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Will New York Recognize Same-Sex Marriage?: An Analysis of the Conflict-of-Laws' Public Policy Exception

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I. INTRODUCTION

If same-sex marriage is legally condoned by the state of Hawaii,[1] there will be an inevitable wave of litigation across each state of the Union. Whether a same-sex marriage performed in Hawaii will be recognized elsewhere must be decided on a state-by-state basis.[2] This Comment focuses on the state of New York, where the Supreme Court of Tompkins County decided in 1996 in *Storrs v. Holcomb* that New York "does not recognize or authorize same-sex marriage."[3]

While New York does not grant marriage licenses other than for opposite-sex couples, New York may soon face the question of whether it will recognize a same-sex marriage validly performed in another state. In deciding this issue, New York must rely on its conflict-of-laws methodology which stems from the general rule that a marriage in one state will be recognized in another, *unless* it violates "strong public policy."[4] The recent *Storrs* opinion sheds an introductory light on New York's public policy as evidenced by the court's unapproving response to the notion of same-sex and female, testifies to a contrary political, cultural, religious and legal

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1. *See* Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911, 912-13 (1995). For a summary of the Hawaii litigation, see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part, Baehr v. Lewin*, 875 P.2d 225, *appeal after remand, Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), *on remand, Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, (Haw. Cir. Ct. Dec. 3, 1996).

2. State law governs marriage, and states may place certain limitations on the ability to marry. *See, e.g.*, Williams v. North Carolina, 317 U.S. 287, 303 (1942) (noting that, within limits of state power, states may enforce their own marital policies).

On September 21, 1996, President Clinton signed into law the Defense of Marriage Act (DOMA), which grants the states the right to ignore same-sex marriages contracted in other states, and creates a federal definition of marriage, which excludes same-sex couples, to be applied in connection with all federal statutes and programs. Defense of Marriage Act, Pub.L.No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419 (to be codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7).

3. 645 N.Y.S.2d 286, 288 (N.Y. Sup. Ct. 1996). *See infra* Part II.

4. Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 687 (N.Y. 1985).

consensus."[5]

Part II of this Note provides the historical background and procedural development of *Storrs v. Holcomb*, New York's latest and most significant case on same-sex marriage. Part III reviews conflict-of-laws principles generally and New York's analysis specifically. Part IV discusses the exception to the conflict-of-laws rule by asking whether recognition of same-sex marriage would violate New York's 'strong public policy.' This Comment derives New York's public policy from four major categories: state statutes, case law, constitutional analysis, and the state's concept of fundamental justice, good morals, and tradition.[6] Part V concludes that, although it is possible New York will validate same-sex marriages celebrated in foreign states, that possibility is remote considering the background of New York's prevailing public policy.

II. STORRS V. HOLCOMB: HISTORICAL AND PROCEDURAL SYNOPSIS

Two men, Phillip and Toshav Storrs, (hereinafter petitioners) applied for a marriage license at the office of the City Clerk in Ithaca, New York, on May 18, 1995.[7] Ithaca city clerk Julie Holcomb (hereinafter respondent), citing an existing directive from the state Department of Health (hereinafter DOH), informed them that she could not issue a marriage license to two persons of the same sex.[8] Subsequently, respondent received a letter and memorandum from DOH confirming that she was not authorized to issue marriage licenses to same-sex couples because they cannot be legally married.[9]

Petitioners then commenced a declaratory judgment action against respondent to issue them a marriage license, alleging that the same-sex marriage ban violated their constitutional rights.[10] The Supreme Court, Tompkins County, notified the Attorney General's office of the constitutional challenge by letter; however, the Assistant Solicitor General responded that his office would not participate in the proceedings.[11] The Supreme Court never ordered that DOH be joined as a necessary party.[12] Without addressing the necessary party issue, the trial court upheld respondent's denial of petitioners' marriage license application on the merits,

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5. *Storrs*, 645 N.Y.S.2d at 287.
6. *Schultz*, 480 N.E.2d at 688.
7. Storrs v. Holcomb, 666 N.Y.S.2d 835, 836 (N.Y. App. Div. 1997).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

finding that the same-sex marriage ban did not violate petitioner's constitutional rights.[13]

Petitioners appealed directly to the Court of Appeals of New York which transferred the case to the Appellate Division, Third Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved.[14] On December 24, 1997, the Appellate Division dismissed the case on procedural grounds without addressing petitioners' contentions on the merits.[15] The appeals court held that the Supreme Court "should have dismissed the action/proceeding without prejudice because petitioners failed to join DOH, a necessary party."[16] Consequently, even if, perhaps especially if, the legislature passes new laws regarding same-sex marriage, this case and this issue will continue to be litigated and debated in New York for several years.

III. CHOICE OF LAW, CONFLICT-OF-LAWS, AND THE PUBLIC POLICY EXCEPTION

Should Hawaii fully authorize same-sex marriage, conflicts between Hawaii's law and other states' laws would eventually arise. When confronted with a conflict-of-laws issue, a court must first choose whether to apply its own law or the foreign state's law. Only after this initial determination is made can the court look at the appropriate substantive law. Many states have adopted a conflicts analysis which incorporates the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988) (hereinafter RESTATEMENT), or an adaptation thereof, which allows the court to consider the contacts and interests of parties and states, as well as the public policy of the forum state.[17]

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13. *Id.* at 836-37.

14. Storrs v. Holcomb, 674 N.E.2d 335 (N.Y. 1996).

15. Storrs v. Holcomb, 666 N.Y.S.2d 835, 837 (N.Y. App. Div. 1997).

16. *Id.*

17. For cases applying the RESTATEMENT SECOND's rule, see *Vandever v. Industrial Comm'n*, 714 P.2d 866, 869 (Ariz. Ct. App. 1985); *Leszinske v. Poole*, 798 P.2d 1049, 1053 (N.M. Ct. App. 1990). For cases applying a similar rule in the RESTATEMENT FIRST see *Loughran v. Loughran*, 292 U.S. 216, 223 (1934); *State v. Graves*, 307 S.W.2d 545, 547 (Ark. 1957); *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952); *Meisenhelder v. Chicago & N.W. Ry.*, 213 N.W. 32, 33 (Minn. 1927); *Bucca v. State*, 128 A.2d 506, 508 (N.J. Super. Ct. Ch. Div. 1957); *In re May's Estate*, 114 N.E.2d 4, 6 (N.Y. 1953).

A. RESTATEMENT *Approach*

The conflict-of-laws analysis embodied in the RESTATEMENT generally prescribes a "most significant relationship" test to determine which state's law applies. Section 283, in pertinent part, states:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in s[ection] 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy of another state* which had the most significant relationship to the spouses and the marriage at the time of the marriage.[18]

In short, a court must determine: 1) which state has the most significant relationship with respect to the same-sex marriage issue, and 2) whether recognizing the marriage would violate a strong public policy of that state. The RESTATEMENT emphasizes the significance of the individual state's public policy in its declaration that:

> Marriage is a matter of intense public concern, and all states have rules stating how marriages may be contracted and prohibiting certain marriages. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule and of the issue involved and by the relation of the marriage and the parties to the state.[19] Prior to determining whether recognition of a same-sex marriage violates a particular state's strong public policy, the RESTATEMENT requires that the court first consult state statutes for a law invalidating the out-of-state marriage

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18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1988) (emphasis added). When deciding which state has the most significant relationship, a court employing the RESTATEMENT approach must evaluate the following section 6 factors:

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

Id. § 6.

19. *Id.* § 283 cmt. b.

of local domiciliaries.[20] The court shall review the state's case law to see if it requires invalidation, assuming there is no statute on point.[21] Presuming both case and statutory law fail to answer the issue, the court must use its discretion in ascertaining whether any violation or unsatisfied requirement constitutes a sufficiently strong public policy to warrant invalidation.[22]

B. New York: Conflict-of-Laws Principles and the Public Policy Exception

1. Conflict-of-Laws

Generally, when faced with the question of which state's law to apply in a particular case, a court must follow its conflict-of-laws principles.[23] These rules may differ depending on the subject of the dispute: for example, whether the case involves a tort or a contract. An in depth look into the extensive field of conflict-of-laws exceeds the scope of this Comment. The relevant inquiry here is the exception to New York's conflict-of-laws rule.

2. Public Policy Exception

In accord with the RESTATEMENT, even if a New York court determines that a foreign state's law applies, the forum court may, based on public policy, nevertheless apply New York's law. In *Schultz v. Boy Scouts of America, Inc.* the Court of Appeals of New York stated: "[t]he public policy doctrine is an exception to implementing an otherwise applicable choice of law in which the forum refuses to apply a portion of foreign law because it is contrary or repugnant to its State's own public policy."[24] The court added that the public policy doctrine is considered "only after the court has determined that the applicable substantive law

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20. *Id.* § 283 cmt. k.

21. *Id.*

22. *Id.* (citations omitted). The RESTATEMENT notes that, "[t]o date a marriage has only been invalidated when it violated a strong public policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter." *Id.* The possibility of legal same-sex marriage in Hawaii opens up the likelihood of invalidation by another state's courts even though both spouses were domiciled in Hawaii.

23. *See generally* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (March 1990); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: the Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, (Oct. 1987); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, (April-May 1996); Reese, *Choice of Law: Rules of Approach*, 57 CORNELL L. REV 315 (1972); Leflar, *Choice Influencing Considerations and Conflicts of Law*, 41 N.Y.U. L. REV. 267 (1966).

24. 480 N.E.2d 679, 687 (N.Y. 1985). *See also* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

under relevant choice-of-law principles is not the forum's law."[25] Assuming the court determines that a foreign state's law appertains, the court must enforce the foreign law "*unless some sound reason of public policy makes it unwise for [the court] to lend [its] aid.*"[26]

The party seeking to invoke the public policy exception has the burden of proving that the foreign law is contrary to New York public policy.[27] The court noted: "public policy is not measured merely by individual notions of expediency and fairness or by showing that the foreign law is unreasonable or unwise."[28] Rather, public policy is found in the state's: 1) statutes, 2) judicial decisions, 3) constitution; furthermore, the proponent of the exception must establish that enforcing the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal" expressed in them.[29]

IV. DETERMINING WHETHER RECOGNITION OF SAME-SEX MARRIAGE WOULD VIOLATE THE PUBLIC POLICY OF NEW YORK

A. Statutory Guidance

New York's statutes do not authorize in-state same-sex marriage, nor same-sex marriages performed in other states.[30] Efforts to secure such measures have been pursued. In 1994 and again in 1995, the Assembly unsuccessfully attempted to pass legislation requiring New York to recognize validly performed non-domestic same-sex marriages.[31] The rejection of the aforementioned legislation connotes an anti-same-sex marriage community in New York.

The *Storrs* court, in dictum, suggested that the potential for a new consensus exists which state legislatures may see fit to recognize. It warned, however, that "[i]n the absence of such legislation, . . . 'We . . . decline the plaintiff's invitation to identify a new fundamental right, in the

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25. *Schultz*, 480 N.E.2d at 687.

26. *Id.* (citations omitted) (emphasis added).

27. *Id.* at 688.

28. *Id.* (citation omitted).

29. *Id.* (citations omitted). In addition, the proponent must establish that there are enough contacts between the parties, the occurrence, and the New York forum to implicate New York's public policy and thus preclude enforcement of the foreign law. *Id.*

The United States Supreme Court has reaffirmed that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979).

30. *See* Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (App. Div.1996); *In re* Jacob, 660 N.E.2d 397, 407 (N.Y 1995).

31. *See* Assembly Bill A-648 (N.Y. 1995); *see* Assembly Bill A-10508 (N.Y. 1994).

absence of a clear direction from the Court whose precedents we are bound to follow.' "[32]

B. *Case Law Guidance*

1. *Storrs v. Holcomb*

While *Storrs* directly addressed the intra-state issue of whether New York *authorizes* same-sex partners, who are residents of the state, to obtain a marriage license, it also indirectly addressed the inter-state issue of whether New York will recognize same-sex marriages validly performed in foreign states.

Storrs provides a judicial view of New York's public policy. The court based its holding that New York "*does not recognize* [inter-state] *or authorize* [intra-state] *same sex marriage* and that the City Clerk correctly refused to issue the license" on notions of public policy, due process and equal protection.[33] Regarding public policy, the court conceded that the state has no legitimate purpose in preventing same-sex partners from exchanging personal commitments.[34] Responding to that concession, the court then gave some notion of New York's public policy on same-sex marriage by stating:

> Nevertheless, it would be a very long inferential leap, from this narrow premise, to the conclusion that a denial of a marriage license to a same-sex couple destroys a fundamental right so implicit in our understanding of ordered liberty that neither justice nor liberty would exist if it were sacrificed.[35]

This language suggests that New York courts are unprepared to condone same-sex marriage.[36] The court then solidified its position by responding to the overall notion of same-sex marriage in this manner: "The long

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32. *Storrs*, 645 N.Y.S.2d at 287-288 (citation omitted).

33. *Id.* (emphasis added).

34. *Id.* at 287.

35. *Id.*

36. Borrowing a Second Circuit Court of Appeals phrase, the court in *Storrs* "decline[d] the plaintiffs' invitation to identify a new fundamental right." Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996).

The city of Ithaca, however, supports the notion of same-sex marriage. In reaction to the *Storrs* litigation, six months prior to the trial court decision, the Mayor of Ithaca issued a statement expressing his and the city council's support of legalizing gay and lesbian marriage. Storrs v. Holcomb, 666 N.Y.S.2d 835, 836 (N.Y. App. Div. 1997). The Mayor, nevertheless, declared that the City could not issue petitioners a marriage license at that time because of a State Department of Health directive. *Id.*

tradition of marriage, understood as the union of male and female, testifies to a contrary political, cultural, religious, and legal consensus."[37]

The *Storrs* court's broad declaration of New York's consensus against same-sex marriage is specifically supported by other cases. There are six cases from 1971 to 1996, including *Storrs,* dealing with or mentioning the same-sex marriage issue. Each of those cases is either not on point to the instant issue[38] or supports a policy of prohibiting same-sex marriages.[39] The remainder of part IV will discuss those cases supporting a prohibition on same-sex marriage.

2. *Anonymous v. Anonymous*

Anonymous[40] is the first New York state lawsuit which considered same-sex marriage. The court declared that the so-called marriage ceremony between plaintiff, a male, and defendant, also a male (who posed as a female and who also underwent a sex-change operation), did not in fact or in law create a marriage contract, and that the parties are not, and never were, 'husband and wife' or parties to a valid marriage.[41] The court's rationale for its holding is straightforward. It stated:

> The law makes no provision for a 'marriage' between persons of the same-sex. Marriage is and always has been a contract between a man and a woman.[42] Marriage may be defined as

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37. *Storrs*, 645 N.Y.S.2d at 287.

38. *See* Koppelman v. O'Keeffe, 535 N.Y.S.2d 871 (1988) (holding that because heterosexual life partners of a rent controlled apartment is not entitled to continue in possession, it is not a denial of equal protection to deny that right to a "gay life partner;" and that "gay life partner" would not be deemed either the functional equivalent of a surviving spouse or a de facto family member); Braschi v. Stahl Assoc. Co., 1987 WL 343445, at *1 (N.Y.App. Div. Mar. 27, 1987) (granting a preliminary injunction restraining landlord from taking further action to terminate his tenancy until it could be determined whether tenant, as surviving gay life partner of deceased tenant of record, was entitled to maintain occupancy of apartment as family member (not as surviving spouse) of deceased); Yorkshire Towers Co. v. Baker, 510 N.Y.S.2d 976 (1986) (ordering that individuals of same sex, in longstanding quasi-marital relationship were de facto "immediate family members," rather than "roommates," for purposes of rent-stabilized lease renewal following death of one of them), *order rev'd* by Yorkshire Towers Co. v. Harpster, 538 N.Y.S.2d 703 (1988).

39. *See* Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971); Frances B v. Mark B, 355 N.Y.S.2d 712 (1974); *In re* Estate of Cooper, 564 N.Y.S.2d 684 (Surrogate's Ct. 1990), *aff'd In re* Cooper, 592 N.Y.S.2d 797 (1993), *appeal dismissed In re* Cooper, 624 N.E.2d 696 (N.Y. App. Div. 1993).

40. *Anonymous*, 325 N.Y.S.2d 499.

41. *Id.* at 501.

42. Some literature attempts to dispute the notion that same-sex marriages have never existed. *See* JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE, 53-107, 218-61 (1995); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435-84 (1993). *But see* Phillip L. Reynolds, *Same-Sex Unions: What Boswell Didn't Find*, CHRISTIAN CENTURY, Jan. 18, 1995, at 49, 54. "Registered Partnership," a legal relationship between same sex partners similar, but not equal to marriage, exists currently in Denmark, Norway, and Sweden. *See* Lawrence Ingrassia, *Danes Don't Debate Same-Sex Marriages, They Celebrate Them*, WALL ST. J., June 8, 1994, at A1,

> the status or relation of a man and a woman who have been legally united as husband and wife. It may be more particularly defined as the voluntary union for life of one man and one woman as husband and wife.[43]

As further explanation of its policy opposing same-sex marriage, the court followed an earlier precedent that stated: "[t]he mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring."[44] Since the era in which *Anonymous* was decided this argument has been deemed 'historical' by legal scholarship,[45] but has persevered in judicial opinions.[46]

3. Frances B. v. Mark B.

In *Frances B.*,[47] a wife brought an annulment action on the ground that her "husband" was female, a transsexual. In making its ruling on related motions, the court explained the following standard in New York:

> Marriage is defined as 'the civil status, condition or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex' . . . . Marriage was a custom long before the state issued licenses for that purpose. For a time marriage records were kept by the church. Some states even now recognize common law marriage which has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary. Neither by statutory nor decisional law has this state defined male and female. New York neither specifically prohibits marriage between persons of the same sex nor authorizes issuance of marriage license to such persons. However, marriage is and always has been a contract between a man and a woman.[48]

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43. *Anonymous*, 325 N.Y.S.2d at 500 (citation omitted).

44. *Id.* (citing Mirizio v. Mirizio, 150 N.E. 605, 607 (N.Y. 1926)).

45. *See* Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of and Recognition of Same-Sex-Marriages*, 109 HARV. L. REV. 2038, 2046-47 (1996).

46. *See* Baker v. Nelson 191 N.W.2d 185, 186-187 (Minn. 1971).

47. Frances B. v. Mark B., 355 N.Y.S.2d 712 (N.Y. App. Div. 1974).

48. *Id.* at 716 (citations omitted).

As with *Anonymous*, this case was adjudicated in the 1970s, and should only be given appropriate weight to the issue of present public policy in light of more recent cases. Nevertheless, it is one of only a few New York state court cases on same-sex marriage from which to assess New York's public policy.

4. In re Estate of Cooper

In re Estate of Cooper presents the issue of whether the survivor of a homosexual relationship, alleged to be a "spousal relationship," is entitled to a right of election against the decedent's will.[49] The petitioner's own words may best explain the background of the case: "Except for the fact that we were of the same sex, our lives were identical to that of a husband and wife. We kept a common home; we shared expenses; our friends recognized us as spouses; we had a physical relationship."[50] The survivor alleged that the only reason he and his partner were not legally married was because marriage license clerks in New York do not issue licenses to persons of the same sex.[51]

On appeal the petitioner further stated:

> I ask this Court simply to declare that if I can establish that Mr. Cooper and I, at the time of his death, were living in a spousal relationship, I am entitled to spousal rights, and the State-imposed unconstitutional impediment of making it impossible for two people of the same sex to obtain a marriage license does not alter this.[52]

The court refused the petitioner's invitation, holding that the survivor was not a "surviving spouse"[53] within the meaning of the applicable New York statute.[54]

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49. 564 N.Y.S.2d 684, 685 (Surrogate's Ct. 1990), *aff'd*, *In re* Cooper, 592 N.Y.S.2d 797 (App. Div. 1993). *In re Cooper* is addressed next.

50. *In re Estate of Cooper*, 564 N.Y.S.2d at 685.

51. *Id.*

52. *In re Cooper*, 592 N.Y.S.2d at 797.

53. *In re Estate of Cooper*, 564 N.Y.S.2d at 688. The court also noted: "[p]ersons of the same sex have no constitutional rights to enter into a marriage with each other. Neither due process nor equal protection of law provisions are violated by prohibiting such marriages." *Id.* at 685. It later stated:

> The court concludes that marriage between homosexuals cannot be legalized under the Laws of the State of New York and that such purported marriages do not give rise to any rights either pursuant to or similar to those granted by EPTL 5-1.1 (providing that the surviving spouse may elect against the will). No constitutional rights have been abrogated or violated in so holding. *Id.* at 688.

54. N.Y. Estates, Powers and Trusts Law §5-1.1 (McKinney's 1997).

In its analysis, the court revealed this recent viewpoint in New York: "[t]raditionally *and currently*, the terms "marriage" and "spouse" necessarily and exclusively involve a contract between persons of different sexes."[55] While the survivor here did not argue for recognition of marriage, he requested the court to deem him a "spouse" in the context of having spousal rights in his partner's estate. The court rejected this contention on the basis of public policy: "[t]o do so would be impermissible judicial legislating and *contrary to the public policy* expressed by our Legislature . . . . The Legislature has chosen to restrict the right to marry to people of the opposite sex."[56]

5. *In re Cooper*

The Supreme Court, Appellate Division, affirmed the holding of the foregoing case, rejecting the petitioner's contention that the traditional definition of the term "surviving spouse" must be revised, and replaced with a broader definition which would include the petitioner.[57] The appeals court concluded, as did the lower tribunal, that the term "surviving spouse" cannot be interpreted to include homosexual life partners.[58]

A large part of the court's analysis was a review of *Baker v. Nelson*, a Minnesota Supreme Court case.[59] The *Baker* court rejected the argument that the absence of an express statutory prohibition against same-sex marriages evidences a legislative intent to authorize them.[60] Instead, the *Baker* court insisted that the legislature's intent was to the contrary: "[The statute] which governs 'marriage,' employs that term as one of common usage, meaning the state of union between persons of the opposite sex."[61]

C. *Constitutional Guidance*

1. *Storrs v. Holcomb*

Because the question of same-sex marriage has not reached the New York Court of Appeals, the *Storrs* court turned to *In re Cooper* (Appellate Division, Second Department) for guidance as to whether a ban on same-sex marriages is unconstitutional. Based on *In re Cooper*, the *Storrs* court concluded that only a rational relation needed to be shown between a

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55. *In re Estate of Cooper*, 564 N.Y.S.2d at 686 (emphasis added).
56. *Id.* (emphasis added).
57. *In re Cooper*, 592 N.Y.S.2d at 799.
58. *Id.* The appeals court added that it held in *In re Alison D. v. Virginia*, 552 N.Y.S.2d 321, *aff'd*, 572 N.E.2d 27 (N.Y. 1990), that a lesbian partner was not a "parent" under Domestic Relations Law § 70(a).
59. 191 N.W.2d 185 (Minn. 1971).
60. *Id.* at 185-86.
61. *Id.*

similar classification and a legitimate state purpose in deciding whether banning same-sex marriage violates the equal protection clause of the Fourteenth Amendment.[62] The *Storrs* court conceded that the precise point at issue in *In re Cooper* was not on same-sex marriage per se, but rather whether the term "surviving spouse," as used in the statute, extends to the survivor of a homosexual life partnership.[63] Nevertheless, the *Storrs* court stated that proscribing same-sex marriage does not inhibit equal protection: "the ratio decidendi forged by the [*In re Cooper*] court includes holdings that marriage, in this state, is limited to opposite sex couples *and that the gender classification serves a valid public purpose.*"[64]

2. *In re Estate of Cooper*

As outlined in more detail above,[65] the survivor of a homosexual relationship argued that the denial of a right to a marriage license resulting in the survivor's inability to marry his partner in New York State involves state action.[66] The court summarized his argument:

> [A]ccording to the surviving partner, under the doctrine of Under 21 v. City of New York, this court would be compounding his deprivation of equal protection of law guaranteed by Section 1 of the 14th Amendment of the United States Constitution were it to rule that because he could not obtain a marriage license, he could not be recognized as a spouse for the purpose of claiming spousal rights.[67]

The court's response and holding were that same sex partners do not have a constitutional right to enter into marriage with each other, and that, "[n]either due process nor equal protection of law provisions are violated by prohibiting such marriages."[68]

The court based its holding partly on the Minnesota Supreme Court decision in *Baker* in which the petitioners contended that:

> [T]he prohibition [to marry] denied them a fundamental right guaranteed by the Ninth Amendment of the United States Constitution and made applicable to the states by the

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62. Constitutional analysis in New York and in the United States requires one of three possible standards in reviewing an equal protection question: rational relation (sometimes termed rational basis review), heightened scrutiny, or strict scrutiny. *See In re* Cooper, 564 N.Y.S.2d 684, 686 (Surrogate's Ct. 1990). *See also* Moe v. Dinkins, 669 F.2d 67, 68 (2d Cir. 1982). *See supra* note 53 at 685, 688.

63. Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996).

64. *Id.* (emphasis added).

65. *See supra* Part IV, Section B, Part 4.

66. *In re Estate of Cooper*, 564 N.Y.S.2d at 685.

67. *Id.* (citations omitted).

68. *Id.*

> Fourteenth Amendment, thereby depriving them of liberty and property without due process, and denying them the equal protection of laws, both guaranteed by the Fourteenth Amendment. They asserted that the right to marry without regard to the sex of the parties is a fundamental right to all persons and that to restrict marriage to couples of the opposite sex is irrational and invidiously discriminatory.[69]

The *In re Estate of Cooper* court, in justifying its denial of the equal protection claim, quoted the *Baker* court: "This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interest for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation."[70] Speaking of the *Baker* case the *In re Estate of Cooper* court further noted that:

> [T]he Minnesota statute, as construed, prohibiting marriage between persons of the same sex, was not irrational nor invidious and did not offend the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution. The appeal from the Minnesota Supreme Court to the United States Supreme Court was dismissed for want of a substantial federal question. Such a dismissal is a holding that the constitutional challenge was considered and rejected.[71]

3. *In re Cooper*

On appeal, the petitioner repeated his argument that a narrow definition of the term "surviving spouse" is unconstitutional as it violates the equal protection clause of the State Constitution.[72] The petitioner specifically argued that this unconstitutional definition directly derives from, and compounds, the State's unconstitutional conduct in interpreting the relevant provisions of the Domestic Relations Law as prohibiting members of the same sex from obtaining marriage licenses.[73] The court then countered the petitioner's argument, explaining that three standards may be applied in reviewing equal protection challenges: strict scrutiny, heightened scrutiny, and rational basis review.[74] The appeals court condoned the lower court's equal protection analysis which applied the

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69. *Id.*
70. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).
71. *In re Estate of Cooper*, 564 N.Y.S.2d at 686 (quoting *Baker*, 191 N.W.2d at 186).
72. *In re Cooper*, 592 N.Y.S.2d at 799.
73. *Id.*
74. *Id.* (citing City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440-441 (1985)).

rational basis standard. Rational basis review mandates that the legislation (or government action) "is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate state interest,"[75] and not the more stringent standards of heightened scrutiny or strict scrutiny.[76]

The appeals court relied on *Baker* in deciding that rational basis and not a higher standard of scrutiny should apply. *Baker* rejected the argument that a prohibition on same-sex marriages denied petitioners equal protection of the laws, holding as follows:

> These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court . . . .
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> . . . .
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> . . .The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination.[77]

E. New York's Concept of Justice, Good Morals, and Tradition

To refuse application of foreign law, New York requires that enforcing the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[78]

1. Principles of Justice

The language within *Storrs* reveals New York's concept of justice in the context of marriage. After the court acknowledged that the state has no legitimate purpose in preventing same-sex partners from exchanging personal commitments,[79] it stated:

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75. *City of Cleburne*, 473 U.S. at 440.
76. *In re Cooper*, 592 N.Y.S.2d at 799-800.
77. *Id.* at 800 (quoting Baker v. Norton, 191 N.W.2d 185, 186-87 (Minn. 1971)).
78. Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 688 (N.Y. 1985).
79. Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996).

> [N]evertheless, it would be a very long inferential leap, from this narrow premise, to the conclusion that a denial of a marriage license to a same sex couple destroys a fundamental right so implicit in our understanding of ordered liberty that neither justice nor liberty would exist if it were sacrificed.[80]

Accordingly, within New York's boundaries, it is the opinion of the judiciary that same-sex marriage is not a right under its concept of justice and liberty.

Constitutional analysis also indicates that a policy denying the right to same-sex marriage does not violate principles of justice. The court stated in *In re Cooper* that denying marriage to same-sex couples is neither "irrational" nor "individiously discriminatory." Quoting *Baker* the court noted:

> These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court . . . .
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> . . .The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination.[81]

Moreover, despite two attempts, the Legislature has not yet passed a law requiring New York to recognize same-sex marriages validly celebrated in a foreign state.[82]

2. *Prevalent Conception of Good Morals*

Ideally, a state legislature, as the voice of the people, reflects and protects the citizens' concept of morality. New York's law-making body has spoken twice on the same-sex marriage issue. As mentioned earlier, in

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80. *Id.*

81. *In re Cooper*, 592 N.Y.S2d at 800 (quoting Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971)).

82. *See supra* text accompanying note 31.

1994 and 1995 attempts to pass law permitting same-sex marriages failed.[83]

Making an analogy between same-sex marriage and common law marriage may also help to draw out New York's notion of good morals. Unlike some states, New York has long refused to authorize common law marriages.[84] Although New York does not itself authorize common law marriages, such a union might be recognized as valid in New York if it was validly contracted in a sister state.[85] The law to be applied in determining the validity of such an out-of-state marriage is the law of the state in which the marriage purportedly occurred.[86]

Two opposing arguments may arise from comparing common law marriage (marriage not solemnized in the ordinary way, i.e. non-ceremonial, but created by an agreement to marry, followed by cohabitation) to same-sex marriage. Same-sex marriage proponents might contend that the foregoing analysis should apply to couples of the same sex married in a foreign state. Same-sex marriage opponents contend, however, that despite the fact that New York may recognize valid out of state common law marriage, it looks down upon and even prohibits common law marriage within its own borders; if the state has a dim view of common law marriage, then New York has the prerogative to take a dim view of same-sex marriage.

The U.S. Supreme Court recognized that "reasonable regulations" may be applied by the states to opposite-sex marriages. Indeed, such prohibitions as health, age, and consanguinity are common.[87] Similarly, the New York Court of Appeals has acknowledged "the broad authority of the Legislature to set standards and procedures to control such a basic institution as marriage" and, thus, to refuse recognition to common law marriages between opposite-sex couples.[88] The *Storrs* court also clarified that marriage is inherently limited: "[c]learly, rights to the perquisites of the marital estate are not absolute."[89]

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83. *Id.*

84. Ledwith v. Sears Roebuck and Co., 660 N.Y.S.2d 402, 407 (App. Div. 1997); Tornese v. Tornese, 649 N.Y.S.2d 177, 178 (App. Div. 1996); *In re* Jacob, 660 N.E.2d 397, 407 (N.Y. 1995).

85. *See supra* note 84. *See also* Mott v. Duncan Petroleum Trans., 414 N.E.2d 657 (N.Y. 1980); *In re* Estate of Watts, 294 N.E.2d 195 (N.Y. 1973).

86. *See supra* note 84. *See also Mott*, 414 N.E.2d 657; *In re* Estate of Gates, 596 N.Y.S.2d 194 (1993), *dismissed in part, denied in part* 619 N.E.2d 646 (1993).

87. Storrs v. Holcomb, 645 N.Y.S.2d 286, 287 (1996) (citing Zablocki v. Rehail, 434 U.S. 374 (1978)).

88. *Id.* (citation omitted).

89. *Id.*

3. Deep-Rooted Tradition

The recent *Storrs* court countered the proposal of same-sex marriage by stating: "[t]he long tradition of marriage, understood as the union of male and female, testifies to a contrary political, cultural, religious and legal consensus."[90]

Likewise, the court in *Anonymous* stated two decades ago:

> [M]arriage is and always has been a contract between a man and a woman. Marriage may be defined as the status or relation of a man and a woman who have been legally united as husband and wife. It may be more particularly defined as the voluntary union for life of one man and one woman as husband and wife.[91]

And in *In re Estate of Cooper*, a case decided less than eight years ago, the court stated: "*[t]raditionally* and currently, the terms "marriage" and "spouse" necessarily and exclusively involve a contract between persons of different sexes."[92]

V. CONCLUSION

The issue of whether New York will recognize a same-sex marriage validly performed in another state must be decided on New York's conflict-of-laws and choice-of-law principles. Assuming New York implements the law of a foreign state which authorizes same-sex marriage, and presuming the marriage is validly performed, New York courts will likely refuse to recognize the marriage based on the conflicts-of-law public policy exception. New York's public policy is found within the state's statutes, case law, constitution, and concept of justice, good morals, and tradition. The foregoing analysis of these factors reveals that New York's policy unequivocally advocates opposite-sex marriage and robustly opposes same-sex marriage.

Todd C. Hilbig

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90. *Storrs*, 645 N.Y.S.2d at 287.
91. *Anonymous*, 325 N.Y.S.2d at 500 (citation omitted).
92. *In re* Estate of Cooper, 564 N.Y.S.2d 684, 686 (1990) (emphasis added).