentence of the final section. At the start of the act, the compilation lists in the margin three dates — 1749, 1754, and 1798 — that presumably specify the year of the act’s original enactment and two later years in which the original act was reenacted and/or amended. Because the compilation does not specify which provisions were part of the original act and which were the result, in whole or part, of later amendment, it is unclear whether the Jewish exception became law in 1749, 1754, or 1798.

¹⁰⁶ Compare *id.* at 481 (“Provided always, that nothing herein contained shall be construed to extend to, or in any wise affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.”), with *May's Estate*, 114 N.E.2d at 7 (“The provisions of the preceding sections shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion.”).

¹⁰⁷ As of 1798, section 12 of “An Act to Prevent Clandestine Marriages” provided that “any marriages which may be had and solemnized . . . among persons professing the Jewish religion, according to their rites and ceremonies, shall be good and valid in law, any thing in this act to the contrary notwithstanding.” 2 FIRST R.I. LAWS, *supra* note 56, at 486. The latter compilation of laws lists several dates in the margin at the start of the act — 1701, 1733, 1749, 1764, 1794, and 1798 — without explanation as to their individual significance. *Id.* at 481. Although 1701 is almost certainly the date of original enactment, it is unclear which, if any, of the other years were years in which the statute was amended, as opposed to simply reenacted. As a result, it is also unclear when the language quoted above from section 12 became law. Two of the years — 1749 and 1798 — coincide with years when the Jewish exception to the incestuous marriage statute may have become law. See *supra* note 105. Given the unusual and similar thrust of both provisions — carving out exceptions for Jews from generally applicable laws — it would not be surprising if they were enacted the same year.

¹⁰⁸ The provision, quoted in part in note 107 *supra*, stated in full:

And be it further enacted, That any marriages which may be had and solemnized among the people called Quakers or Friends, in the manner and form used or practiced in their societies, or among persons professing the Jewish religion, according to their rites and ceremonies, shall be good and valid in law, any thing in this act to the contrary notwithstanding.

Although this appears to exhaust the available specific legislative history of the statute, the early history of the Jewish community in Rhode Island offers some indirect insight into the policies that motivated enactment of the statute. Well before 1749 — the Jewish incestuous marriage exception's earliest possible date of enactment — Rhode Island had a special relationship with members of the Jewish faith. Although during colonial times Rhode Island denied Jews certain political rights, it offered them a relatively welcoming and tolerant environment as compared to other colonies.¹⁰⁹ Roger Williams, the famous minister who founded the Providence colony in 1636, was a vocal and influential proponent of liberty of conscience for Jews.¹¹⁰ Rhode Island's charter in 1663 was the first in North America to provide for freedom of conscience in matters of religion.¹¹¹ Not long after the first Jews settled in Rhode Island around 1680, the Rhode Island Assembly expressly granted them legal protection.¹¹² In 1763, when the Jewish community in Newport completed building a synagogue, it was only the second synagogue that Jews had built in the colonies.¹¹³

If, in light of this history, the two policies suggested above may be taken to be ones that actually motivated the Rhode Island legislature in enacting the special treatment for Jews, Rhode Island appears to be an interested state in *May's Estate*. Any application of the Rhode Island statute to validate a marriage lawful under the Jewish exception sends a message to Jews everywhere that Rhode Island respects them and their beliefs and traditions. By the same token, any such application of the statute broadly communicates Rhode Island's commitment to religious diversity.

A creative lawyer might argue for the existence of another Rhode Island interest based on an additional policy: stimulating the Rhode Island economy by making Rhode Island a favorite place for Jewish uncle-niece couples, residing in or outside the state, to get married. The historical record is essentially silent as to whether the Rhode Island legislature may have relied on this policy. Silences in the

2 FIRST R.I. LAWS, *supra* note 56, at 486. Current law reproduces this language almost verbatim and adds members of the Baha'i faith to the list of exempted groups. R.I. GEN. LAWS § 15-3-6 (2003 & Supp. 2005).

¹⁰⁹ See Ellen Smith & Jonathan D. Sarna, *Introduction: The Jews of Rhode Island*, in *THE JEWS OF RHODE ISLAND* 1, 1-4 (George M. Goodwin & Ellen Smith eds., 2004).

¹¹⁰ *Id.* at 1.

¹¹¹ *Id.*

¹¹² *Id.* at 2.

¹¹³ *Id.*

historical record, however, are often ambiguous, and courts applying the Currie approach have often been quite freewheeling in identifying policies as relevant despite the absence of any legislative history in support.¹¹⁴

Nevertheless, in this instance, it seems especially difficult to assume that the legislature was moved by the particular policy absent affirmative evidence in the historical record. To figure legitimately into a Currie analysis, a policy need not provide a cogent or even sensible justification for enacting the law at hand. As long as the policy, however wrongheaded, at least partly motivated the lawmaker to adopt the law, that is enough.¹¹⁵ However, if the historical record is basically silent as to whether the legislature was influenced by a particular policy that offers little, if any, justification for enacting the law, there is good reason to question whether such a policy had any real role in the legislative decision.

The policy of boosting the Rhode Island economy by making the state a favorite place for Jewish uncles and nieces to get married rather clearly seems to be a policy of this sort. Even if Rhode Island were to become the locale of choice for Jewish uncle-niece weddings, there would be little chance that the Rhode Island economy would benefit materially as a result. Given that (1) Jews have long constituted no more than a small, low single-digit percentage of the United States population and (2) Jews are hardly oblivious to the problems associated with uncle-niece marriage, Rhode Island almost certainly

¹¹⁴ Two years after its historic adoption in *Babcock v. Jackson*, 191 N.E.2d 473 (1963), of an interest analysis approach in torts, see *supra* text accompanying note 16, the New York Court of Appeals in *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965), was not deterred by the lack of legislative history from holding that one policy behind a Colorado guest statute was ensuring that “the negligent defendant’s assets are not dissipated in order that the persons in the car of the blameless driver will not have their right to recovery diminished by the [guest’s negligence] suit.” *Id.* at 794. With no greater support in legislative history but at least as much creativity, a California appellate court in *Hernandez v. Burger*, 162 Cal. Rptr. 564 (Ct. App. 1980), later held that a key purpose behind a Mexican law generally limiting damages in tort was “fostering tourism” in Mexico. *Id.* at 568.

¹¹⁵ See, e.g., *Cipolla v. Shaposka*, 267 A.2d 854, 858 (Pa. 1970) (Roberts, J., dissenting) (“Of course a statute could be passed for a particular purpose, even though it is poorly designed to effectuate that purpose. But I do not believe that is the case here, for neither the Legislature nor the courts of Delaware have ever mentioned low insurance rates as the purpose of the guest statute.”); CURRIE, *supra* note 31, at 377 (underlining that interest analysis focuses on actual purposes — “what the legislature meant”).

would not reap significant profits as a sort of “marriage mill” for Jewish uncle-niece couples.¹¹⁶

b. New York

New York’s exceptionless prohibition on uncle-niece marriages apparently reflects a policy of depriving certain couples of the freedom to marry when such marriages are apt to result in a troubled relationship and defective offspring.¹¹⁷ At the time of Sam and Fannie’s marriage, New York unquestionably had an interest in applying this policy to invalidate the marriage of its two residents. Does a New York interest persist, however, at the time of *May’s Estate*, with the marital relationship now a thing of the past and the potentially abnormal children long since born?

Whether or not Sam and Fannie’s marriage led to a troubled relationship or to abnormal children — and the one daughter’s petition, supported by two of her sisters, to in effect have the three of them and the rest of Sam and Fannie’s children all declared illegitimate may fairly give rise to some suspicion about the petitioners’ mental health — a choice of New York law at the time of *May’s Estate* could not undo what was done. It is therefore doubtful that New York retained any interest in the application of New York law based on its onetime stake in preventing two of its residents from entering into a troubled relationship and from giving birth to abnormal children.

Nonetheless, New York continued to have an interest if, as seems quite likely, the New York law was based in part on a policy of deterring uncles and nieces from marrying and having children. By applying New York law in *May’s Estate*, the court would deny Sam some of the fruits of marriage — in particular, the right to be named administrator of his wife’s estate as a surviving spouse.¹¹⁸ In addition,

¹¹⁶ According to a United States Census Bureau study in 1958 — several years after *May’s Estate* — 3.2% of Americans 14 years of age and older regarded themselves as Jewish. See WINTHROP S. HUDSON, *RELIGION IN AMERICA* 354 n.39 (2d ed. 1973).

¹¹⁷ For discussion of the policies behind incestuous marriage statutes, see *Bucca v. State*, 128 A.2d 506, 510 (N.J. Super. Ct. Ch. Div. 1957); *Incuria v. Incuria*, 280 N.Y.S. 716, 719 (Fam. Ct. 1935); *Johnson v. Johnson*, 106 P. 500, 501 (Wash. 1910); Alan H. Bittles, *Genetic Aspects of Inbreeding and Incest*, in *INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY* 38 (William H. Durham & Arthur P. Wolf eds., 2004); Winston P. Nagan, *Conflict of Laws and Proximate Relations: A Policy-Science Perspective*, 8 *RUTGERS-CAM. L.J.* 416, 423-41 (1977); Storke, *supra* note 20, at 476-78.

¹¹⁸ With regard to Sam’s rights of intestate succession, see *supra* note 101.

it presumably would make him bear some shame by identifying him publicly as a violator of the state's incest laws, and it would be apt to cause him some anguish by branding his children as illegitimate. By punishing Sam in these various ways, a choice of New York law would send a message to other New Yorkers that they violate the prohibition on uncle-niece marriages at their peril. Even if not detected for years, an uncle-niece marriage will be met with substantial penalties.

c. Choosing Between the Interests

After identifying the state interests at issue in a case, a court engaged in interest analysis must then choose the applicable law by choosing between the interests. If, as Currie tacitly assumed and other commentators have expressly maintained, the policy objective for using interest analysis is to maximize enforcement of forum interests in the long run, the court must choose between state interests in a manner consistent with that objective.¹¹⁹

A choice of law that vindicates a nonforum interest is most obviously warranted under this approach if the jurisdiction whose law is chosen is the only interested jurisdiction. In this "false" conflict situation, as Currie called it,¹²⁰ the court defers to the nonforum interest in the hope that the other jurisdiction will repay its deference in kind in future cases when that jurisdiction is the forum and is adjudicating a false conflict case in which the only interested state is the state now acting as the forum.

According to Currie, if a court finds that the forum state and another state have interests — a "true" conflict, in Currie's terms — the court should always opt for forum law.¹²¹ In terms of maximizing enforcement of forum interests in the long run, Currie's resolution is correct as long as one assumes that courts cannot fairly ascertain differences in magnitude between state interests of any substance. If, as some courts and commentators have expressly or implicitly maintained, courts can competently determine when one state's interest is materially greater than another's,¹²² then the goal of

¹¹⁹ See Simson, *supra* note 23, at 295 n.44 (citing and discussing sources).

¹²⁰ CURRIE, *supra* note 31, at 109-10.

¹²¹ *Id.* at 117-19, 181-84.

¹²² Judicial opinions and scholarly commentary to this effect include: Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 509 (D.C. 1985); Eger v. E.I. du Pont DeNemours Co., 539 A.2d 1213 (N.J. 1988); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 79(d) (3d ed. 2002); and Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CAL. L. REV. 845, 852-73 (1961). Along similar lines, see Bernhard v.

maximizing forum interests in the long run calls for application of another jurisdiction's law when that jurisdiction's interest tangibly outweighs the forum state's.

Whether one accepts the Currie solution to true conflicts or the alternative, more nuanced approach, an interest analysis of the conflict of laws in *May's Estate* points strongly toward a choice of New York law. Although the New York deterrent interest at issue in the case is probably not as weighty as the interest that New York had before the birth of any of Sam and Fannie May's children, it compares quite favorably in magnitude to the aggregate interests of Rhode Island. Concededly, the apparent Rhode Island policies of communicating to Jews that Rhode Island offers them a hospitable environment and communicating generally that Rhode Island is committed to religious diversity are furthered by a choice of Rhode Island law. They are also served to a considerable degree, however, by the publicity that the Rhode Island law would receive if the New York high court does no more than discuss the Rhode Island law in its opinion while ultimately choosing New York law. In contrast, the deterrent policy underlying the New York law is seemingly only served by an actual choice of New York law.

In sum, whether or not the New York interest in *May's Estate* is materially weightier than the Rhode Island interest — and I believe it is — it is rather clearly not materially less weighty. If the court in *May's Estate* chose Rhode Island law out of deference to the state that it tacitly viewed as the most interested jurisdiction, its deference was misplaced.

2. Protection of Justified Expectations

A more promising defense of the New York Court of Appeals' choice of Rhode Island law may lie in a choice-of-law policy frequently mentioned as providing the policy basis for the place-of-celebration rule: the protection of justified expectations.¹²³ In giving so narrow a reading to the positive-law and natural-law exceptions established by New York precedent, the New York high court did not expressly cite

Harrah's Club, 546 P.2d 719 (Cal. 1976) (applying "comparative impairment"); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17-22 (1963) (proposing the "comparative impairment" approach).

¹²³ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. h (1971) (expressly linking the policy to the rule); SCOLES ET AL., *supra* note 15, § 13.5 (same); WEINTRAUB, *supra* note 15, § 5.1C, at 292 (same); Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 955 (1977) (same).

the protection of justified expectations as its reason for doing so. It hardly seems a stretch, however, to suppose that in pushing the two seemingly quite relevant exceptions to the periphery and siding instead with the dictates of the place-of-celebration rule, the court was strongly influenced by the choice-of-law policy most commonly identified with that rule.

Assuming, then, that the New York Court of Appeals' choice of Rhode Island law was tacitly based on the protection of justified expectations, the question remains whether the court's choice of law is defensible in those terms.¹²⁴ The place-of-celebration rule assumes that people generally expect the validity of their marriage to be determined by the law of the state where they marry.¹²⁵ Moreover, there seems little doubt that in this instance the spouses-to-be expected that law to govern the validity of their marriage. Although Rhode Island may hold many attractions for New Yorkers, Sam and Fannie quite obviously left their home in New York to get married in Rhode Island for one reason only: to take advantage of the distinctive exception for Jewish uncle-niece marriages under Rhode Island law. Other than Georgia, which apparently broadly permitted uncle-niece marriages without regard to religion but which, for Sam and Fannie, offered a possible place of celebration rather far from home, Rhode Island was the only state whose laws would permit Sam and Fannie to wed.

In selecting Rhode Island law, the New York Court of Appeals may well have been responding not only to Sam and Fannie's expectation that Rhode Island law would apply and validate their marriage, but also to their apparent reliance on that expectation. Though not certain, it is at least quite probable that if Sam and Fannie had not believed that they were lawfully married, they would not have had six children together. Various courts and commentators have suggested that the policy of protecting justified expectations deserves greater weight in choice of law when the person or persons whose expectations are at issue have acted upon the expectations.¹²⁶ The

¹²⁴ For discussion and critical analysis of the choice-of-law policy of protecting justified expectations, see David F. Cavers, *Oral Contracts to Provide by Will and the Choice of Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 38 (Roscoe Pound et al. eds., 1964); P. John Kozyris, *Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?*, 19 SAN DIEGO L. REV. 313 (1982); Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17-31 (1944).

¹²⁵ See sources cited *supra* note 123.

¹²⁶ Judicial and scholarly suggestions to this effect may be found in: *Blakesley v. Wolford*, 789 F.2d 236, 242-43 (3d Cir. 1986); *Royce v. Estate of Denby*, 379 A.2d

New York Court of Appeals in *May's Estate* may well have shared that view and given special weight to protecting Sam and Fannie's expectations at the time of marriage on that account.

Even assuming, however, that the court chose Rhode Island law out of regard not only for Sam and Fannie's expectation that it would apply but also for their actions in reliance on that expectation, the policy of protecting justified expectations still may not provide substantial support for the court's choice of law. It does so only if Sam and Fannie had strong justification for holding the expectations that they held and for relying on such expectations. Very likely, however, they did not. In going to Rhode Island to get married, Sam and Fannie were plainly both shopping for a favorable law and trying to avoid home state law. In this instance the home state law was one designed to benefit the individuals regulated by the law (as well as society generally) by preventing those individuals from fulfilling their desire to get married. Under the circumstances, it would not have been very reasonable for Sam and Fannie to expect that if the issue ever arose in their home state's courts, those courts would give priority to their wishes over the home state's policy of defeating those wishes. That, however, is precisely what Sam and Fannie seemed to expect and what the New York Court of Appeals proceeded to do.

If Sam and Fannie, cognizant of the differences between the New York and Rhode Island laws, had planned to stay in Rhode Island permanently after the marriage and in fact did make it their home, their justification for expecting Rhode Island law to govern the validity of their marriage would have been substantially greater. They reasonably might have assumed that, even if a case were brought in New York courts, those courts would not feel the same investment in applying to Rhode Islanders, as opposed to New Yorkers, a law designed to benefit individuals and the society of which they are a part by defeating certain of their desires.

Sam and Fannie's actual stay in Rhode Island after the wedding, however, was merely two weeks. Moreover, there is no suggestion in the New York high court's opinion that the brevity of the stay reflected a change of heart after the wedding from a pre-wedding plan to take up residence in Rhode Island.¹²⁷ If Sam and Fannie expected at the time of their marriage that they would be able to avoid the application

1256, 1258-59 (N.H. 1977); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647-48 (Tex. 1995); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. g (1971); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 336-38 (1990); Leflar, *supra* note 44, at 282-85; and Simson, *supra* note 23, at 291-92.

¹²⁷ See *supra* note 61 (discussing Sam's testimony about his residence).

of New York law simply by getting married in Rhode Island and spending a couple of weeks there, their expectation was not very reasonable. It failed to come to grips with the realities that (1) New York attached considerable importance to defeating the desires of uncles and nieces to marry one another and (2) as New Yorkers prior to and after marriage, they fell within the heart of the New York regulatory scheme. Under that scheme, the marriage represented a serious threat to the well-being of the two New Yorkers being joined in matrimony and to the general welfare of the New York society in which they lived.

3. Better Rule of Law

In a pair of influential articles in the mid-1960s, Professor Robert Leflar articulated, and defended judicial use of, a “better rule of law” factor in choice of law.¹²⁸ Leflar acknowledged that the choice-of-law methodologies expressly applied by courts over the years did not call upon or authorize the courts to predicate choices of law in whole or in part on a determination as to which of the two laws in conflict was superior. Leflar maintained, however, that “[o]ne way or another” courts often managed to reach results that tacitly took this better-law factor into account.¹²⁹ Leflar applauded judicial consideration of the factor as a “less subjective” means of achieving justice in the individual case than judicial consideration of the “better party.”¹³⁰ He urged courts to make explicit their reliance on better rule of law,¹³¹ and courts in a number of states subsequently have done so.¹³²

In choosing Rhode Island over New York law, the New York Court of Appeals in *May’s Estate* conceivably was siding tacitly with the rule of law that it regarded as superior. Although the Rhode Island exception for Jewish uncle-niece marriages was unique among the states, and although Rhode Island was joined only by Georgia in allowing any uncle-niece marriages, the New York high court could have found special appeal in the Rhode Island exception. Perhaps, for

¹²⁸ Leflar, *supra* note 44, at 295-304; Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966).

¹²⁹ Leflar, *supra* note 44, at 300-04.

¹³⁰ *Id.* at 296-97.

¹³¹ *Id.* at 303-04.

¹³² Instances of express judicial reliance on better rule of law include: *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1195-97 (N.H. 1988); *Victoria v. Smythe*, 703 A.2d 619, 621 (R.I. 1997); and *Conklin v. Horner*, 157 N.W.2d 579, 586-87 (Wis. 1968).

example, it saw this deference to Jewish law as an enlightened show of respect by government to a minority religion.

However, if the New York Court of Appeals indeed tacitly based its choice of law entirely or partly on better rule of law, it was not justified in doing so. First of all, if better rule of law can be used to justify the choice of a law that draws a religion-based distinction drawn by no other state and that allows a form of marriage barred in every other state but one, better rule of law seems to invite almost boundless judicial subjectivity. In defending the use of better rule of law, Leflar underlined courts' need for a better-law factor in order to avoid application of a law of a sort "still hanging on" in a tiny number of states.¹³³ In so doing, he was implicitly, and I believe correctly, suggesting that if better rule of law is to be applied with some modicum of objectivity, a law as isolated from the mainstream as the Rhode Island exception cannot be characterized as "better."¹³⁴

Second, and more basically, if the New York high court was relying on better rule of law in choosing Rhode Island law, it was relying on an approach that is fundamentally flawed. For a court to refuse to apply a forum-state statute on the ground that the statute is inferior to the law of another state flies in the face of widely accepted state constitutional principles of separation of powers, legislative supremacy, and democratic government.¹³⁵ As the branch of state government most representative of the people of the state, the legislature has ultimate authority to establish by its lawmaking the weight and priority due various policies. In a purely intrastate case a court, out of deference to these state constitutional principles, would not presume to second-guess the policy balance struck by the legislature in adopting a particular law. The court would apply the forum-state statute regardless of how wise or fair or socially beneficial the court deemed the law to be. The fact that a case in one or more of its elements transcends the borders of the forum state affords the court no greater license to substitute its policy judgments for those made by the legislature. The same state constitutional principles that compel a court in intrastate cases to base its definition of better law on the

¹³³ See Leflar, *supra* note 44, at 299-300.

¹³⁴ For discussion of the factors commonly taken into account by courts to determine better rule of law and a critique of the factors' potential for objective application, see Gary J. Simson, *Resisting the Allure of Better Rule of Law*, 52 *ARK. L. REV.* 141, 146-51 (1999).

¹³⁵ See *id.* at 151-52. With regard to the difficulties posed by using better rule of law to reject either forum-state common law in favor of nonforum law or nonforum law in favor of forum law, see *id.* at 152-54.

policy judgments imbedded in law by the forum-state legislature compel a court to act likewise in multistate cases.

D. Another Perspective on May's Estate

Under my analysis of *May's Estate* thus far, application of the traditional rules approach explicitly invoked by the New York Court of Appeals rather clearly calls for the choice of New York law, the New York high court's decision to the contrary notwithstanding. By the same token, application of a governmental interest analysis approach along the lines of the one developed by Currie strongly points toward a choice of New York law. The policy of protecting justified expectations may not offer weighty affirmative support for choosing New York law. However, it also does not significantly militate in favor of Rhode Island law. Finally, under better rule of law, the longstanding and overwhelming predominance in the United States of the type of law adopted by New York would clearly favor a choice of New York law.

If I believed that either the traditional rules, governmental interest analysis, or better rule of law, or some combination thereof, offered an optimal method of deciding choice of law, I would conclude my analysis of *May's Estate* here and simply add that the New York Court of Appeals obviously erred in not choosing New York law. However, as indicated above, I regard better rule of law as fundamentally unsound.¹³⁶ In addition, I would not characterize either the traditional rules or governmental interest analysis as optimal or nearly so. In my view, both have serious flaws. The traditional rules have come under heavy attack by commentators for more than fifty years.¹³⁷ Furthermore, although the rules have by no means disappeared from the scene as far as state judicial practice in the United States, their significance in the courts is greatly diminished.¹³⁸ For present purposes, I see no need to relate in detail the various scholarly and judicial objections to the rules. Suffice it to say that in my view the traditional rules are so lacking in direction as to virtually beg for judicial manipulation and disingenuous opinion-writing. Even more

¹³⁶ See *supra* text accompanying note 135.

¹³⁷ Among those leading the attack were Professors Cook, see WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); Currie, see CURRIE, *supra* note 31; Cavers, see David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Ehrenzweig, see Ehrenzweig, *supra* note 91; and Leflar, see Leflar, *supra* note 44.

¹³⁸ See SIMSON, *supra* note 17, at 13-14.

basically, the rules are, as I have argued elsewhere, “so tenuously related to any material choice-of-law objective as to verge on, if not surpass, the outer limits of constitutionality.”¹³⁹

Though a marked improvement over the traditional rules, governmental interest analysis has met with a considerable amount of judicial and scholarly criticism.¹⁴⁰ As I have argued previously and discuss further below, interest analysis takes into account too narrow a range of choice-of-law policies — in effect, only the policy of maximizing enforcement of forum interests in the long run.¹⁴¹ Also, in calling upon courts to reconstruct the lawmakers’ actual reasons for enacting the laws in conflict in the particular case, interest analysis incorporates a subjective focus that makes the approach unduly manipulable and resistant to principled, consistent application.¹⁴²

To conclude my discussion of *May’s Estate*, I therefore would like to consider how the case should be decided under an approach that I believe provides a substantially better means for achieving conflicts justice. I set forth and then apply that approach below.

1. The Proposed Approach

As I summarized the approach when I proposed it a number of years ago, it calls upon a court to resolve choice-of-law problems as follows:

1. Ascertain whether any state has a greater interest in *determining the outcome of the case* at hand than the forum state.
2. If so, make the choice(s) of law that a court sitting in the foreign state and applying that state’s conflicts law would make.

¹³⁹ Simson, *supra* note 23, at 295.

¹⁴⁰ Judicial discontent with governmental interest analysis is unmistakable in: *Fisher v. Huck*, 624 P.2d 177 (Or. Ct. App. 1981), *appeal dismissed by stipulation*, 632 P.2d 1260 (Or. 1981); *McMillan v. McMillan*, 253 S.E.2d 662 (Va. 1979); and *Paul v. Nat’l Life*, 352 S.E.2d 550 (W. Va. 1986). Scholarly writing of a critical bent includes: Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Alfred Hill, *Governmental Interest and the Conflict of Laws — A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Friedrich K. Juenger, *Governmental Interests — Real and Spurious — in Multistate Disputes*, 21 UC DAVIS L. REV. 515 (1988); and P. John Kozyris, *Interest Analysis Facing Its Critics — And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569 (1985).

¹⁴¹ See Simson, *supra* note 23, at 283, 295.

¹⁴² See *id.* at 283-84.

3. If not, apply forum law with regard to each issue in the case unless:
 - a. The foreign elements in the case bring into play a policy that would not be materially implicated if the case were confined in its elements to the forum state;
 - b. Such policy militates strongly in favor of a choice of nonforum law; *and*
 - c. The policy preference expressed in the forum state's internal law is not so strong as to belie the possibility that the forum state's lawmakers could intend it to yield to another policy in a multistate case.¹⁴³

I explained the operation of, and thinking behind, this approach in considerable detail in the article in which I first proposed it. I highlight below the key ingredients of the approach, and I refer the interested or skeptical reader to my earlier article for a more detailed account.¹⁴⁴

In essence, the first step of the approach requires a choice of jurisdiction — a decision as to which jurisdiction should have authority to determine the outcome of the case. The second and third steps instruct the court how to make the ultimate choice of law, with the prescription varying depending on whether or not the jurisdiction identified as authoritative in Step 1 is the forum state.

Step 1 owes an obvious debt to Currie's governmental interest analysis. Like Currie's approach, it recognizes the centrality to choice of law of the notion of state interests. In addition, it likewise tacitly pursues a policy of maximizing forum interests in the long run.¹⁴⁵

¹⁴³ *Id.* at 279.

¹⁴⁴ On the view that it is unnecessary and probably a distraction for the reader, I have not attempted in the footnotes to provide page cites to my article for each point in the synopsis to follow. For anyone seeking further detail on a particular point, however, I note that the synopsis generally follows the sequence of the discussion in the article.

¹⁴⁵ See *supra* text accompanying notes 92-100, 119-22 (discussing Currie's approach). In pursuing the policy of long-term maximization of forum interests, Step 1 adopts a strategy — giving effect to a forum-state interest absent a greater interest on the part of another state — that allows for balancing interests. Although Currie rejected any balancing of interests, various courts and scholars have endorsed it. See *supra* note 122 and accompanying text. As indicated in the part of my article illustrating the application of Step 1, see Simson, *supra* note 23, at 284-87, I am mindful of the need to minimize subjectivity in balancing, and I suggest in that part of the article "some possibilities for simplification" (*id.* at 284) that, along with the more objective nature of the interests featured in my approach as compared to those in

However, as my use of italics in the Step 1 phrase “interest in *determining the outcome of the case*” is intended to emphasize, Step 1 focuses on a type of interest that is demonstrably different from the type with which the Currie approach is concerned. While Currie focused on states’ interests in applying in the particular multistate case at hand the policies underlying their internal (i.e., local or nonconflicts) laws of tort, contract, etc., Step 1 looks at states’ interests in determining the case’s outcome. In addition, while Currie’s interest analysis decides whether or not a state interest exists by asking whether applying an underlying, internal-law policy would benefit the lawmaking state’s residents, Step 1 instead does so by asking whether the welfare of the state’s residents would be affected by how the case comes out.

Gauging interests in terms of outcome-determination, as Step 1 prescribes, corrects for certain shortcomings in Currie-style interest analysis. By focusing on outcome-determining interests, Step 1 tacitly takes a broader, more realistic, and less manipulable view of the state interests that come into play in cases transcending the borders of a single state. Unlike the Currie approach, it recognizes that, out of regard for choice-of-law policies such as protecting justified expectations or serving the needs of the interstate and international systems, a state may have an interest in applying the internal law of another state. As made clear by Step 3, Step 1 implicitly allows for the operation of a wide range of choice-of-law policies, while the Currie analysis, with its focus on policies underlying states’ internal laws, does not. Also unlike the Currie method, Step 1 recognizes that, for reasons of fairness and morality, a state may have an interest in applying its own internal law to *disadvantage* its residents. Finally, the Step 1 inquiry as to whether the outcome of the case stands to affect a state’s residents is considerably more conducive to principled, consistent judicial decisionmaking than the inquiry mandated by the Currie methodology into the policies on the lawmakers’ minds when they adopted the internal laws potentially applicable in the case.

Step 2 tells the court how to proceed if the Step 1 analysis indicates that a foreign jurisdiction has the paramount interest in determining outcome. By telling the court to adopt a “renvoi”-like posture — apply the foreign jurisdiction’s choice-of-law methodology as if it were a court sitting in that jurisdiction¹⁴⁶ — Step 2 ensures that the foreign

Currie’s, would help minimize such subjectivity.

¹⁴⁶ “Renvoi,” part of the traditional rules methodology, calls upon a court to look to the whole (conflicts) law of the jurisdiction selected by the applicable rule — e.g., place of making or place of wrong — that follows immediately from the

interest receives the respect that it must receive if the forum wishes to maximize forum interests in the long run. Only by affording the paramount foreign interest such respect can the forum realistically hope for reciprocal treatment of forum interests when a tribunal in the other state confronts a case in which the state now acting as the forum has the paramount interest.

Step 3 prescribes the appropriate judicial response if the court's Step 1 analysis indicates that no state has a greater interest than the forum state in determining the outcome. The centerpiece of Step 3 is a weighty presumption in favor of choosing forum law. Unless each of three conditions, discussed below, is met, forum law should be applied. The thinking behind Step 3 is that unless there is a strong justification for departing from forum law, the natural advantages that always support a choice of forum law are sufficiently great to call for choosing that law.

Step 3 tacitly proceeds on the assumption that in formulating the forum state's internal laws of tort, contract, etc., state lawmakers strike policy balances that take as their paradigm situations confined in their elements to the forum state. The three Step 3 conditions seek to identify cases with one or more out-of-state elements in which the forum state lawmakers would, if asked, strike policy balances different from those reflected by the state's internal laws. Conditions (a) and (b) recognize that a case with one or more out-of-state elements may implicate a policy that strongly supports a choice of nonforum law but that would be of little or no significance if the case were entirely intrastate. In combination with condition (c), conditions (a) and (b) suggest that nonforum law should apply where such a policy exists, unless the forum-state lawmakers appear to be so strongly committed to the policy preference expressed in the relevant forum-state internal law that they could not intend it to give way to another policy in a multistate case.

2. Application to *May's Estate*

In doing Step 1, a court needs to identify, and gauge the magnitude of, the effects that the outcome of the case may have on the residents

characterization of the case — e.g., contract or tort. The First Restatement limited the usage of *renvoi* to questions “of title to land” and ones “concerning the validity of a decree of divorce.” *RESTATEMENT OF CONFLICT OF LAWS* §§ 7, 8 (1934). In using the traditional rules, however, courts have not always been so restrained. *See, e.g., Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295 (Md. 1995) (using *renvoi* in resolving question of contract interpretation); *Univ. of Chi. v. Dater*, 270 N.W. 175 (Mich. 1936) (using *renvoi* in resolving question of capacity to contract).

of the states with some connection to the case. In the litigation at hand to decide whether Sam May or his daughter Alice should be the one designated to administer Fannie's estate, New York clearly has a substantial interest in whether Sam is named to administer the estate. The welfare of this New York resident stands to be significantly affected.¹⁴⁷ Most obviously, whether or not he is named administrator determines whether or not he will enjoy the monetary and other benefits of being so named. In addition, depending on how the question of marital validity is resolved, Sam may or may not be made to suffer the reputational harm and emotional distress that could be expected to follow from a finding that his marriage was incestuous and void and his children illegitimate.

By the same token, New York has a substantial interest in whether Alice, also a New Yorker at the time of *May's Estate*,¹⁴⁸ is named to administer the estate. Her welfare, like Sam's, stands to be significantly affected by the outcome of the case. She may or may not get to enjoy the benefits of being named administratrix. In addition, the determination of the validity of her parents' marriage has various implications for her well-being in so far as it implicitly characterizes her as legitimate or illegitimate of birth.

A focus on the effect of the outcome on the two parties vying to be designated to administer Fannie's estate therefore points to New York as the jurisdiction most interested in determining the outcome of the case. New York, as the residence of both Sam and Alice, appears to be the only materially interested jurisdiction. Indeed, even if Alice had relocated a number of years earlier to Rhode Island, Step 1 would still seem to point to New York as the jurisdiction with authority to determine the outcome of the case. Although both New York and Rhode Island would have substantial outcome-determining interests, Rhode Island would not appear to have, in any objective sense, a greater interest than New York. Because Step 1 breaks "ties" between forum and nonforum interests in favor of the forum state, New York would remain the selected jurisdiction under Step 1.

Doing Step 1, however, only by reference to the case's potential impact on the two parties competing to administer the estate may slight important state interests. For example, it ignores the state interests arising out of the case's potential impact on Sam and Fannie's five children other than Alice, all of whom joined the litigation on one

¹⁴⁷ With regard to Sam's continued residence in New York as of the time of *May's Estate*, see Record on Appeal, *supra* note 49, at 6 (listing father's and children's addresses).

¹⁴⁸ *Id.*

side or the other. Like Alice, if their parents' marriage were held invalid in the litigation at hand, they all would have to bear the repercussions of being publicly labeled illegitimate of birth. With these five individuals' well-being thus implicated, the states in which they resided at the time of suit had interests in determining the outcome.

Whether or not these interests were comparable in magnitude to the state interests based on the case's potential effect on Sam and Alice is open to debate. In my view, it seems most reasonable to assume that they were not. Each of the state interests relating to Sam and Alice's welfare was a function of two types of effect that the case may have had on its residents' well-being: (1) the effect of being awarded or denied the benefits of being named to administer Fannie's estate; and (2) the effect of being characterized or not characterized as illegitimate of birth (in Alice's case) or as the father of illegitimate children (in Sam's case). Because the state interests relating to the other children's welfare were based on only one of these two potential effects — the second — each such interest seems to be materially less weighty than each of the interests related to Sam and Alice.

In any event, however, the facts of *May's Estate* are such that the Step 1 analysis is not significantly different whether or not the interests relating to the five other children are considered comparable in magnitude to the interests relating to Sam and Alice. Like Sam and Alice, these five children were all New York residents at the time of *May's Estate*.¹⁴⁹ Even if not comparable to the New York interests relating to Sam and Alice, the New York interests relating to the five other children only reinforce the conclusion that New York should be the selected jurisdiction under Step 1.

Other, more generalized, interests could also be considered under Step 1. Attention to such interests, however, provides no real basis for reaching a different conclusion as to the selected jurisdiction under Step 1. For example, the likelihood that the outcome of *May's Estate* would affect Jewish New Yorkers' readiness to comply with the New York prohibition on uncle-niece marriages was not insignificant. Because Jewish New Yorkers' degree of compliance with the prohibition surely had bearing on their well-being, New York had a "general deterrent" interest in the outcome of the case. Though at least arguably less weighty than either of the interests deriving from the state's relationship to Sam and Alice, this interest was also one belonging to New York. It therefore could only serve to lend further

¹⁴⁹ *Id.*

support to the conclusion that the selected jurisdiction under Step 1 should be New York.

The outcome of *May's Estate* was apt to have certain effects on the welfare of the people of Rhode Island as a whole. None of these generalized effects, however, alone or in combination, seemed to give rise to a substantial Rhode Island interest in determining outcome. The outcome might have had some effect, for example, both on whether Jews in Rhode Island and elsewhere perceived Rhode Island as a hospitable environment for Jews and on whether people throughout the country recognized Rhode Island as committed to religious diversity. It is highly dubious, however, that either of those possible effects translated into a material Rhode Island interest in determining outcome, particularly because both effects were likely to follow regardless of outcome. As suggested earlier,¹⁵⁰ whether Sam or Alice prevailed, the publicity given the Rhode Island law by the New York Court of Appeals' discussion of the law in its opinion would probably yield positive effects of both sorts.

By the same token, the outcome of *May's Estate* could have been expected to have some effect on the Rhode Island economy by encouraging or not encouraging Jewish uncle-niece couples to get married in Rhode Island. As previously discussed,¹⁵¹ however, it is very doubtful that the magnitude of the anticipated economic effect would be anything but trivial.

Ultimately, then, application of Step 1 to *May's Estate* points unequivocally to New York as the state that should be recognized as having authority to determine the outcome of the case. In various instances, the issue as to which jurisdiction should be selected under Step 1 will be a matter on which reasonable people may differ. *May's Estate*, however, was not such an instance.

Under my proposed approach, if New York, the forum state, is the selected jurisdiction under Step 1, then the court should follow Step 3 in making its ultimate choice of law. In resolving the choice-of-law issue presented by *May's Estate*, the court therefore must begin with a strong presumption in favor of New York's internal law — i.e., its prohibition on uncle-niece marriage. It then should consider carefully whether the multistate elements of the case implicate a policy not significantly implicated in an intrastate case of this sort and, if so, whether such policy strongly favors a choice of Rhode Island law.

In setting forth my approach, I suggested that two policies warrant

¹⁵⁰ See *supra* text following note 122.

¹⁵¹ See *supra* text accompanying notes 114-16.

special consideration at this juncture of the analysis: protecting justified expectations, and serving the needs of the interstate and international systems.¹⁵² On the relatively rare occasions that the forum-law presumption stated in Step 3 should give way to a policy of particular importance in multistate cases, one of these two policies is very likely to be the policy implicated.

As discussed earlier, the protection of justified expectations has a relevance in *May's Estate* that it would not have if the case transpired entirely within New York.¹⁵³ Sam and Fannie's travel to Rhode Island for purposes of taking advantage of its distinctive marriage laws provides a basis for a justified-expectations claim that Rhode Island law should govern the validity of their marriage — a claim that could not conceivably be made in an entirely intrastate New York case. As also discussed earlier, however, this justified-expectations claim is simply not a weighty one.¹⁵⁴

The policy of serving the needs of the interstate and international systems comes into play with even less force.¹⁵⁵ The only sense in which it appears to come into play at all is that the court's decision in *May's Estate* may have some bearing on the frequency with which Jewish uncle-niece couples travel to Rhode Island. To the extent that a decision upholding the marriage may encourage such travel, the interstate needs of ensuring people's right to travel freely from state to state and of promoting economic activities across state lines are served to some degree.¹⁵⁶ Both needs are served far too insignificantly, however, to justify departing from forum law.

With regard to the need to safeguard people's right to travel, whether Rhode Island or New York law is applied in *May's Estate*, no

¹⁵² Simson, *supra* note 23, at 291.

¹⁵³ See *supra* Part II.C.2.

¹⁵⁴ See *supra* Part II.C.2.

¹⁵⁵ Discussions of this choice-of-law policy may be found in: RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d (1971); Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962-64 (1952); Leflar, *supra* note 44, at 285-87, 318-19; Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases Under the Second Restatement and Leflar's Choice-Influencing Considerations*, 70 TUL. L. REV. 2465 (1996); and Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 928-41 (1975).

¹⁵⁶ For choice-of-law decisions expressly relying upon the need to facilitate interstate and international travel, see *Barrett v. Foster Grant Co.*, 450 F.2d 1146, 1152 (1st Cir. 1971); *Rungee v. Allied Van Lines, Inc.*, 449 P.2d 378, 383 (Idaho 1968). For ones invoking the need to promote interstate and international commercial activity, see *Lauritzen v. Larsen*, 345 U.S. 571, 581-82 (1953); *Lurie v. Blackwell*, 51 P.3d 846, 848-49 (Wyo. 2002).

one is in any way being restricted in his or her right to travel freely across state lines. Instead, all that is happening is that one tiny subset of the population — Jewish uncles and nieces wishing to marry one another — are either being encouraged or not being encouraged to take one trip to another state.

As far as the need to promote interstate commercial activities, a choice of New York or Rhode Island law is similarly of virtually no consequence. As already discussed, if the court chooses the law (Rhode Island's) that by validating the marriage might encourage some Jewish uncle-niece couples to get married in Rhode Island, the economic repercussions for Rhode Island are minimal are best. The need to promote interstate commercial activities is trivially served as a result.

Finally, even assuming, for purposes of argument, that justified expectations or interstate needs offered a weighty reason for choosing Rhode Island law, it is doubtful that the remaining condition under Step 3 for nonapplication of forum law is met. Is the New York statute's policy against uncle-niece marriages not so strong that the legislature could have intended it to give way to another policy in a multistate case? The strength of a state's policy is almost always difficult to gauge with precision. Nonetheless, in this instance, there are a number of indications that the New York lawmakers regarded the policy against uncle-niece marriages as so weighty as to preclude its yielding to another policy in a multistate case. In particular, the statutory prohibition on uncle-niece marriage is paired with prohibitions of other types of marriage — parent-child and brother-sister — widely regarded as repugnant.¹⁵⁷ In addition, the statute affixes to uncle-niece marriage, as to those others, the highly charged label of "incestuous," and it declares all these incestuous marriages "void," rather than simply voidable.¹⁵⁸ Lastly, the statute makes entering into, solemnizing, or abetting the solemnization of an uncle-niece or other incestuous marriage a criminal offense and provides for a mandatory fine and possible imprisonment of up to six months.¹⁵⁹

¹⁵⁷ N.Y. DOM. REL. LAW § 5 (McKinney 1999). As discussed *supra* note 82 and accompanying text, an 1893 statute added uncle-niece and aunt-nephew marriages to the list of marriages statutorily prohibited as incestuous.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

III. INTERSTATE RECOGNITION OF SAME-SEX MARRIAGE, AND THE
UNCONSTITUTIONALITY OF SAME-SEX MARRIAGE PROHIBITIONS

If my analysis in this Article is correct, there should be little question that *May's Estate* was wrongly decided. Rather than deferring to the law of the state of celebration and validating an uncle-niece marriage between two New Yorkers, the New York Court of Appeals should have abided by the relevant New York statute and refused to recognize the marriage. A reader reasonably might infer from my discussion of *May's Estate* that I would take the same view of the appropriate choice of law if the marriage in question were a same-sex, rather than uncle-niece, one. In fact, however, I would not.

The issues of interstate recognition of same-sex marriage and interstate recognition of uncle-niece marriage are fundamentally different and should be treated as such. In essence, the difference between the two issues is the difference between policy choices and constitutional law. While a state is free to adopt a policy of prohibiting or allowing uncle-niece marriages as it sees fit, the decision whether to prohibit or allow same-sex marriage is not a policy choice for each state to make. Rather, it is a decision that the federal Constitution, properly understood, makes for every state.¹⁶⁰ As I argue below, the Constitution requires states to give same-sex couples the same freedom to marry within their borders as they give opposite-sex couples. If so, it readily follows that a court cannot justify denying recognition of a same-sex marriage celebrated out of state by citing a forum-state policy against same-sex marriage.

In discussing New York's prohibition on uncle-niece marriage, I made no mention of any constitutional difficulties the prohibition may raise. I did not mention any because none of any real substance exists. The New York legislature's prohibition on uncle-niece marriage was a policy decision that the New York legislature had every right to make,

¹⁶⁰ As discussed at the start of this Article, see *supra* notes 1-2, 10-12 and accompanying text, prohibitions on same-sex marriage may be found to clash with states' constitutions. For present purposes, I do not attempt to address the constitutionality of same-sex marriage prohibitions under the various states' constitutions. The implications of state constitutional law for prohibitions on same-sex marriage are discussed in: Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism — Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249 (2004); *Symposium on Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 1 (2004); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001); and Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1852-61, 1868-72 (2004).

and the New York high court in *May's Estate* simply failed to give that decision the respect that it was owed.

To be sure, the New York statutory prohibition on uncle-niece marriage implicates the “right to marry,” and the U.S. Supreme Court has long treated the “right to marry” as a fundamental right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁶¹ In addition, under the relevant Supreme Court case law, a denial of a fundamental right cannot stand unless necessary to serve a compelling state interest.¹⁶² However, the Court historically has afforded, and sensibly should afford, the states a certain amount of deference in deciding what types of marriage may be forbidden consistent with this “strict scrutiny” test.¹⁶³ If, for example, one state wishes to bar children under eighteen from marrying without parental consent and another state would place the prohibition at sixteen, the Court has given no indication that the Constitution prevents either state from drawing the line where it thinks best.¹⁶⁴ By the same token, in light of the genetic and sociological justifications for banning uncle-niece marriages,¹⁶⁵ the Court almost certainly, and quite appropriately,

¹⁶¹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (equal protection); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (due process). For general discussion of this and other fundamental rights, see Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

¹⁶² See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (articulating the necessary-to-a-compelling-interest test in a due process context); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969) (articulating that test in an equal protection context).

¹⁶³ The Court has characterized the necessary-to-a-compelling-interest test in these terms on numerous occasions, including, for example, *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973).

¹⁶⁴ Cf. *Roper v. Simmons*, 125 S. Ct. 1183, 1195, 1204-05 (2005) (observing, in case involving juvenile death penalty, that “[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from . . . marrying without parental consent,” and presenting in appendix, without any suggestion of possible constitutional difficulties, the minimum age for marrying without parental consent set by statute in each state — as low as fifteen in one state and as high as nineteen in another).

¹⁶⁵ See *supra* note 117 and accompanying text. Of course, the genetic justification does not apply if the uncle and niece are not blood relations. In that instance, a defense of the marital prohibition would focus on sociological grounds. Such a defense is not as potent as one that is also based on genetics. However, it reasonably may be viewed as quite weighty, see, e.g., Storke, *supra* note 20, at 476-77 (taking that view), though some would urge the contrary view, see, e.g., UNIF. MARRIAGE & DIVORCE ACT § 207 & cmt. (amended 1973), 9A U.L.A. 183-84 (1998 & Supp. 2005) (uniform law, adopted in eight states, includes uncle-niece marriages among those prohibited, but limits uncle-niece prohibition and almost all prohibitions on marriage between family relations to blood relations). Though not nonexistent, the likelihood

would not substitute its view of whether a ban on uncle-niece marriages is necessary to a compelling interest for the state's tacit view that it is.

In contrast, a state's prohibition on same-sex marriage raises constitutional difficulties that in my view are not only substantial but insuperable. As I argue below, Supreme Court doctrines developed in other contexts strongly support holding such prohibitions unconstitutional. Moreover, in light of the Court's decision in *Lawrence v. Texas* in 2003, the Court's willingness to adopt one or more of these arguments and invalidate bans on same-sex marriage seems much more a question of when, rather than if.¹⁶⁶ Faced with a due process challenge to a prohibition on same-sex sodomy, the Court in *Lawrence* sustained the challenge and expressly overruled its 1986 holding to the contrary in *Bowers v. Hardwick*.¹⁶⁷ In language no less forceful than that used by the *Bowers* Court to deny the constitutional claim,¹⁶⁸ Justice Kennedy's opinion for the Court in *Lawrence* recognized "the protected right of homosexual adults to engage in

that the Supreme Court would tell states that they are constitutionally required to limit any bans to blood relations seems low.

¹⁶⁶ The abundant scholarship on *Lawrence v. Texas*, 539 U.S. 558 (2003), includes: Colloquium, *The Boundaries of Liberty After Lawrence v. Texas*, 102 MICH. L. REV. 1447 (2004); Katherine M. Francke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27; Symposium, *Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017 (2004); Symposium, *Privacy Rights in a Post Lawrence World: Responses to Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 263 (2004); and Laurence H. Tribe, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

¹⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). Seven years prior to *Lawrence*, the Court in *Romer v. Evans*, 517 U.S. 620 (1996), had taken a major step away from *Bowers* and toward *Lawrence*. In *Romer* the Court struck down under the Equal Protection Clause a 1992 amendment to the Colorado Constitution that nullified any state or local laws prohibiting discrimination based on sexual orientation. Justice Kennedy's majority opinion did not expressly question the validity of *Bowers*. Its tenor contrasted sharply, however, with that of the majority opinion in *Bowers*. According to the Court in *Romer*, the Colorado amendment did not simply disadvantage gays and lesbians but did so out of "animosity toward the class of persons affected," *id.* at 634, and for the impermissible purpose of "mak[ing] them unequal to everyone else," *id.* at 635.

¹⁶⁸ Most memorably, the Court in *Bowers* characterized as "at best, facetious" the notion that the right at issue in the case could qualify as fundamental under the Court's standards for fundamental rights. *Id.* at 194.

intimate, consensual conduct”¹⁶⁹ and repudiated *Bowers* as a decision that “demeans the lives of homosexual persons.”¹⁷⁰

¹⁶⁹ *Lawrence*, 539 U.S. at 576.

¹⁷⁰ *Id.* at 575. Justice O’Connor was one of the six Justices in *Lawrence* who voted to strike down the Texas same-sex sodomy ban. Her retirement and Justice Alito’s appointment to her seat may well mean one fewer member of the Court relatively responsive to claims of gay and lesbian rights. See Adam Liptak, *In Abortion Rulings, Idea of Marriage Is Pivotal; Decisions Offer Clues to Judge Alito’s View of Divisive Issues*, N.Y. TIMES, Nov. 2, 2005, at A1. Ultimately, however, Justice O’Connor’s departure from the Court and replacement by Justice Alito may not affect the outcome if and when the constitutionality of prohibitions on same-sex marriage come before the Court. The remaining Justices from the *Lawrence* majority still constitute a majority of the Court. Moreover, of the six in the *Lawrence* majority, Justice O’Connor appears to be the one who would be least receptive to recognizing a constitutional right to same-sex marriage. Not only was Justice O’Connor a member of the majority in *Bowers*, but in declining to join Justice Kennedy’s opinion for the Court in *Lawrence*, she made clear that she was not prepared to overrule *Bowers*. *Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring in the judgment). Also, in voting to invalidate the Texas law, Justice O’Connor expressly did not reach the due process issue addressed by Justice Kennedy and instead rested on a narrower, equal protection ground. *Id.* at 579, 585. Last but not least, in reaching out to comment on one issue clearly not before the Court — the constitutionality of prohibitions on same-sex marriage — Justice O’Connor indicated her reluctance to strike down such laws. *Id.* at 585 (“Unlike the moral disapproval of same-sex relations — the asserted state interest in this case — other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).

I do not read the Court’s recent decision in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, 126 S. Ct. 1297 (2006), as casting serious doubt on the existence of five probable votes on the Court for invalidating same-sex marriage prohibitions in the not too distant future. According to Chief Justice Roberts’s opinion for a unanimous Court in *FAIR*, the First Amendment is no obstacle to Congress’s conditioning universities’ receipt of federal funding on their treating military recruiters no differently than they treat other employers who come to campus. In the Court’s view, if universities, out of objection to the military’s discrimination against gays and lesbians by means of its “don’t ask, don’t tell” policy, wish to exclude military recruiters from campus or otherwise be less accommodating to military recruiters than other employers, they are free to do so, but they will lose federal funding as a result.

It is tempting to see the case as one primarily about gay and lesbian rights and, in that vein, to understand the Court’s disposition of it as a statement of its attitude toward such rights. The Court’s reasoning, however, strongly suggests that deference to Congress in military matters was foremost in the Court’s mind. As history shows, when the Court deals with congressional legislation on such matters, claims of individual rights almost invariably receive relatively short shrift. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (rejecting claim that Congress’s authorization of male-only draft registration constituted unconstitutional sex discrimination). In short, *FAIR* seems much more a comment on the Court’s attitude toward military cases than its attitude toward gay and lesbian rights.

A. *The Fundamental Right to Marry*

As already noted, the Supreme Court has recognized that individuals have a fundamental right to marry that is infringed by restrictions upon whom and when a person may marry.¹⁷¹ To justify denying someone the very basic autonomy interest of deciding whom they will marry because the prospective spouse is of the same sex, the state must show that this serious deprivation is necessary to serve a compelling state interest. This showing is not one, however, that the state can make, and the Due Process Clause is violated as a result.¹⁷²

¹⁷¹ See *supra* note 161 and accompanying text. In holding Virginia's ban on interracial marriage invalid under the Due Process Clause, the Court in *Loving v. Virginia*, 388 U.S. 1 (1967), described the importance of the right to marry in memorable and emphatic terms: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Court also held the ban invalid under the Equal Protection Clause, underlining that the law discriminated on the basis of a suspect classification (race). *Id.* at 7-12. For more on equal protection and suspect classifications, see *infra* Part III.B.

¹⁷² For commentary maintaining that same-sex marriage bans violate the fundamental right to marry, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 123-52 (1996); STRASSER, *supra* note 18, at 49-74; *Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1605-11 (1989). For the contrary view, see George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 593-608 (1999); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 28-39. For an interesting analysis that offers some support to those arguing for a fundamental rights violation but that expressly stops short of claiming that such a violation exists, see Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004).

As noted earlier, see *supra* text accompanying note 161, the Supreme Court has treated the right to marry as fundamental under both the Due Process and Equal Protection Clauses. While a right-to-marry challenge under the Due Process Clause is noncomparative (i.e., without regard to how the state treats others), one under the Equal Protection Clause is comparative (i.e., with regard to the state's more favorable treatment of persons wishing to marry someone of the opposite sex). By the same token, a court addressing a right-to-marry challenge under the Due Process Clause must think noncomparatively, asking whether the state's denial of the right to persons wishing to marry someone of the same sex is necessary to serve a compelling state interest; and a court addressing such a challenge under the Equal Protection Clause must think comparatively, asking whether the state's starkly less favorable treatment of people wishing to marry someone of the same sex than people wishing to marry someone of the opposite sex is necessary to serve a compelling state interest. Ultimately, for essentially the reasons set forth in the text immediately below, the state is no more able to satisfy the necessary-to-a-compelling-interest test in an equal

First of all, after *Lawrence* and its affirmation of gays' and lesbians' "protected right" to "engage in intimate, consensual conduct,"¹⁷³ the state does not arguably have a compelling interest in preventing same-sex marriages in order to minimize the frequency of same-sex sodomy. Indeed, after *Lawrence*, this interest is not only not compelling; it is not even legitimate.

Second, a same-sex marriage prohibition cannot be cogently defended as necessary to serve a compelling interest in avoiding a type of union thought to be immoral. Although the Supreme Court has yet to make clear the criteria to be used in deciding the weightiness of a moral interest, one important criterion almost certainly is the degree to which the moral judgment underlying the interest is widely shared among the members of society. According to public opinion polls, a shrinking majority of people in the United States favor prohibiting same-sex marriage, while a substantial and growing portion of the population favor legal recognition.¹⁷⁴ Significantly, in terms of future trends, a majority of those under thirty favor legal recognition,¹⁷⁵ and

protection context than in a due process one. For analytical clarity and to avoid redundancy, I have focused in the text on the due process issue alone.

¹⁷³ *Lawrence*, 539 U.S. at 576.

¹⁷⁴ For example, in both March 1996 and November 2003, a national CNN/*USA Today*/Gallup Poll asked people eighteen years of age and older the question, "Do you think marriages between homosexuals should or should not be recognized by the law as valid, with the same rights as traditional marriages?" In the March 1996 poll, 27% responded "should," 68% responded "should not," and 5% had no opinion. GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1996*, at 48 (1997). In the November 2003 poll, the responses were broken down into two age groups, rather than provided cumulatively. Nonetheless, it is apparent that the cumulative percentages for 2003 had to be significantly different from those for 1996. Among people eighteen to twenty-nine years of age, 53% responded "should," 45% responded "should not," and 2% had no opinion; and among people age thirty and older, 32% responded "should," 64% responded "should not," and 4% had no opinion. GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 2003*, at 391-92 (2004) [hereinafter *GALLUP POLL 2003*]. In a May 2005 *Boston Globe* poll conducted nationwide among people eighteen and older by the University of New Hampshire Survey Center, the responses to the question, "Overall, do you approve or disapprove of gay and lesbian couples being allowed to get married?" were as follows: approve 37%, disapprove 50%, neutral 11%, unsure 2%. See Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage, Split Seen by Region, Age, Globe Poll Finds*, *BOSTON GLOBE*, May 15, 2005, at A1, available at <http://www.pollingreport.com/civil.htm>.

¹⁷⁵ According to an ABC News/*Washington Post* national poll in January 2004, 55% of those 18-29 years of age favor legalizing same-sex marriage, while 42% of that age group believes it should be illegal. David Morris & Gary Langer, *Same-Sex Marriage: Most Oppose It, but Balk at Amending Constitution*, Jan. 21, 2004, http://abcnews.go.com/sections/us/Relationships/same_sex_marriage_poll_040121.html. To similar effect, see *supra* note 174 (providing data from November 2003 CNN/*USA*

this age group in recent years consistently has favored legal recognition at a substantially higher rate than their elders.¹⁷⁶ Furthermore, as some measure of intensity of feeling, it is noteworthy that the percentage of the population supporting a constitutional amendment banning same-sex marriage throughout the United States is materially less than the percentage supporting a legislative ban.¹⁷⁷ Under the circumstances, the notion that there is a compelling moral interest in banning same-sex marriage rather clearly overstates the case.

Third and lastly, bans on same-sex marriage are not rescued from a finding of unconstitutionality by the state's interest in encouraging procreation.¹⁷⁸ That interest may well qualify as compelling. The means-end relationship, however, falls far short of the "necessary" connection required by strict scrutiny. Prohibiting same-sex couples from marrying does little to further procreation. Concededly, if allowed to marry, such a couple would not bear any children by sexual intercourse with one another. If not allowed to marry, however, they are not apt to wed persons of the opposite sex and have children by sexual intercourse with their spouses. Indeed, in light of current reproductive technologies, same-sex marriage bans may well result in a net loss of births. Although some same-sex couples may take advantage of these technologies even if they are not allowed to marry, substantially more may do so if they are allowed to marry.

Today/Gallup Poll).

¹⁷⁶ See GALLUP POLL 2003, *supra* note 174, at 393 ("Young Americans are substantially more likely than older Americans to support marriages between homosexual couples: 53% versus 32%, respectively. This greater acceptance of gay and lesbian rights among young Americans has been a consistent finding in Gallup Polls for a number of years.").

¹⁷⁷ When asked in a January 2004 ABC News/*Washington Post* nationwide poll, "Would you support amending the U.S. Constitution to make it illegal for homosexual couples to get married anywhere in the U.S., or should each state make its own laws on homosexual marriage?," 38% of people responded in support of an amendment. See Morris & Langer, *supra* note 175. In the same poll, 55% of people said same-sex marriage should be illegal. See *id.* To similar effect, see Frank Newport, *Opposition to Legalized Same-Sex Marriage Steady: Support for Civil Unions Increases*, GALLUP POLL NEWS SERVICE, Mar. 11, 2004, at 20 (reporting that, according to a March 2004 poll, "there is a drop off of 11 points between those who believe that same-sex marriage should not be legal and those willing to support a constitutional amendment," and suggesting that "[a]pparently, a number of Americans do not believe that the issue warrants such a high level of legal response").

¹⁷⁸ For an attempt to justify same-sex marriage prohibitions in such terms, see *Adams v. Howerton*, 486 F. Supp. 1119, 1123-25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).

Altogether, if a state is truly intent on promoting procreation, it ought to be prohibiting marriage between opposite-sex couples who do not intend to have children. Similarly, it should prohibit any opposite sex couple from marrying if, for reasons pertaining to one member of the couple, they are incapable as a couple of having children. The fact that states do no such things underlines the tenuous nature of the connection between same-sex marriage prohibitions and the state interest in encouraging procreation.¹⁷⁹

B. *Sexual Orientation as a Suspect Classification*

A second ground for attack on the constitutionality of prohibitions on same-sex marriage arises under the Equal Protection Clause and focuses not on the right at issue, but rather on who is being disadvantaged relative to whom. Under this line of argument, a ban on same-sex marriage is so problematic because it classifies people — treats them more or less favorably — on the basis of a characteristic, sexual orientation, that is constitutionally “suspect.”

Concededly, the Supreme Court thus far has not added sexual orientation to the short list of bases for classification that it has declared suspect — race, national origin, alienage, and religion.¹⁸⁰ However, the Court also has not ruled out adding sexual orientation to this list, and a persuasive case can be made for its doing so.¹⁸¹

¹⁷⁹ For other sources critical of the various justifications offered for bans on same-sex marriage, see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961-68 (Mass. 2003); ESKRIDGE, *supra* note 172, at 123-52; KOPPELMAN, *supra* note 10, at 72-93; and STRASSER, *supra* note 18, at 49-74.

¹⁸⁰ See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (discussing the need for strict scrutiny if a classification “is drawn upon inherently suspect distinctions such as race, religion, or alienage”); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (stating that “the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect”).

¹⁸¹ For the view that classifying on the basis of sexual orientation should be regarded as suspect, see ESKRIDGE, *supra* note 172, at 172-82; STRASSER, *supra* note 18, at 26-44. For commentary to the contrary, see Wardle, *supra* note 172, at 62-75, 88-95.

Since the 1970s, the Supreme Court has applied a standard of review to sex classifications that is more stringent than traditional rational basis review and less stringent than the strict scrutiny review applied to suspect classifications. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.4, at 723-27 (2d ed. 2002). Some commentators have invoked the Court’s recognition of sex classifications as essentially semi-suspect to attack the constitutionality under the Equal Protection Clause of same-sex marriage prohibitions. See ESKRIDGE, *supra* note 172, at 162-72; KOPPELMAN, *supra* note 10, at 53-71. Basically, they have maintained that: (1) such prohibitions not only take sex into account but also operate to the

In articulating the criteria for determining whether a basis for classification is suspect, the Court has been less than consistent.¹⁸² It has mentioned four criteria, however, with particular frequency: the relative political powerlessness of the disadvantaged group;¹⁸³ the extent to which the disadvantaged group has been the object of societal prejudice;¹⁸⁴ the degree to which lawmakers have historically discriminated against the disadvantaged group;¹⁸⁵ and whether the classification is based on an unchangeable characteristic.¹⁸⁶

disadvantage of women, thus classifying on the basis of sex; (2) as sex classifications, the laws must meet the applicable middle-tier level of review — “substantially related” to “important governmental objectives,” as one case put it (*Craig v. Boren*, 429 U.S. 190, 197 (1976)), or an “exceedingly persuasive” justification, as another case put it (*United States v. Virginia*, 518 U.S. 515, 531 (1996)); and (3) the laws fail to satisfy middle-tier review.

The proponents of this view make a very thoughtful and sophisticated argument. Ultimately, however, I am inclined to see it as less likely to prevail than the three lines of attack that I present. As an initial matter, the argument may be unable to overcome the hurdle of persuading the Court that a sex classification is at hand. Cf. Gary J. Simson, *Separate but Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 448-51 (2005) (discussing the nature of this hurdle in the context of coordinate single-sex schools). Even assuming that this challenge can be met, the argument may fail due to the relative weakness of middle-tier review as applied by the Court. At least some of the cases in which the Court has upheld sex classifications may be understood as tacitly holding that middle-tier review is satisfied as long as the sex classification under review bears more than a minimal relationship to a state interest of some substance. See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (upholding different requirements for acquisition of citizenship by foreign-born child of unmarried parents depending on whether citizen parent is mother or father); *Michael M. v. Super. Ct.*, 450 U.S. 464 (1981) (upholding California statutory rape law that prohibits sexual intercourse if it involves a female under eighteen, limits criminal penalties to males, and applies such penalties to males even if they were under eighteen when they violated the prohibition). If so, the moral justification for prohibitions on same-sex marriage may be adequate to sustain such prohibitions even if they are found to classify on the basis of sex.

¹⁸² For example, the criteria discussed by the Court in *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964), overlap with, but are not all the same as, those mentioned in *Plyler v. Doe*, 457 U.S. 202, 216-17 n.14 (1982).

¹⁸³ Cases mentioning this factor include *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), and *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹⁸⁴ For example, note the Court’s articulation of a societal-prejudice criterion in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 443 (1985), and *Plyler*, 457 U.S. at 216-17 n.14.

¹⁸⁵ The Justices have recognized the importance of historical disadvantage in a number of cases, including *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam), and *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973) (plurality opinion).

¹⁸⁶ Among the cases in which the Justices have invoked an unchangeable-

Inssofar as the Court has treated any one of these four as most central, it would seem to be the relative political powerlessness of the disadvantaged group.¹⁸⁷ Measured in terms of this criterion, the suspectness of classifying on the basis of sexual orientation seems quite clear. Like African Americans — the group that, in light of the history of the adoption of the Equal Protection Clause, is logically seen as the paradigmatic suspectly disadvantaged group¹⁸⁸ — gays and lesbians are seriously limited in their ability to influence the political process.

By all indications, gays and lesbians generally are vastly outnumbered on lawmaking bodies in the United States. The proportion of legislators who are openly gay or lesbian is very small. Undoubtedly, there are some gay and lesbian legislators who, out of concern for hampering their chances for election or reelection or for other reasons, have not made public their sexual orientation. Unless, however, gays and lesbians are present on lawmaking bodies in much higher proportion than their percentage of the general population — a percentage that is “1-10%, depending on the study,” according to a Harvard Medical School professor¹⁸⁹ — gays and lesbians, whether in or out of the “closet,” constitute only a small minority of lawmakers.

In light of the prejudice against gays and lesbians in various quarters of the electorate, the likelihood that they are overrepresented on legislative bodies relative to their numbers in the general population seems especially low.¹⁹⁰ Such prejudice obviously makes it more

characteristic criterion are *Plyler*, 457 U.S. at 217 n.14, and *Frontiero*, 411 U.S. at 686 (plurality opinion).

¹⁸⁷ Concededly, my perception of what the Court has been doing may be somewhat clouded by my longtime view as to what the Court should be doing. See Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974) (maintaining that in deciding whether or not a classification is suspect, the Court should focus exclusively on the relative political powerlessness of the disadvantaged group). For cases, in addition to those cited *supra* note 183, utilizing the political powerlessness criterion, see *Cleburne*, 473 U.S. at 445; *Plyler*, 457 U.S. at 217 n.14; and *Frontiero*, 411 U.S. at 686 & n.17 (plurality opinion).

¹⁸⁸ See *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880); Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 518-19 (1994).

¹⁸⁹ Marshall Forstein, *Overview of Ethical and Research Issues in Sexual Orientation Therapy*, in *SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL AND RESEARCH PERSPECTIVES* 167, 169 (Ariel Shidlo et al. eds., 2001) [hereinafter *SEXUAL CONVERSION THERAPY*].

¹⁹⁰ For discussion and analysis of such prejudice, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 205-11 (1999).

difficult for openly gay or lesbian (or “suspected” gay or lesbian) candidates to prevail. In addition, particularly in this era of heightened media exposure and diminished candidate privacy, societal prejudice deters would-be candidates from running who are eager not to make public their gay or lesbian sexual orientation.

Of course, a group’s political power is not determined solely by its actual representation on legislatures. Some groups, such as doctors, tend to have little, if any, actual representation on lawmaking bodies but exercise considerable political power because, directly or indirectly, they are able to influence substantially the decisions of those sitting on legislatures.

A number of factors strongly suggest, however, that gays and lesbians are not among such groups and that their political power much more closely approximates that of blacks. First of all, because they, like African Americans, make up only a small percentage of the electorate, they are hardly in a position to protect their interests in the political process by their voting power alone.

Second, also like African Americans, gays and lesbians tend to experience a significant degree of insularity from other groups in society. Although they may commonly interact with some groups, their social interactions with many other groups are very limited. As a result, they are not as likely as groups that mix socially with a broad cross-section of society to have other groups seek to protect their interests in the political arena. All too often, a group with relatively few friends from outside the group for social purposes has a shortage of friends from outside the group for political purposes and has less voice in the political process as a result.

Third, again like African Americans, gays and lesbians historically have often been the victims of intense prejudice at the hands of both legislators and other groups in society.¹⁹¹ The more that legislators view a group with animus, the less likely that they will weigh dispassionately and rationally the costs and benefits of classifying to the group’s disadvantage. In effect, the legislators’ prejudice diminishes the group’s political power by causing the legislators to give less deference to the group’s desires and needs than would seem to be politically expedient. As far as societal prejudice, the more that other groups in society view a group with such deep distrust and dislike, the less likely that those groups will use their political power to boost the group’s ability to protect itself from legislative unfairness.

¹⁹¹ See *id.* at 205-38, 362-71.

Finally, to the extent that there is any doubt whether gays and lesbians are comparable to blacks in relative political powerlessness, the historical record is depressingly instructive. As Professor Eskridge has chronicled, there is a long history in the United States of laws disadvantaging gays and lesbians¹⁹² — the type of history that only a group with relatively little political power could have. Moreover, as evidenced by the persistence of such highly visible forms of discrimination as the military's "don't ask, don't tell" policy¹⁹³ and, of course, prohibitions on same-sex marriage, gays and lesbians continue to suffer today from a serious deficit in political power.

As indicated in the above discussion, two of the other criteria for suspectness most frequently mentioned by the Supreme Court — the extent to which the disadvantaged group has been the object of societal prejudice, and the degree to which lawmakers have historically discriminated against the group — would be considered in the course of trying to gauge the disadvantaged group's relative political powerlessness. In addition, as also indicated above, each of these criteria strongly favors treating classifications based on sexual orientation as suspect.

The fourth and final criterion to be considered is whether the classification is based on an unchangeable characteristic. The Supreme Court plainly has not regarded fulfillment of this criterion as necessary to a finding of suspectness. If it had, it could not have included classifications based on alienage and religion — two changeable characteristics — among the four types of classifications that it has called suspect. Because the three other criteria for suspectness are met by all four types of classifications that the Court has declared suspect, the Court apparently does not assign as much importance to unchangeable characteristic as to the other three criteria in deciding whether or not a certain type of classification is suspect.

Determining whether or not sexual orientation meets the unchangeable characteristic criterion is complicated by the Court's somewhat different articulations of the criterion. In some instances, the Court has asked whether the characteristic at issue is immutable from birth.¹⁹⁴ In others, it has framed the inquiry more broadly and

¹⁹² See *id.* at 327-71.

¹⁹³ 10 U.S.C. § 654 (2000).

¹⁹⁴ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). For the view that even if sexual orientation is generally immutable, proponents of gay rights are ill-advised to frame their legal arguments in terms of immutability, see Janet E. Halley, *Sexual Orientation and the Politics of Biology*:

asked whether the characteristic is beyond the disadvantaged group's control.¹⁹⁵

If sexual orientation must be immutable from birth for the unchangeable characteristic criterion to favor a finding of suspectness, there is room for debate as to whether the criterion is met. Various scientific findings in the past fifteen years — some from the early 1990s and some as recent as 2005 — suggest that genes and sexual orientation are significantly linked and that even if genes do not wholly determine everyone's sexual orientation, they do establish innate tendencies of greater or lesser strength toward homosexuality or heterosexuality.¹⁹⁶ Such findings have not gone unchallenged.¹⁹⁷ The available evidence is such, however, that at a minimum it seems fair to conclude that (1) sexual orientation has not been shown to *lack* a substantial element of immutability from birth and (2) there is at least arguably a significant likelihood that sexual orientation *has* a substantial element of immutability from birth. Under this view, if unchangeable characteristic as a criterion for suspectness focuses on immutability from birth, the criterion does not militate against a finding of suspectness and, indeed, seems to militate at least mildly in favor of such a finding.

If unchangeable characteristic as a criterion for suspectness focuses instead on whether the characteristic at issue is beyond the individual's control, this criterion more strongly favors a finding that sexual orientation is suspect. For most people sexual orientation appears to be sufficiently set by early adulthood, if not sooner, that in later years it is, for all practical purposes, beyond their capacity to

A Critique of the Argument from Immutability, 46 STAN. L. REV. 503 (1994).

¹⁹⁵ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (“Legislation imposing special liabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”).

¹⁹⁶ The relevant earlier studies include Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991). With regard to more recent studies, see *Science and Technology: Dyed in the Womb; Homosexuality*, ECONOMIST, Oct. 11, 2003, at 99 (discussing study by Dr. Qazi Rahman of University of East London and his colleagues); Nicholas Wade, *For Gay Men, Different Scent of Attraction*, N.Y. TIMES, May 10, 2005, at A1 (discussing study by Dr. Ivanka Savic of Karolinska Institute in Stockholm, Sweden, and her colleagues).

¹⁹⁷ Challenges appear, for example, in Robert Alan Brookey, *Bio-Rhetoric, Background Beliefs and the Biology of Homosexuality*, 37 ARGUMENTATION & ADVOC. 171 (2001), and George Rice et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, 284 SCIENCE 665 (1999).

change or control.¹⁹⁸ To be sure, proponents of conversion therapy for gays and lesbians argue that such therapy has achieved successes that belie the notion of sexual orientation as unchangeable.¹⁹⁹ The great weight of psychological opinion, however, appears to be that conversion therapy is generally unhelpful,²⁰⁰ and a number of experts have maintained that it is often very harmful.²⁰¹

In sum, in keeping with the Court's approach to suspect classifications, classifying on the basis of sexual orientation should be declared suspect. Three of the four criteria most commonly cited by the Court strongly support adding sexual orientation to the Court's list of suspect bases for classification. The other criterion, unchangeable characteristic, offers at least moderate support for doing so, and it in any event is the criterion that the Court seems to consider least essential. Under the Court's equal protection case law, a determination that classifications based on sexual orientation are suspect would mean that same-sex marriage prohibitions as well as any other laws treating people differently on the basis of sexual orientation must be struck down unless the state can show that they are necessary to serve a compelling state interest. As discussed above, if this "strict scrutiny" standard applies, prohibitions on same-sex marriage are doomed.²⁰²

¹⁹⁸ In support of this view, see, for example, Forstein, *supra* note 189, at 167; Douglas C. Haldeman, *Gay Rights, Patient Rights: The Implications of Sexual Orientation Conversion Therapy*, 33 *PROF. PSYCH.: RES. & PRACTICE* 260 (2002); and Doug Grow, *Anti-Gay Seminar "Will Be Very Slick,"* *STAR TRIB.* (Minneapolis), Aug. 9, 2000, at 2B.

¹⁹⁹ See Michael Schroeder & Ariel Shidlo, *Ethical Issues in Sexual Orientation Conversion Therapies: An Empirical Study of Consumers*, in *SEXUAL CONVERSION THERAPY*, *supra* note 189, at 131 (discussing representations made by licensed conversion therapists to clients).

²⁰⁰ See Schroeder & Shidlo, *supra* note 199, at 132 (summarizing views of various individuals as well as the American Psychiatric Association and the American Psychological Association). Also, see the criticisms of conversion therapy in Forstein, *supra* note 189, and Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 *J. CONS. & CLIN. PSYCH.* 221 (1994).

²⁰¹ Such experts include Dr. Haldeman (see Douglas C. Haldeman, *Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies*, in *SEXUAL CONVERSION THERAPY*, *supra* note 189, at 117), and Drs. Schroeder and Shidlo (see Schroeder & Shidlo, *supra* note 199, at 160-62).

²⁰² See *supra* text accompanying notes 172-79. Technically speaking, my earlier discussion of the necessary-to-a-compelling-interest test and prohibitions on same-sex marriage does not strictly apply to the question at hand of whether such prohibitions can survive that test under the Equal Protection Clause. My earlier discussion was in the context of a due process analysis. Because the focus of the Equal Protection Clause is comparative and that of the Due Process Clause is noncomparative, see *supra*

C. Government Support of Religion

The third and final constitutional ground that I will discuss for challenging bans on same-sex marriage focuses on neither the right at issue nor the disadvantaged group. Instead, it focuses on the religious underpinnings of such bans. As interpreted by the Supreme Court, the First Amendment's Establishment Clause²⁰³ prohibits (1) laws adopted entirely or almost entirely for the purpose of endorsing religion and (2) laws likely to have the effect of communicating to a reasonable observer government endorsement of religion.²⁰⁴ Under both the purpose and effect prongs of this endorsement test, the forbidden religious endorsements include not only endorsements of a particular religion or religious belief but also endorsements of religion

note 172, the necessary-to-a-compelling-interest test takes on somewhat different form in the equal protection and due process contexts. Nonetheless, in this instance it should be apparent that same-sex marriage prohibitions cannot survive strict scrutiny under the Equal Protection Clause for very much the same reasons that they cannot survive such scrutiny under the Due Process Clause.

²⁰³ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). The Establishment Clause is also discussed *supra* notes 85-90 and accompanying text.

²⁰⁴ Spurred on by Justice O'Connor's opinions in *Wallace v. Jaffree*, 472 U.S. 38, 67-84 (1985) (O'Connor, J., concurring), and *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), the Court in the mid-to-late 1980s made clear its adherence to an endorsement test along the lines described in the above text. See *Allegheny County v. ACLU*, 492 U.S. 573, 592-94, 599-600 (1989); *Wallace*, 472 U.S. at 56 & n.42. The Court's adherence to some type of endorsement test, however, dates back at least to the early 1960s. Though less well-defined than the test that emerged in the 1980s, an endorsement test is implicit in the purpose and effect inquiries that the Court adopted as a general Establishment Clause test in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and that later became the first two parts of the three-part Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As the Court wrote in 1989, "[W]hether the challenged governmental practice either has the purpose or effect of 'endorsing religion' [is] a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny County*, 492 U.S. at 592.

As illustrated by a long line of cases dealing primarily with state aid to parochial schools, the Court has interpreted the Establishment Clause as a prohibition on not only government endorsement of religion but also government funding of religion. See Simson, *supra* note 38, at 481-91; Gary J. Simson, *School Vouchers and the Constitution — Permissible, Impermissible, or Required?*, 11 CORNELL J.L. & PUB. POL'Y 553, 570-75 (2002).

in general over nonreligion.²⁰⁵ If the endorsement test is given its due, prohibitions on same-sex marriage should be struck down.

Because the purpose prong of the test demands a showing of exclusive or nearly exclusive sectarian purpose before a law may be struck down under that prong, the chances for a successful challenge are almost always greater under the effect prong.²⁰⁶ Challenges to

²⁰⁵ Some Justices have maintained that the Establishment Clause does not prevent the government from favoring religion over nonreligion. For example, see the arguments to that effect in *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748-57 (2005) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.), and *Wallace v. Jaffree*, 472 U.S. 38, 98-106 (1985) (Rehnquist, J., dissenting). However, the Court has long adhered to the contrary view. See, e.g., *McCreary County*, 125 S. Ct. at 2733 (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

²⁰⁶ In its most recent discussion of the endorsement test’s inquiry into purpose, the Court maintained that someone challenging a law on the basis of purpose needs to show a “predominantly religious purpose” in order to prevail. *McCreary County*, 125 S. Ct. at 2734. The Court went on to explain that such a purpose would be found where the asserted secular purpose was “an apparent sham” or “secondary.” *Id.* at 2736.

As stated, this purpose inquiry appears to be somewhat more favorable to the challenger than the inquiry previously mandated by the Court. In particular, although the Court’s directive to ignore “sham” secular purposes is nothing new, its statement that a secular purpose would be inadequate if “secondary” seems to be a departure from the past. As the four dissenters in *McCreary* pointed out, see *id.* at 2757-58 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.), the Court’s precedents in the past 25 or so years often characterized the requisite showing as one of an entirely religious purpose. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (“[A] court may invalidate a statute only if it is motivated wholly by an impermissible purpose.”); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.”). Although some cases of this period stated the requisite showing less categorically, see, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 590, 593, 594 (1987) (invalidating law because its “primary” or “preeminent” purpose was religious); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating law because of “pre-eminent” religious purpose), it seemed appropriate to understand them, alongside the more categorical statements, as softening the entirely-religious-purpose standard but not deviating from it substantially.

Whether or not the *McCreary* majority’s formulation of the inquiry into purpose truly marks a material change in the inquiry, however, remains to be seen. First of all, the Court’s resolution of the case did not depend on any change in the inquiry. In finding that two Kentucky counties’ displays of the Ten Commandments on their

same-sex marriage prohibitions are no exception. Unless there is language in the law itself, a committee report, or the legislative debate strongly suggesting that the law is deeply rooted in religious purposes, a court is virtually certain to conclude that the law does not violate the purpose prong. Instead, it will find that (1) some legislators at least partly relied on one or more secular purposes, such as encouraging procreation and avoiding a type of union regarded by many as morally offensive and (2) this partial reliance on secular purposes suffices to immunize the law from invalidation under the purpose prong.

courthouses' walls failed to survive the requisite purpose inquiry, the Court in *McCreary* did not rely on an expansive interpretation of the purpose inquiry. Instead, the Court seemed to second the federal district and appellate courts' determinations in the case that there was no genuine secular purpose behind the counties' practice. See *McCreary County*, 125 S. Ct. at 2740.

Second, in light of the outcome in the Ten Commandments case from Texas decided the same day, it is difficult to interpret anything said by the *McCreary* five-member majority as reflecting a resolve by a majority of the Court to beef up the endorsement test in some way. In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), Justice Breyer — a member of the majority in *McCreary* — joined with the four *McCreary* dissenters to uphold Austin, Texas's display of the Ten Commandments on a monument located on the state capitol grounds. Although Justice Breyer, who concurred only in the judgment in *Van Orden*, could point to factual differences between the two cases that led him to reach different conclusions on constitutionality, it seems extremely unlikely that someone who did not see impermissible endorsement of religion in the Austin display was intending to sign on in *McCreary* to any sort of change in the purpose inquiry to make it less accommodating to government.

Third and lastly, even assuming that the five members of the *McCreary* majority all intended to put in place such a change in the inquiry, there is good reason to question whether the change continues to command a majority of the Court. Justice O'Connor was one of the five Justices in the *McCreary* majority. With her retirement from the Court, a fifth vote supporting such a change would have to come from her successor (Justice Alito) or Chief Justice Rehnquist's successor (Chief Justice Roberts), and neither seems a likely source of a vote for any change in Establishment Clause doctrine that would make the clause any less accommodating toward government support of religion. See *infra* note 215 and accompanying text.

In characterizing the requisite showing as one of an "exclusive or nearly exclusive sectarian purpose," see *supra* text accompanying this note, I assume, for purposes of argument, that *McCreary* has not changed the purpose inquiry. As indicated in the text below, I predicate my claim that prohibitions on same-sex marriage are unconstitutional on the endorsement test's inquiry into effects, which neither *McCreary* nor *Van Orden* expressly or implicitly changed.

For the view that a challenger should not be required to prove an entirely or even predominantly religious purpose in order to prevail, see Simson, *supra* note 87, at 908-11 (arguing that, in keeping with the rationale for invalidating laws based on impermissible purpose, the Court should revise its approach to purpose to provide that any law that would not have been adopted but for a religious purpose should be struck down).

Challenging same-sex marriage prohibitions under the effect prong is considerably more promising. Even if a law communicates a message that is not entirely or nearly entirely sectarian, the law is not immune from attack under the effect prong. The key is whether or not the law sends a message that a reasonable observer acquainted with the law's history and background is apt to perceive as significantly endorsing religion.²⁰⁷ If the law does, it must fall.

Reasonable people may often disagree as to what message the Court's hypothetical reasonable observer is apt to perceive. Realistically understood, however, laws prohibiting same-sex marriage are not the kind that should stimulate such debate. Indeed, it is hard to comprehend how a reasonable observer could *avoid* perceiving such laws as communicating a substantial endorsement of religion.²⁰⁸ A reasonable observer even moderately knowledgeable about the history of same-sex marriage prohibitions and other laws disadvantaging gays and lesbians would recognize that the teachings of various religions that homosexuality is abnormal and that homosexual conduct is a grievous sin played a vital role in the adoption of such laws.²⁰⁹

Concededly, if prohibiting same-sex marriage were an important means of serving the state's interest in promoting procreation, a forceful argument for finding no endorsement of religion could be made. In particular, it could be argued that a reasonable observer would be apt to perceive same-sex marriage prohibitions as state sponsorship not of religion, but of procreation. As discussed earlier, however, prohibiting same-sex marriage bears little relation to any state interest in encouraging procreation.²¹⁰ An argument that assumes otherwise is entitled to little weight.

One may also attempt to deny that bans on same-sex marriage have the effect of endorsing religion by arguing that a reasonable observer would perceive a moral, rather than religious, message in the bans. Consider, for example, a law restricting access to abortions. Although such a law may be seen as an endorsement of the religious belief that

²⁰⁷ See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573, 592-94, 599-600 (1989) (articulating this standard); *Wallace v. Jaffree*, 474 U.S. 38, 76 (1985) (O'Connor, J., concurring) (same).

²⁰⁸ Cf. Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265, 293-97 (2000) (maintaining that abstinence-only sex education programs violate the effect prong of the endorsement test).

²⁰⁹ With regard to such religious teachings, see MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 82-85 (1997).

²¹⁰ See *supra* text accompanying notes 178-79.

life begins at conception, a reasonable observer may be more likely to see the law as largely reflecting a secular interest in protecting potential life.²¹¹ There is good reason to question, however, whether a ban on same-sex marriage is fairly understood in such nonreligious terms. Its moral underpinnings seem inextricably linked to its religious origins. Furthermore, even assuming for purposes of argument that a same-sex marriage prohibition has distinct moral underpinnings, the conclusion that it communicates a substantial endorsement of religion is difficult to avoid. Whatever its moral underpinnings, such a prohibition has substantial religious underpinnings that a reasonable observer would have to be unreasonably unperceptive not to recognize.

It remains to be seen, however, whether the endorsement test will survive Justice O'Connor's departure from the Court. As of the close of the Court's 2004 Term in June 2005, four members of the Court — Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas — on one or more occasions over the past twenty years had written or joined opinions disapproving of the endorsement test.²¹² In their view, the relevant inquiry is not whether government is endorsing religion but rather whether it is coercing people to support or conform to religion. Though not insurmountable, a coercion test is substantially more difficult to meet than an endorsement one.²¹³

With Chief Justice Rehnquist's death in the summer of 2005 and Justice O'Connor's retirement in early 2006, the Court has lost both a leading opponent of the endorsement test and the Justice who has been most articulate in shaping and defending the test.²¹⁴ Simply in terms of numbers, with Justice O'Connor's departure, the crucial fifth vote on the Court in favor of the test may no longer exist. Based on the available evidence as to how her and Chief Justice Rehnquist's

²¹¹ Cf. *Roe v. Wade*, 410 U.S. 113, 160-61 (1973) (“[Recognition of] the existence of life from the moment of conception . . . is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians.”).

²¹² See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2867-68 (2005) (Thomas, J., concurring) (criticizing endorsement test); *Lee v. Weisman*, 505 U.S. 577, 640-44 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.) (same); *Allegheny County*, 492 U.S. at 659-63, 668-79 (Kennedy, J., concurring in judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Scalia, JJ.) (same).

²¹³ See Simson, *supra* note 38, at 462-63, 479-81.

²¹⁴ The late Chief Justice's opposition to the test is discussed *supra* note 212 and accompanying text. With regard to Justice O'Connor and the endorsement test, see CONKLE, *supra* note 85, at 118-21; *supra* note 204.

successors — Justice Alito and Chief Justice Roberts — are apt to approach Establishment Clause issues on the high court, there is good reason to believe that a coercion, rather than endorsement, test now commands a majority of the Court.²¹⁵

Even under a coercion test, however, prohibitions on same-sex marriage should be struck down. As I argued earlier, an objective observer is apt to perceive such prohibitions as deeply rooted in religious belief. If so, when a state relies on such a prohibition to deny marriage licenses to same-sex couples, it coerces those couples to live their lives in conformity with a religious precept that they do not share. Even though same-sex couples seeking marriage licenses do not regard same-sex marriage as sinful and unacceptable, they are forced to live as if they do.

Concededly, some members of the Court — most obviously, Justices Scalia and Thomas — who favor replacing the Court's endorsement test with a coercion test would manage to avoid the conclusion that same-sex marriage prohibitions violate a coercion test. Dissenting from the Court's holding in *Lee v. Weisman*²¹⁶ that prayers at public school graduations violate a coercion test, Justices Scalia and Thomas made clear that they would apply a coercion test with a strong presumption against invalidating any "longstanding American tradition."²¹⁷ Moreover, even though many people, myself included, may not take pride in prohibitions on same-sex marriage as an American tradition, there is no denying the fact that they do fit the bill of a "longstanding American tradition."

Even assuming, however, that the Court's two new members, Chief Justice Roberts and Justice Alito, would support adoption of a

²¹⁵ As to the likelihood that Chief Justice Roberts will take the view that the endorsement test is too restrictive of the government, see Linda Greenhouse, *Roberts's Files Recall 80's Cases*, N.Y. TIMES, Aug. 16, 2005, at A1; David E. Rosenbaum, *An Advocate for the Right*, N.Y. TIMES, July 28, 2005, at A1. As to Justice Alito's likely view, see David Kirkpatrick, *Nominee Is Said to Question Church-State Rulings*, N.Y. TIMES, Nov. 4, 2005, at A22; Neil A. Lewis, *Alito Often Ruled for Religious Expression*, N.Y. TIMES, Nov. 21, 2005, at A18. The above newspaper articles about Chief Justice Roberts were written after he had been nominated for the Court and before he had been confirmed. The timing of the above articles about Justice Alito was the same. In citing the articles, I recognize that Justices do not always end up voting on the Court as the available evidence at the time of their appointment appears to suggest. I do think, however, that placed in proper context, such evidence frequently tells us a great deal. See Gary J. Simson, *Mired in the Confirmation Mess*, 143 U. PA. L. REV. 1035, 1046-54 (1995).

²¹⁶ 505 U.S. 577 (1992).

²¹⁷ *Id.* at 645. (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.).

coercion test and would apply it in as accommodationist and tradition-conscious a manner as Justices Scalia and Thomas, Justice Kennedy, the author of the Court's opinion in *Lee*, clearly would not. And absent further changes in personnel on the Court, Justice Kennedy's way of applying a coercion test would be decisive.

The Court's likely alignment today on this issue looks very much like its alignment at the time of *Lee*. In *Lee* four members of the Court who opposed replacing the endorsement test with a coercion one (Justices Souter, Stevens, O'Connor, and Blackmun) joined Justice Kennedy's opinion striking down graduation prayer under a coercion test. As those four Justices made clear in concurring opinions in *Lee*, they would have preferred to rest the decision on a violation of the endorsement test.²¹⁸ However, they were willing to join Justice Kennedy's opinion because in applying a coercion test, it did not reject the endorsement test. Rather, it characterized a coercion test as a constitutional "minimum"²¹⁹ and did not address the question whether the endorsement test, which sets the constitutional bar higher, remains applicable. The year after *Lee* was decided, the retirement of Justice White — one of the *Lee* dissenters — and the appointment to his seat of Justice Ginsburg, who has proven to be a proponent of the endorsement test, established a majority of five for retaining that test.²²⁰ That majority status was unaffected by the retirement a year later of Justice Blackmun — a supporter of the test — and his replacement by Justice Breyer, who has a similar attitude toward the test.²²¹ Today, with Justice O'Connor no longer on the Court, there may again be only four proponents of the endorsement test — Justices Stevens, Souter, Breyer, and Ginsburg — and Justice Kennedy's mode of applying a coercion test may again hold the balance of power.

Though not as "boundless, and boundlessly manipulable" as Justice Scalia angrily charged in *Lee*,²²² a coercion test in Justice Kennedy's hands is sufficiently sensitive to government coercion to spell the demise of same-sex marriage bans. Justice Kennedy's opinion in *Lee*

²¹⁸ *Id.* at 604 (Blackmun, J., concurring, joined by Stevens and O'Connor, JJ.); *id.* at 609 (Souter, J., concurring, joined by Stevens and O'Connor, JJ.).

²¹⁹ *Id.* at 587 (majority opinion).

²²⁰ *See, e.g.,* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 817-18 (1995) (Ginsburg, J., dissenting) (finding violation of endorsement test).

²²¹ *See, e.g., id.* at 786-92 (Souter, J., concurring in part and concurring in the judgment, joined by O'Connor and Breyer, JJ.) (rejecting plurality's attempt to limit scope of endorsement test).

²²² *Lee*, 505 U.S. at 632 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.).

and his more recent willingness to join an opinion invalidating prayer at high school football games on coercion and endorsement grounds²²³ are not fairly understood to suggest otherwise.

CONCLUSION

The Defense of Marriage Act has cast a long shadow over the nation's same-sex marriage debate. With its focus on choice of law, the Act encourages courts, scholars, and the general public to think about conflicts between two states' laws on same-sex marriage no differently than they would think about conflicts between two states' laws on uncle-niece marriage.

Proponents of same-sex marriage who are familiar with *May's Estate* may welcome the analogy. After all, if recognition of uncle-niece marriage can be right, how can recognition of same-sex marriage be wrong?

May's Estate is undoubtedly a fascinating and quite remarkable case. Indeed, it may well be to the study of conflict of laws what, in many law professors' eyes, *Sibbach v. Wilson & Co.*²²⁴ is to the study of civil procedure and *Palsgraf v. Long Island Railroad*²²⁵ is to the study of torts: a potential vehicle for exploring with students the great majority of the key issues in a course.²²⁶

Nevertheless, as authority for a choice of law upholding a same-sex marriage of two forum-state residents that is valid in the state of celebration but invalid under forum law, *May's Estate* is sorely lacking. Upon close examination, the New York Court of Appeals' choice of law in *May's Estate* is so difficult to defend that the case, properly understood, appears to militate strongly against adopting a similarly deferential attitude toward the law of the state of celebration in a same-sex marriage case.

Fortunately for the proponents of same-sex marriage, however, the analogy to *May's Estate* ultimately fails. As the Article's juxtaposition

²²³ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

²²⁴ 312 U.S. 1 (1941).

²²⁵ 162 N.E. 99 (N.Y. 1928).

²²⁶ I thank Professors Kevin Clermont, a civil procedure specialist, and Douglas Kysar, a torts teacher and scholar, for sharing with me their insights regarding the status of *Sibbach* and *Palsgraf* among teachers in their respective fields. See E-mail from Kevin M. Clermont, James and Mark Flanagan Professor of Law, Cornell Law School, to Gary J. Simson, Professor of Law, Cornell Law School (Aug. 18, 2005, 14:33 EST) (on file with author); E-mail from Douglas A. Kysar, Professor of Law, Cornell Law School, to Gary J. Simson, Professor of Law, Cornell Law School (Aug. 17, 2005, 17:44 EST) (on file with author).

of the uncle-niece and same-sex marriage recognition issues highlights, same-sex marriage recognition is far more than simply a matter of choice of law. While the Constitution leaves states free to favor or disfavor uncle-niece marriage, it is best understood as depriving states of such freedom in legislating about same-sex marriage. Prohibitions on same-sex marriage, unlike prohibitions on uncle-niece marriage, should be held to be constitutionally out of bounds. They overstep not simply one constitutional limitation but three: due process, equal protection, and nonestablishment of religion.

In short, a court is no more justified in applying a forum-state prohibition on same-sex marriage in interstate cases than in intrastate ones. In both instances, the court is constitutionally obliged to allow same-sex couples the freedom to marry that opposite-sex couples have long enjoyed.