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## Chambers v. Ormiston: The Harmful and Discriminatory Avoidance of the Laws of Comity and Public Policy for Valid Same-Sex Marriages

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## Notes & Comments

### ***Chambers v. Ormiston*: The Harmful and Discriminatory Avoidance of the Laws of Comity and Public Policy for Valid Same-Sex Marriages**

Jared B. Arader\*

#### INTRODUCTION

On December 7, 2007, the Supreme Court of Rhode Island did something that no other state high court has done: faced squarely with the issue of whether out-of-state same-sex marriages should be recognized, it punted on a jurisdictional technicality.<sup>1</sup>

The issue in the case, *Chambers v. Ormiston*,<sup>2</sup> was whether two Rhode Island women, who were legally married in Massachusetts, could obtain a divorce from the Rhode Island

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1. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007). See also Matthew J. Skinner, Comment, *To Harm, To Victimize, And To Destroy: The Ugly Reason Why the Chambers Majority Opinion was So Right*, 72 ALB. L. REV. 825, 827 (2009) ("In a three-to-two split, the court ultimately concluded that . . . the Rhode Island Family Court today did not have jurisdiction to entertain a divorce petition of a same-sex couple married in Massachusetts . . .").

2. 935 A.2d 956, 958 (R.I. 2007).

Family Court, the only avenue available to them as Rhode Island residents.<sup>3</sup> The Supreme Court of Rhode Island said no.<sup>4</sup>

The issue here, the foreign recognition of valid same-sex marriages, reaches back to 1993. In *Baehr v. Lewin*, the Hawaii Supreme Court held that the Hawaiian government must show a compelling reason for limiting same-sex marriage to opposite-sex couples.<sup>5</sup>

This decision became a national concern for conservatives when commentators on both sides on the issue began postulating that, under either the Full Faith and Credit Clause of the U.S. Constitution or the common-law doctrine of comity, all states would have to afford the rights of marriage to same-sex couples married validly in other states.<sup>6</sup> The response to this was the "Defense of Marriage Act" of 1996 (DOMA), which codified the existing law of comity and its accompanying public policy exception, granting states a reprieve from recognition of any validly performed same-sex marriage.<sup>7</sup>

The catch, however, is that this is merely a bar to enforcement under federal law. This limitation invites States to enact individual state DOMAs or pass legislation restricting marriage to opposite-sex couples. Additionally, some states have amended their constitutions to define the contours of marriage as purely heterosexual. Forty-one states currently have some form of

3. *Id.* at 970, (Suttell, J., dissenting) (discussing that under Rhode Island law, divorces are only heard by the Family Court, which has jurisdiction over all divorces arising among Rhode Island residents); *see also* Cote-Whiteacre v. Dep't of Pub. Health, 844 N.E.2d 623, 631 (Mass. 2006) (holding that non-Massachusetts residents from states that do not recognize same-sex marriages could be afforded a valid marriage in Massachusetts); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the state of Massachusetts could not deny same-sex couples the right to marriage under the state constitution).

4. *Chambers*, 935 A.2d at 963.

5. 852 P.2d 44, 68 (Haw. 1993). The decision was short-lived, however. Soon afterwards, a movement to amend the Hawaii constitution to define marriage as between a man and a woman began. This amendment, HRS Const. art I, §23 was passed in November of 1998. It reads: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

6. Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1860 (2008).

7. 28 U.S.C. § 1738C (2003).

prohibition on their books, either in the form of a state DOMA, a statutory prohibition, or a constitutional prohibition against same-sex marriages.<sup>8</sup>

New York, Maine, New Jersey, New Mexico and Rhode Island have no laws regarding the recognition of valid out-of-state same-sex marriages.<sup>9</sup> This lack of statutory authority prompted Rhode Island's Attorney General, Patrick Lynch, to issue an advisory opinion arguing that the state must recognize such marriages.<sup>10</sup> The opinion, which is not binding, conflicts with the Rhode Island Supreme Court's assertion in *Chambers* that persons in a valid same-sex marriage cannot be granted a divorce in the state's courts. The Rhode Island legislature, to date, has taken no action; it has not recognized same-sex marriages, affirmatively denied them, or codified its public policy exception.<sup>11</sup> This causes confusion in interpreting the laws of the state: for what purposes will a marriage be recognized, and for which will it not?

The position of this Comment is that Rhode Island must recognize all valid out of state same-sex marriages for all purposes. Rhode Island is behind the times, as it is surrounded by states that recognize same-sex marriages. Indeed, all of New England excluding Maine and Rhode Island now does so.<sup>12</sup>

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8. Human Rights Campaign, *Statewide Marriage Prohibitions*, [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) [hereinafter *Statewide Marriage Prohibitions*]. The number has, at times, been higher. Iowa and Connecticut have both had statutes restricting marriage to one man and one woman, both of which have been declared unconstitutional by both state's courts. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

9. *Statewide Marriage Prohibitions*, *supra* note 8.

10. Memorandum from Patrick Lynch, Attorney General of the State of Rhode Island, to Jack R. Warner, Commissioner of Rhode Island Board of Governors for Higher Education, (Feb. 20, 2007) (on file with author) [hereinafter *Lynch*] (memorandum in response to a question by the Commissioner as to whether employees of state universities must have their personnel file statuses changed to "married" as a result of being married to a person of the same sex in Massachusetts).

11. See Cynthia Needham, *Why Rhode Island Stands Alone in New England on Same-Sex Marriage*, PROVIDENCE J., May 9, 2009, at 1; see also Katherine Gregg, *Carcieri Vetoes Bill Allowing Partners to Plan Funerals*, PROVIDENCE J., Nov. 11, 2009, at 1 (Rhode Island's governor, Donald Carcieri, vetoed a bill passed by the legislature that would allow domestic partners funerary rights over a recently deceased loved one).

12. See Abby Goodnough, *Gay Rights Rebuke Might Result in Change in Tactics*, N.Y. TIMES, Nov. 5, 2009 at A25.

This Comment seeks to demonstrate how, using Rhode Island as a model, the doctrine of comity, where applied properly, clearly works in favor of same-sex couples married validly, but currently living in states where the law is silent on the issue. The law of comity is an answer that confers the full panoply of state-marriage benefits upon a couple once validly married anywhere. With it, the courts need not parse out the different benefits and burdens for which a marriage will apply. A proper and just decision on the issue of comity as it applies to same-sex marriages would have a tremendous impact on the nationwide issue of same-sex marriages.<sup>13</sup>

Part I of this Comment examines the decision in *Chambers*, addressing both the majority and the dissenting opinions, discussing why the dissent was correct in its analysis of state statutory law that would have granted the right of same-sex couples to divorce. Part II discusses in greater detail the history of using comity and public policy to recognize foreign marriages. Part III sets forth how the public policy exception to the comity doctrine should be applied in Rhode Island. In such, this Comment contends that Rhode Island should apply comity broadly, to encompass the full recognition of foreign same-sex marriages. This Comment concludes by illustrating that comity has protected a range of couples throughout American history, and it has consistently furthered the virtues of equality and justice. Recognizing same-sex marriage is in accordance with this tradition.

#### I. *CHAMBERS V. ORMISTON*: A TALE OF LOST LOVE AND NEVER-ENDING MARRIAGE

Margaret Chambers and Cassandra Ormiston, both Rhode Island residents, were married in Fall River, Massachusetts on May 26, 2004.<sup>14</sup> The right of same-sex couples to marry in

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13. This Comment does not address issues pertaining to Equal Protection or the oft-debated argument regarding whether valid same-sex marriages must be recognized under the Full Faith and Credit Clause of the U.S. Constitution. See Andrew Koppelman, *Recognition and Enforcement of Same-Sex Marriage: Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146 (2005) (arguing that many people "confusedly" believe that interstate recognition of valid same sex marriages is a Full Faith and Credit issue).

14. *Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007).

Massachusetts had been recognized by the Massachusetts Supreme Judicial Court in the landmark case of *Goodridge v. Department of Public Health*.<sup>15</sup> The couple returned to Rhode Island and resided together for two years until they decided to dissolve their marriage.<sup>16</sup> Accordingly, Ms. Ormiston petitioned the Rhode Island Family Court for divorce on October 27, 2006 and Ms. Chambers answered and counterclaimed a week later.<sup>17</sup>

The Rhode Island Family Court is a statutory court, with jurisdiction to “hear and determine all petitions from the bond of marriage.”<sup>18</sup> Despite the Family Court’s jurisdiction over “all petitions,” Family Court Chief Judge Jeremiah S. Jeremiah, Jr. expressed hesitance at granting this particular divorce.<sup>19</sup> No state that did not explicitly recognize same-sex marriage had ever granted a divorce from one performed in another jurisdiction before and Judge Jeremiah was unsure how to proceed given Rhode Island’s complete lack of same-sex marriage legislation, permissive or prohibitory.<sup>20</sup> To resolve the confusion, the Family Court certified the question to the Rhode Island Supreme Court.<sup>21</sup>

After remanding for fact finding, the Supreme Court heard the case, asking whether the Family Court Act allowed the Family Court “to grant a divorce to the instant parties, who are described in the certified question as two persons of the same-sex who were purportedly married in another state.”<sup>22</sup> In other words, is a valid gay marriage treated the same as a heterosexual marriage for the purpose of divorce?

Justice William P. Robinson, writing for a majority that included then-Chief Justice Frank Williams and Justice Francis

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15. 798 N.E.2d 941, 969 (Mass. 2003); *see also* *Cote-Whiteacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 631 (Mass. 2006) (holding that non-Massachusetts residents from states that did not have any statutory or judicial non-recognition of same-sex marriages could be afforded a valid marriage in Massachusetts).

16. *Chambers*, 935 A.2d at 958-59.

17. *Id.* at 959.

18. R.I. GEN. LAWS § 8-10-3(a) (1997) (Known as the “Family Court Act,” the statute reads: “There is hereby established a family court, consisting of a chief judge and eleven (11) associate justices, to hear and determine all petitions for divorce from the bond of marriage and from bed and board . . .”).

19. *See Chambers*, 935 A.2d at 959.

20. *See Skinner*, *supra* note 1, at 826.

21. *Chambers*, 935 A.2d at 959.

22. *Id.* at 961 (internal quotations omitted).

Flaherty, decided that in order to answer this question, the court must first inquire whether the statute was ambiguous.<sup>23</sup> Justice Robinson began this analysis by attempting to divine the meaning of the word "marriage" as understood by the legislature in 1961, when the statute was enacted.<sup>24</sup> Relying on the default "plain meaning" rule of statutory construction, Justice Robinson looked to three contemporary dictionaries, finding that the meaning of marriage, as understood by the legislature then, could have been nothing more than that consisting of a man and a woman.<sup>25</sup> Thus, in his view, the statute was unambiguous.

Recognizing that this was "no ordinary case,"<sup>26</sup> Justice Robinson justified his logic under an alternative line of reasoning, declaring that the result would have been the same under the canon of statutory construction *noscitur a sociis*, which instructs courts to look at other words associated with the ambiguous term in question.<sup>27</sup> In his analysis, Justice Robinson looked at other provisions of the general laws relating to marriage, finding them all to consist of a male party and a female party.<sup>28</sup> All of these statutes, he found, employed gendered terms, leading him to conclude that even if the statute were ambiguous, it was clearly meant to constrict the jurisdiction of the family courts to marriages consisting of one man and one woman.<sup>29</sup>

The dissent, authored by now-Chief Justice Paul Suttell, and joined by Justice Maureen McKenna Goldberg, argued that "the legal recognition that ought to be afforded same-sex marriages for any particular purpose is fundamentally a question of public

23. *Id.*

24. *Id.* at 961-62.

25. *Id.* at 962.

26. *Id.* at 963 n.16 ("Although in the ordinary case we would not engage in an analysis pursuant to a canon of statutory construction after we had found a statute to be unambiguous, we recognize that this is no ordinary case, and we believe that such an analysis would be informative and useful to the public at large in this instance.").

27. *Id.* at 964 (citing *State v. DiStefano*, 764 A.2d 1156, 1161 (R.I. 2000) ("[T]he meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.")); *see also* LATIN FOR LAWYERS 208 (The Lawbook Exchange, Ltd. 1992) ("The meaning of a word may be ascertained by reference to those associated with it.").

28. *Chambers*, 935 A.2d at 964-65 (citing R.I. GEN. LAWS §§ 15-1-1, 15-1-2 (2003), § 15-2-1, 15-2-7 (2003), § 11-6-1 (2002)).

29. *See id.*

policy, more appropriately determined by the General Assembly after full and robust public debate.”<sup>30</sup> In other words, Chief Justice Suttell would, had he been writing for the majority, have only decided the issue as relating to divorce, and not as it relates to same-sex marriage in general.

The dissent’s primary contention with the majority’s holding is that it addressed the wrong issue. The parties’ marriage, Chief Justice Suttell wrote, is valid in Massachusetts, and must be recognized under the statute’s language granting the Family Court jurisdiction to hear “all” petitions for divorce from marriage.<sup>31</sup> The dissent declared that it would have been “quite extraordinary” for the drafters of the 1961 legislation to have contemplated same-sex marriages.<sup>32</sup> But, argued the dissent, the court must instead look to the “breadth and objectives” of the statute to resolve all matters of domestic relations, instead of how legislators in 1961 may have envisioned marriage.<sup>33</sup>

The dissent also argued that the Court indeed had jurisdiction under a separate statute, Rhode Island General Law § 15-5-1, enacted five years prior to the Family Court’s establishment in 1956. The statute states that: “[D]ivorces from the bond of marriage shall be decreed in case of any marriage originally void or voidable by law . . . .”<sup>34</sup> According to Chief Justice Suttell, this provision provides the Family Court plenary power to entertain any divorce, whether or not it is valid in Rhode Island, without having to necessarily assess its validity.<sup>35</sup> It is telling to note that this statute is not cited or discussed by the majority. This statute would allow parties to a bigamous or incestuous marriage, both of which are void under Rhode Island law, to petition the Family Court for divorce.<sup>36</sup> Therefore, even if the majority’s analysis of the Family Court’s jurisdiction was dependant on the definition of marriage as understood by the legislature at the time, same-sex marriages would be precisely the “void or voidable” sort of marriage for which this statute pertains to.

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30. *Id.* at 967 (Suttell, J., dissenting).

31. *Id.* at 970-71 (Suttell, J., dissenting).

32. *Id.* at 971 (Suttell, J., dissenting).

33. *Id.*

34. R.I. GEN. LAWS § 15-5-1 (1956).

35. *Chambers*, 935 A.2d at 972 (Suttell, J., dissenting).

36. *Id.*



Finally, the dissent noted that Rhode Island has recognized the rule of *lex loci celebrationis*, a common law maxim meaning that the capacity to marry is determined by the law of the jurisdiction where the marriage is to take place, and must be recognized unless it is opposed to the stated public policy of the jurisdiction.<sup>37</sup> Chief Justice Suttell reiterated that even if the public policy exception operated to bar a foreign marriage in Rhode Island, the state's statutes give the courts a way to hear the petition for divorce anyway.<sup>38</sup> R.I. General Law § 15-5-1, he noted, would still allow the Family Court to hear a divorce from such a valid marriage declared void for being against the strong public policy of the state.<sup>39</sup> As the dissent makes clear, despite whatever interpretation a 1961 legislature may have had, it should be clear that a petition for divorce for any marriage, valid or invalid, void or voidable, in Rhode Island, must be entertained by the Family Court.

The dissent refrained from arguing that Rhode Island law should recognize same-sex marriages performed validly for all purposes, and not just for divorce, when fully analyzed under principles of comity and public policy.<sup>40</sup> Whether it is because full recognition was not the issue presented to them or purely for purposes of judicial restraint is unclear. The position of this Comment, however, is that the doctrine of comity and public policy will grant full recognition to all marriages, and not only for isolated incidences. The next two sections will explore the contours of the doctrine. This Comment argues for full recognition for all marriages performed validly outside of Rhode Island and other jurisdictions that similarly do not have positive prohibitions on same-sex marriage.

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37. *Id.* (Suttell, J., dissenting) (citing *Ex parte Chace*, 58 A. 978, 979 (R.I. 1904)).

38. *Id.* at 973 (Suttell, J., dissenting).

39. *Id.* ("As we previously have noted, however, even if the presumption of validity of a Massachusetts same-sex marriage were rebutted by a showing that it was 'strongly against the public policy' of Rhode Island, or if the General Assembly declared it as such, the Family Court would not be deprived of authority to entertain a petition seeking to dissolve the marriage.").

40. *See id.*

## II. COMITY AND THE STRONG PUBLIC POLICY EXCEPTION TO RECOGNITION OF MARRIAGES FROM FOREIGN JURISDICTIONS

In 2007, months before *Chambers* was decided, Attorney General of Rhode Island Patrick Lynch took the position that same-sex couples who had legally married in Massachusetts should be afforded full legal recognition in Rhode Island.<sup>41</sup> He reiterated his position in the *Chambers* case.<sup>42</sup> The Attorney General's argument is simple and persuasive: because Rhode Island lacks any law strictly prohibiting same-sex marriages, comity must be granted to all same-sex marriages performed validly in other jurisdictions.<sup>43</sup> This issue pertaining to comity and the public policy exception is detailed below.

### A. Comity and the Public Policy Exception

Under the doctrine of comity, a political entity affords recognition, reciprocity and respect to the judgments of other entities.<sup>44</sup> Comity is not a rule of law per se, but it is uniformly employed by courts as a courtesy to judgments and contracts made under the laws of fellow sovereigns.<sup>45</sup>

In the context of marriage, the general rule of comity is that a marriage that is valid where entered into will be recognized in all other states except those that have a strong public policy against that marriage.<sup>46</sup> This public policy exception to the rule of

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41. See Lynch, *supra* note 10.

42. See Brief for State of Rhode Island as Amicus Curiae Supporting Parties, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 2006-0340 M.P.).

43. *Id.* at \*16.

44. BLACK'S LAW DICTIONARY 114 (3d Pocket ed. 2006) ("A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts."); see also Gennaro Savastano, Comment, *Comity of Errors: Foreign Same-sex Marriages in New York*, 24 *TOURO L. REV.* 199, 208 (2008) (describing the necessity of the doctrine to deal "properly and fairly" with the high magnitude of decrees and judgments stemming from courts that would ordinarily be put at risk due to the different laws of different states and nations).

45. See *Obrien v. Costello*, 216 A.2d 694, 699 (R.I. 1966).

46. *Ex parte Chace*, 58 A. 978, 980 (R.I. 1904) ("[A] well-recognized exception to the general rule laid down above, namely, that if a marriage is odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public

marriage recognition exists to protect a sovereign political entity's ability to define its own laws. In American law, the general rule of comity has been partially codified by the Full Faith and Credit Clause of the U.S. Constitution.<sup>47</sup> Thus, the Constitution ensures that the judgment of a state court should have the same credit, validity and effect in every court in the United States that it had in the state where it was pronounced, preventing states from acting as foreign sovereigns to one another, ignoring binding obligations created by each state.<sup>48</sup>

Comity and conflicts of laws, however, are inherently broader than the Full Faith and Credit Clause. These concepts apply not only to judgments, but also to obligations that arise according to a state's laws, such as marriage. Comity creates an exception from forcing a sovereign entity—here, the fifty states that form the United States of America—from recognizing such obligations if they are against the strong public policy of that entity.<sup>49</sup> Thus, when dealing with an obligation from a foreign state (Massachusetts and Rhode Island are indeed foreign to each other), a state may apply traditional conflict of laws principles in order to determine whether to honor the obligation as made pursuant to another state's law.

#### B. The Evolution of the Public Policy Exception Doctrine

The rules regarding whether a marriage under one state's laws will be recognized by another state are no different than the general rule of comity as applied to all laws. The Restatement (Second) of Conflict of Laws states the rule: "[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

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policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized.").

47. See 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.").

48. See *Williams v. North Carolina*, 317 U.S. 287, 293-94 (1942) (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818)).

49. See *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

the time of the marriage.”<sup>50</sup> This principle is built on the common law rule of *lex loci celebrationis*, which states that the validity of a marriage is to be determined by the law of the state where it is entered into, and only need not be honored and given the effect of comity if it violates the strong public policy of the jurisdiction.<sup>51</sup>

A brief history of the emergence of the doctrine in American law is essential to understanding the doctrine. In Anglo-American jurisprudence, the public policy rule has been applied to recognition of marriages as early as 1567.<sup>52</sup> There, in the case of *Cartwright's Case*, an Englishman who brought a slave from Russia was brought before England's Star Chamber. The court was loathe to endorse slavery and it set the slaves free, declaring that “England was too pure an air for slaves to breathe in.”<sup>53</sup> The so-called “Pure Air” rule was cited by early American courts faced with the issue of whether slaves, upon entering a non-slave state, were instantly freed.<sup>54</sup> As noted by Professor Lynn D. Wardle, some colonies applied this “pure air” rule, which could also be thought of as a form of instant emancipation, while other colonies allowed a slave to pass through its territory but did not permit them to remain there in perpetual bondage.<sup>55</sup> The difference, Wardle writes, was whether or not the states had banned slavery, or were in a period of gradual emancipation.<sup>56</sup>

The rationale gradually expanded to interstate recognition of interracial marriages.<sup>57</sup> While comity was a default position under American law pursuant to the U.S. Constitution as discussed above, states that prohibited interracial marriages generally prohibited recognition of interracial marriages when

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50. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

51. Savastano, *supra* note 44, at 210; *see also Ex parte Chace*, 58 A. at 979 (holding that *lex loci celebrationis* is the law in Rhode Island).

52. Wardle, *supra* note 6, at 1871.

53. *Id.* (internal quotations omitted). The author argued that the case reflects “the notion that slavery was incompatible with the strong domestic policy in England in favor of recognizing the liberty of all individuals in England” and that it overrode any considerations of comity. *Id.* at 1872.

54. *Id.* at 1876-77 (suggesting that slavery, not based on natural law or common law principles, could only exist and be enforced where there was positive law to allow it).

55. *Id.* at 1885-86.

56. *Id.*

57. *See id.* at 1893.

validly performed elsewhere.<sup>58</sup> In the 1819 Massachusetts case of *Medway v. Needham*, an interracial couple married in Rhode Island in order to evade Massachusetts' laws prohibiting miscegenation.<sup>59</sup> The marriage, the court held, could be recognized in Massachusetts, despite the couple's intent to violate the laws that would prohibit their marriage in Massachusetts, because the marriage did not violate public policy.<sup>60</sup> So long as such a valid marriage does not cause "disastrous consequences" or "public mischief, which would result from the loose state, in which people situated would live," then the foreign marriage must be recognized, despite the fact that it would be void had it been performed in Massachusetts.<sup>61</sup> Judicial application of comity in the racial context has seen little usage or necessity in recent times due to the U.S. Supreme Court's decisive holding in the 1967 case of *Loving v. Virginia*,<sup>62</sup> which held that laws prohibiting interracial marriage violate the Constitution. The doctrine is still binding law on all issues of comity, and, as this Comment argues, same-sex couples will need to rely on it to determine the legal status of their marriages.

### C. The Public Policy Doctrine and Same-Sex Marriage

The rule of *lex loci celebrationis* has been voided for same-sex marriages in forty-one states by way of "mini-DOMAs" and constitutional amendments specifically banning recognition of any valid same-sex marriages performed in other jurisdictions.<sup>63</sup> The authority for states to enact such law expressly denying comity is found in the DOMA, which prohibits the federal government from

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58. *Id.*

59. 16 Mass. 157, 159 (MA 1819). This case also stands for another important principle of comity, forum evasion. This was often an issue relating to interracial marriage, where an interracial couple would escape to another state in order to avoid the criminal penalties of marriage in that state. In this case, however, there was no clear public policy prohibiting interracial marriages even where the couple married in a different state simply to evade the laws proscribing such a marriage. As we can see, the public policy bar in the nineteenth century was significantly lower, and perhaps harder to distinguish, than it is today.

60. *Id.* at 161.

61. *Id.* at 160-61.

62. 388 U.S. 1, 2 (1967) (holding unconstitutional any state laws to prevent marriage between persons based solely on racial criteria).

63. See *Statewide Marriage Prohibitions*, *supra* note 8.

superseding state law regarding the recognition of same-sex marriages.<sup>64</sup> State DOMAs can be utilized to suggest that such marriages are contrary to the strong public policy of the state.<sup>65</sup> Additionally, as noted by Professor Andrew Koppelman, other state laws could reflect a similar policy.<sup>66</sup> Professor Koppelman suggests, for instance, looking to incidental marriage benefits provided under state law, such as the right to make medical decisions for one's partner.<sup>67</sup> A state's public policy, he argues, would not be offended when a couple, married in another state, attempts to claim this right absent some sort of statutory ban on the couple's marriage.<sup>68</sup>

On the issue of same-sex marriage, there are few reported cases discussing whether comity compels recognition of foreign same-sex marriages. However, two courts have done so, and they reached different results. These opinions shed light on the current understanding of the doctrine. In the 2002 case of *Rosengarten v. Downes*, the Connecticut Supreme Court held that Connecticut had a strong public policy against same-sex marriage, evinced by a state statute, and, therefore, did not need to enact a state DOMA to ban same-sex marriages.<sup>69</sup> The *Rosengarten* Court

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64. See generally 28 U.S.C. § 1738C (2003).

65. Koppelman, *supra* note 13, at 2149-50 (stating that by enacting such laws, states employ a "blanket rule of nonrecognition" allowing them to "ignore marriage licenses granted to same-sex couples in other states") (internal citations omitted).

66. *Id.* at 2153. Professor Koppelman further suggests that statutory law declaring homosexual sex to be criminal sodomy would have served as an example to suggest a strong public policy against the recognition of same-sex marriages, however such laws have, indeed, been declared unconstitutional and void following *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring all state laws criminalizing private consensual sex acts between adults unconstitutional).

67. *Id.* at 2145.

68. *Id.*

69. 802 A.2d 170, 182 (Conn. App. Ct. 2002). While this case, regarding the recognition of a Vermont civil union under the public policy exception has been limited by *Kerrigan*, 957 A.2d at 407, which held that the Connecticut constitution guaranteed the right of same sex couples to marry, it still stands as an example of how the public policy exception to comity has been tested and used to deny recognition. *Rosengarten*, 802 A.2d at 180. The court also discussed the fact that a civil union was not a "marriage" under Vermont law as a reason for not allowing it to be recognized as a marriage under Connecticut law, but its discussion of comity and public policy in terms of the state's strong public policy stance on opposite-sex marriage would

explicitly found a statutory policy against same-sex marriages in Connecticut General Statute § 45a-727a.<sup>70</sup> The *Rosengarten* Court also referenced debate by the Connecticut legislature on whether a state DOMA was needed in light of § 45a-727a.<sup>71</sup>

In 2006, the New York State Court of Appeals held that, under the state's equal protection clause, the state was not required to grant marriages to same-sex couples.<sup>72</sup> Despite this pronouncement, two years later the Fourth Department of the New York Supreme Court-Appellate Division held in *Martinez v. County of Monroe* that validly married same-sex couples must have their marriage recognized in New York under the doctrine of comity.<sup>73</sup> This sentiment was echoed two years following *Martinez* by New York's highest court, the Court of Appeals, in Justice Carmen Beauchamp Ciparick's concurring opinion in *Godfrey v. Spano*.<sup>74</sup>

The *Godfrey* concurrence, like the *Martinez* majority, applied

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presumably apply the same way to a valid same-sex marriage. *Id.* at 174-75, 179-82.

70. *Id.* at 181. "It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman." *Id.*, (quoting CONN. GEN. STAT. § 45a-727a (2000)).

71. *Id.* at 182.

72. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

73. *Martinez v. County of Monroe*, 50 A.D.3d 189, 191 (N.Y. App. Div. 2008).

74. *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (Ciparick, J., concurring). *Godfrey* involved the right of state executives to order agencies under their control to recognize valid same sex marriages for the purpose of state benefits. *Id.* at 330. The majority held that same sex marriages, performed validly out-of-state, could be recognized for the purpose of state employee benefits. *Id.* at 376. The holding was limited, however, to the issue of benefits. *Id.* Judge Ciparick, in a concurring opinion, argued that the decision should cover complete recognition. *Id.* at 337 (Ciparick, J., concurring). In *Martinez*, the intermediate appellate court ordered the full recognition of same sex marriages by a state college under public policy grounds. *Martinez*, 50 A.D.3d 189. This decision, however, is not binding statewide, unlike *Godfrey*. Thus, while the argument under *Martinez* that same sex marriages must be recognized is still good law for the parties it applied to (college employees), its command that foreign same-sex marriages must be recognized is not as strong as the command under *Godfrey*, that marriages must be recognized for the sole purpose of certain employment benefits when directed by the administrator of that agency. *Godfrey*, 920 N.E.2d 328; *Martinez*, 50 A.D.3d 189; see also Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1 (three months after *Martinez*, Governor David Paterson ordered all state agencies under his control to recognize same-sex marriages).

a New York version of the public-policy test, where comity would not be granted if the marriage was prohibited by either positive law of the state or by natural law.<sup>75</sup> The court in *Martinez* held 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 to prohibit recognition of a marriage that would have been invalid if solemnized in New York.”<sup>76</sup> Because the state legislature had not enacted any legislation strictly prohibiting the recognition of same-sex marriages entered into validly in foreign jurisdictions, then the marriage must be upheld in New York.<sup>77</sup> The Court of Appeals declined to hear an appeal of the *Martinez* decision, upholding its decision to use comity to order the recognition of the marriages at issue, but not enshrining comity as the vehicle to recognizing same-sex marriages for all purposes statewide.<sup>78</sup>

Further discussion of how the *Martinez* court circumvented the possible public policy against same-sex marriage that could be inferred from *Hernandez* is discussed below. It is worth noting at this point that the *Martinez* rule, requiring an explicit prohibition against *foreign* same-sex marriages, is more restrictive than what the laws of comity generally require to show a strong public policy. *Martinez* thus requires that the prohibition discriminate between performing the marriages within the state or excluding those from outside of the state. Despite this, both *Rosengarten* and *Martinez/Godfrey* highlight the modern framework discussed by Professor Koppelman and set forth in the Restatement (Second) of

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75. *Godfrey*, 920 N.E.2d at 338-39 (Ciparick, J, concurring).

76. *Martinez*, 50 A.D.3d at 192 (quoting *Matter of May*, 305 N.Y. 486, 493 (N.Y. 1953)).

77. *Id.*; see also *Godfrey v. Spano*, 920 N.E.2d 328, 338 (N.Y. 2009) (Ciparick, J., concurring) (“Although the Federal Defense of Marriage Act (DOMA) authorizes the states to pass so-called “mini-DOMAs”—and many states have done so—New York has not, and the Legislature has enacted no other law expressly forbidding the recognition of same-sex marriages performed in other jurisdictions or expressing any legislative intent that such marriages be voided. Thus, the positive law exception to recognizing out-of-state same-sex marriages does not apply.” (internal citations omitted)).

78. See *Martinez v. County of Monroe*, 889 N.E.2d 496 (N.Y. 2008) (“Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.”).



Conflict of Laws: state law must actively prohibit recognition of the marriage in order to show a strong public policy that will deny comity to the marriage.<sup>79</sup>

D. *Ex Parte Chace*: The Public Policy Exception Benefiting “Evasive” Marriages in Rhode Island

The public policy exception to the comity doctrine has only appeared once in Rhode Island case law prior to the *Chambers* dissent, in the case of *Ex parte Chace*.<sup>80</sup> In May of 1899, Henry C. Chace was appointed as the ward of Andrew D. Wilson.<sup>81</sup> Three years later, Henry Chace married the future Elizabeth Chace in Massachusetts, without the Wilson’s written consent. This was contrary to Rhode Island law, which required a ward to obtain the written consent of his or her guardian before he or she could receive a marriage license from the state.<sup>82</sup> Additionally, other state laws voided all contracts and bargains entered into by

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79. Nothing about the test prescribed here, or this Comment in general, should be construed to suggest that the author intends to close the door to comity and public policy recognition in states that possess a law limiting marriage to one man and one woman. While the test clearly grants comity where there is no such law, the bar will, in the end, rely on the comity and public policy jurisprudence of each individual state. As seen with *Rosengarten*, laws limiting marriage are passed under a variety of circumstances and in different means, each one susceptible to a different level of interpretation by different state courts. See Memorandum of Douglas F. Gansler, Attorney General of the State of Maryland to Hon. Richard S. Madaleno, Jr., Maryland Senate, (Feb. 23, 2010) (on file with author) (arguing that Maryland’s laws limiting marriage in that state to a man and a woman are not strong enough public policy to deny comity to same-sex marriages because the law was not passed in reaction to gay marriages performed in other states). In theory, a state’s high court could find a state limiting marriage to one man and one woman to not be a sufficient public policy, depending on the circumstances of that statute’s passage and the state’s laws on comity. Unfortunately, the door to comity recognition is indeed shut for the twenty-nine states that have amended their state constitutions to exclude same sex couples from marriage.

80. *Ex parte Chace*, 58 A. 978, 980 (R.I. 1904).

81. *Id.* at 978-79 The decision gives little background as to why this appointment was made other than, pursuant to Rhode Island law at the time, that Ward became guardian because “on the ground that, from want of discretion in managing his estate, [Chace] was likely to bring himself to want.” The decision says nothing of Chace’s age other than that he was “a person of full age.”

82. *Id.* at 979.

wards.<sup>83</sup> Apparently, such conditions and prerequisites did not exist in order to obtain a marriage in Massachusetts.<sup>84</sup> The couple returned to Rhode Island, where they lived for several months until Wilson removed Henry Chace from the home.<sup>85</sup> Mrs. Chace then filed a writ of habeas corpus seeking to have her husband liberated from Wilson's guardianship and returned to her.<sup>86</sup>

The Rhode Island Supreme Court, as a threshold matter, engaged in a discussion of whether the couple was validly married.<sup>87</sup> Andrews argued, *inter alia*, that because Rhode Island law voids any "contracts, bargains, and conveyances made by any person under guardianship," that it is the policy of Rhode Island law to deny validity to contracts entered into by a ward, even those fulfilling the requirements of the law where it took place.<sup>88</sup>

The court, however, disagreed with Mr. Andrews' arguments, holding first that the capacity of the parties to marry depends on the law of the place where the marriage occurred.<sup>89</sup> To hold otherwise, the court rationalized, would mean that the validity of the marriage depended on the domicile of the parties, wherever they were, which would lead to confusion.<sup>90</sup> To support this proposition, the court cited *Medway* to demonstrate that even marriages that may have the appearance of being conducted in a different jurisdiction merely to evade the laws proscribing such a marriage in the jurisdiction of domicile must be presumed non-evasive.<sup>91</sup> The court next decided that an exception to this rule would invalidate the marriage in the state of domicile only if the

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83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.* at 978-79 (Mrs. Chace averred that "the respondent guardian thereupon imprisoned Mr. Chace, and is now unlawfully restraining him of his liberty . . .; that he is deprived of the companionship, assistance, and care of his wife, which he desires; that he is not permitted to have social intercourse with her, save in the presence of his guardian; and that he is being treated in a manner inconsistent with the relation of guardian and ward.").

87. *Id.* at 979.

88. *Id.*

89. *Id.*

90. *Id.* at 980 (citing *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395, 417 (K.B. 1752)).

91. *Id.* (citing *The Inhabitants of Medway v. The Inhabitants of Needham*, 16 Mass. 157 (Mass. 1819)).

marriage is "odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction."<sup>92</sup> Under this analysis, the court declared Mr. Chace's marriage valid.<sup>93</sup>

The court, in dicta, suggested that polygamous and incestuous marriages would "probably" fit the "odious by the consent of nations" standard.<sup>94</sup> The *Chace* court looked for a present prohibition of the specific type of marriage, by either positive statutory law or generally accepted moral standards, in order to identify the sort of "strong public policy" that would fit into its narrow exception.<sup>95</sup> While the law invoked by Mr. Chace's guardian voided marriages that took place in Rhode Island where the ward had not received the consent of his guardian, it still permitted wards to marry in general.

*Ex parte Chace* establishes that Rhode Island law conforms to the general principles of comity: that a marriage entered into validly in another jurisdiction must be valid in Rhode Island, even if it would not be valid if entered into in Rhode Island, unless there is reason, such as a state law, to cause the marriage to be considered dangerous to the morals of the state, and generally "odious."

As will be demonstrated, although the "odious by consent of nations, or if its influence thought dangerous to the fabric of society" standard is outdated, it can be updated and applied to modern standards as a two-part test, using the same rationale as the Rhode Island Supreme Court did in 1914.

### III. THE RHODE ISLAND MODEL FOR COMITY AND PUBLIC POLICY RECOGNITION OF SAME-SEX MARRIAGES

#### A. Shaping the Policy for Same-Sex Couples . . .

Chief Justice Suttell, in his dissenting opinion in *Chambers*,

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92. *Ex parte Chace*, 58 A.2d at 980.

93. *Id.* at 981.

94. *Id.* at 980.

95. *See id.* The court here did not engage in a discussion as to whether the marriage was prohibited under the "dangerous to the fabric of society" exception, presumably because it was clear that such marriages are generally allowed by the statute, only proscribing the marriage of a ward when he does not obtain the consent of the guardian.

addresses the question of the public policy exception as an “even if” question: “[E]ven if the presumption of validity of a Massachusetts same-sex marriage were rebutted by a showing that it was strongly against the public policy of Rhode Island, or if the General Assembly declared it as such, the Family Court would not be deprived of authority to entertain a petition seeking to dissolve the marriage.”<sup>96</sup>

He thus addressed, but did not explain or apply the contours of the public policy exception in Rhode Island, as laid down in *Ex parte Chace*. There could be a number of reasons for this fact. As stated earlier, judicial restraint is a likely reason. An examination of *Rosengarten*, *Godfrey*, *Martinez* and *Ex parte Chace* reveals that the public policy exception to the comity rule slightly differs from jurisdiction to jurisdiction. However, this Comment contends that its application to same-sex marriages in American states should be relatively uniform: if the state has a “mini-DOMA” or statutory law codifying the state’s public policy against same-sex marriages or explicitly limited to heterosexual marriages, there will be no recognition. But, without such a law, the marriage must be recognized under principles of comity.<sup>97</sup>

As discussed earlier, the *Godfrey* concurrence, channeling the *Martinez* court, subscribed to a simple test: look first to positive law and ask if it specifically prohibits recognizing a type of marriage. Next, look to natural law, and ask whether the marriage in question has been traditionally disfavored, such as polygamous or bigamous marriages.<sup>98</sup>

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96. *Chambers v. Ormiston*, 935 A.2d 956, 973 (R.I. 2007) (Suttell, J., dissenting) (internal quotations omitted).

97. See generally *Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. Ct. 2002); *Godfrey*, 920 N.E.2d at 337-40 (Ciparick, J., concurring); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 742 (N.Y. App. Div. 2008); *Ex parte Chace*, 58 A. 978, 980 (R.I. 1904). One begins to see the emerging of a counterargument: why not just add same-sex marriage to this list of natural law exceptions? The difference is that these natural law exceptions are deeply seated in American and English jurisprudence. As we see in the footnote below, Judge Ciparick has used simple language to define what should and should not fall into the natural law category, despite its standard being so very subjective as to be almost impracticable for regular application.

98. *Godfrey*, 920 N.E.3d at 339 (Ciparick, J., concurring). Judge Ciparick explains that the “natural law” exception can only be invoked where the marriage is “offensive to the public sense of morality to a degree regarded generally with abhorrence and thus not within the inhibitions of natural

The language that governs the public policy exception under Rhode Island law must be updated in order to ensure its modern relevance. It can be broken down into a similar test, given how the *Ex parte Chace* court first looked to state statutes to determine that the type of marriage itself, in its form, was not necessarily prohibited. This is the positive law aspect; the "odious by the consent of nations, or if its influence is thought dangerous to the fabric of society" standard.<sup>99</sup> Thus, the court's first task must be to look to statutory enactments and case law on State public policy to determine whether there is any indication of a strong public policy that specifically prohibits recognition of that type of marriage. This would comport with Professor Koppelman's suggestion that a public policy proscribing valid same-sex marriages from recognition in a forum that does not expressly recognize gay marriage will be difficult to divine absent some sort of positive statutory authority.<sup>100</sup> However, it also allows for consideration of case law to factor into the analysis.

The Restatement (Second) of Conflict of Laws, section 283, comment *k* generally concurs in requiring explicit prohibition in order to find a strong public policy.<sup>101</sup> Specifically, the comment states that "the problem arises in a situation where the marriage does not satisfy the requirements of the state of [domicile] and where as a result the marriage would have been invalid if it had been contracted in that state."<sup>102</sup> Indeed, by "requirements," the Restatement likely refers to whatever structure, either legislative or common law, that the state requires as a condition precedent to marriage; including those conditions that expressly void a marriage, such as blood or familial relation, or in states possessing

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law." *Id.* at 339 (Ciparick, J., concurring). Polygamous and bigamous marriages, often proscribed by natural law, are also frequently proscribed by positive law as well, as is the case in Rhode Island. See *Martinez*, 850 N.Y.S.2d at 742.

99. See generally *Ex parte Chace*, 58 A. at 980. The court's "odious by the consent of nations, or if its influence is thought dangerous to the fabric of society" language can be interpreted to be a general acknowledgement of natural law here, particularly where it describes bigamous and polygamous marriages. It would appear to fully comport with Judge Ciparick's suggestion that these marriages are barred by natural law where they are offensive to public morals to such a character as to be generally abhorred.

100. Koppelman, *supra* note 13, at 2153.

101. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. k (1971).

102. *Id.*

a state-DOMA, the gender of the couples.

B. . . . And then Apply it in Rhode Island

Rhode Island law already proscribes the kinds of marriages that may be entered in to. Chapter 1 of Title 15 of the Rhode Island General Laws (R.I.G.L) contains six statutes prohibiting certain types of marriages and placing limitations on permissible ones. It is an exhaustive list. The first two sections, R.I.G.L §§ 15-1-1 and 15-1-2 prohibit marriages between various blood-related persons.<sup>103</sup> General Law §15-1-3, perhaps somewhat redundantly, voids all incestuous marriages.<sup>104</sup> General Law § 15-1-4 provides an exception to the incest prohibition, permitting certain types of kindred marriages based on degrees of affinity within the Jewish religion.<sup>105</sup> General Law § 15-1-5 declares void all bigamous marriages, particularly those where a person is not yet divorced.<sup>106</sup> The same statute also declares void any marriage entered into by a mentally incompetent person.<sup>107</sup> The difference between each of these statutes and the one at issue in *Ex parte Chace* is that, in *Chace*, the statute did not prohibit the Chaces' marriage, it merely specified the method in which it must be entered in to.<sup>108</sup>

The statutes here do much more; they place an outright restriction on a certain marriage from occurring in Rhode Island. Do they evince a strong public policy to prohibit these same marriages where performed validly elsewhere? Unlike the guardian consent provision, the statutes here allow no marriage at all, as opposed to allowing a marriage pursuant to a precondition. Under Professor Koppelman's analysis, the marriage prohibitions as enacted today are inherently prohibitory, and thus would pass muster as a public policy exception to recognition of these

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103. See R.I. GEN. LAWS §§ 15-1-1, -2 (1956).

104. *Id.* § 15-1-3 (1956).

105. *Id.* § 15-1-4 (1956).

106. *Id.* § 15-1-5 (1956).

107. *Id.*

108. See *Ex parte Chace*, 58 A. at 979 ("Pub. Laws 1898-99, p. 49, c.549 § 11, merely provides that no marriage license shall issue to a person under guardianship without the written consent of the guardian . . .").

marriages.<sup>109</sup> Thus, carving out marriage statutes that expressly prohibit certain types of marriage and declaring them void for all purposes indicates a strong public policy towards denying recognition to such marriages. This, however, is not the case with same-sex marriage.

### C. Can a Prohibitory Statute Imply a Prohibition that it Does Not Expressly Assert?

Can a statute that prohibits incestuous marriages somehow be read to automatically apply a total ban on same-sex marriages as well, when it makes no mention of such marriages? The argument of Rhode Island Governor Donald Carcieri in his *amicus curiae* brief in *Chambers* contends that it can, and indeed does.<sup>110</sup> R.I. Gen Laws § 15-1-1 and 15-1-2 proscribe, respectively, twenty different incestuous relationships for men and nineteen for women.<sup>111</sup> All of these proscribed relationships are heterosexual.<sup>112</sup>

Presumably, however, brother and brother, a relationship not expressly barred by either statute, would not be able to marry. This is because General Law § 15-1-1 stands for the proposition that a man cannot engage in an incestuous marriage to an immediate degree of blood relation within his immediate family, or one extended no more than one or two generations. Under the positive law analysis, step one of our modified *Ex parte Chace* test, one would presume marriages to any immediate family member to be specifically prohibited through statutes that bar a host of similar relationships. These thirty-nine relationships proscribed

109. See Koppelman, *supra* note 13, at 2153.

110. Brief for Governor Donald Carcieri as Amicus Curiae, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 06-340-M.P), 2007 WL 6149056.

111. R.I. GEN. LAWS §§ 15-1-1, -2 (1956).

112. *Id.* § 15-1-1 ("No man shall marry his mother, grandmother, daughter, son's daughter, daughter's daughter, stepmother, grandfather's wife, son's wife, son's son's wife, daughter's son's wife, wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, sister, brother's daughter, sister's daughter, father's sister, or mother's sister."); *Id.* § 15-1-2 ("No woman shall marry her father, grandfather, son, son's son, daughter's son, stepfather, grandmother's husband, daughter's husband, son's daughter's husband, daughter's daughter's husband, husband's father, husband's grandfather, husband's son, husband's son's son, husband's daughter's son, brother, brother's son, sister's son, father's brother, or mother's brother.").

from marriage in Rhode Island indicate a strong public policy to expressly prevent all incestuous marriages. Additionally, if the first two are not enough, § 15-1-3 specifically voids all incestuous marriages.<sup>113</sup>

Using the *Ex parte Chace* framework and the modern trend of looking for evidence of public policy in prohibitory statutes, a couple validly married out of state whose relationship runs afoul of Rhode Island law would not likely be granted comity in Rhode Island. Therefore, a marriage between two brothers would not be granted comity in Rhode Island considering the three statutes that expressly proscribe such a marriage

Because the statute does not expressly ban a homosexual relationship between two brothers but, according to *Ex Parte Chace*, is nevertheless prohibited, does this passive non-recognition of a relationship between two brothers imply that the same passive non-recognition rule exists for all relationships between two men?<sup>114</sup>

This is precisely what Rhode Island Governor Donald Carcieri argued.<sup>115</sup> The Governor's brief postulates that because the legislature did not think it necessary to expressly proscribe an incestuous relationship between same-sex kindred, it would clearly be an "absurd result" to allow such a relationship for lack of strong public policy against it.<sup>116</sup> The Governor uses *Rosengarten v. Downes* to illustrate this.<sup>117</sup> The Governor relies on *Rosengarten* to suggest that "while the lack of an explicit statutory ban might indicate the lack of a public policy against same sex marriage, it could also indicate that the public policy against same-sex marriage is so strong that a statutory ban is not necessary."<sup>118</sup> Thus, where there is no statutory enactment to

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113. *Id.* § 15-1-3 (1956).

114. And, presumably, two women. *Id.* § 15-1-2 (1956). The incest statute for females, does not prohibit a woman from marrying her sister, but it can be presumed that the same public policy non-recognition would forbid such a union. *See id.*

115. *See generally* Brief for Governor Donald Carcieri as Amicus Curiae, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 06-340-M.P), 2007 WL 6149056.

116. *Id.* at \*11-12.

117. *Id.* at \*11 (citing *Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. Ct. 2002)).

118. *Id.*



suggest a strong public policy against same-sex marriage, a strong public policy must be implied by the state's lack of desire to enact one.<sup>119</sup>

This conclusion ignores *Ex parte Chace* completely, which instructs courts to apply principles of comity and conflicts of law analysis, asking whether Rhode Island's stated public policy expresses any desire to not see this marriage exist.<sup>120</sup> The answer in *Chace* was to look to see if the marriage in question has been so strongly detested that it has been deemed so by the legislature or the judiciary.<sup>121</sup> The inquiry was not whether a marriage was so strongly detested in the abstract – the *Chace* court required affirmative evidence.

The Governor's argument is additionally flawed because in looking for public policy, one can only look at the statutes. Collectively, they assert a public policy that incestuous relationships must not exist in Rhode Island.<sup>122</sup> It would be absurd to reason from this that the omission of homosexual incestuous relationships operates as an implicit acceptance of them. They remain incestuous in character, and the companion statutes proscribing incestuous marriages can only be read to evidence a desire by the state to provide a blanket prohibition of all incestuous marriages. Thus, we see the *Ex parte Chace* framework in action, and Governor Carcieri would be correct: an incestuous homosexual marriage validly performed in another jurisdiction would not be recognized in Rhode Island because Rhode Island law clearly evidence a strong public policy disfavoring such incestuous marriages.

But does the omission of same-sex relationships from the incest statutes indicate a strong public policy against permitting same-sex marriages, including those non-incestuous? The answer is certainly no. Public policy in Rhode Island must be founded on

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119. The governor's reading of *Rosengarten* is flawed. While the Governor applies the case to suggest that complete legislative silence suggests an implicit public policy against same sex marriages, the *Rosengarten* court found that strong public policy against same-sex marriages still existed where the legislature found it unnecessary to enact a state-DOMA because it had defined its policy favoring the composition of marriage as between one-man and one-woman in an earlier statute. *Rosengarten*, 802 A.2d at 182.

120. See *Ex parte Chace*, 58 A. at 980.

121. See *id.*

122. See R.I. GEN. LAWS § 15-1-1, -2, -3 (1956).

positive averments stating such a policy founded within express statutory pronouncements or case law.<sup>123</sup> An alternative holding would dictate that statutory silence could imply a public policy. It would also suggest that the incest statutes cover homosexuality in general. A court would be hard-pressed to justify such an expansive legislative intent. The rule established by *Ex parte Chace* clearly commands that public policy be shown by an express proscription of a certain category of marriage, of which same-sex would be a completely separate category than incestuous or bigamous marriages.<sup>124</sup> A public policy prohibiting non-incestuous or non-bigamous same-sex marriages could not be implied from its omission from statutes proscribing incestuous or bigamous marriages.

D. Consideration of Existing Statutes Defining Marriage as Between “A Man and a Woman”

One must next consider whether the construction of Rhode Island’s marriage statutes contained within Title 15 of the Rhode Island General Laws, governing the issuance of marriage licenses between man and woman, groom and bride, could also be construed as strong public policy prohibiting same-sex marriages.<sup>125</sup> Rhode Island does not contain such a statute written to define marriage as being “exclusively” between a man and a woman, as found under the laws and mini-DOMAs of other states.<sup>126</sup> These state prohibitions are, in effect, codified public policy exceptions.<sup>127</sup>

The dissent in *Chambers* reminds us that contemporary knowledge cannot be foisted upon historical actors.<sup>128</sup> A half

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123. See Lynch, *supra* note 10.

124. See *Ex parte Chace*, 58 A. at 980.

125. See generally R.I. GEN. LAWS §§ 15-2-1 (1975) (requiring a license from the town in which either the male or female party resides); *Id.* § 15-2-7 (1967) (requiring both “bride” and “groom” to subscribe to the truth of the data submitted in their marriage license before the state or local official); *Id.* §§ 15-4-1 to -17 (1957) (enumerating the various property and other rights of married women).

126. See Kimberly N. Chehardy, Note, *Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law*, 8 CONN. PUB. INT. L. J. 301, 303 (2009).

127. See *id.* at 318.

128. See *Chambers*, 935 U.S. at 971 (Suttell, J., dissenting).

century ago, the Rhode Island legislature was not thinking about same-sex marriage when crafting a statutory codification of marriage. Therefore, we cannot assume legislative intent to restrict the recognition of marriage to opposite-sex couples, nor to exclude same-sex couples.<sup>129</sup> A strong public policy disfavoring same-sex marriages can only be clear when it mentions a particular arrangement, which Rhode Island law does not.

#### E. Statutes and Case Law Expressing a Public Policy in Favor of Recognition: Does it Fit in the Test?

The movement among judges to rely on statutes and case law that favor recognizing out of state marriages is gaining momentum. In her concurrence in *Godfrey*, Judge Ciparick takes a close look at “laws of New York protect[ing] committed same-sex couples in a myriad of ways,” looking at laws bestowing visitation rights, next-of-kin rights for hospital visitations, and rights regarding disposition of loved ones’ remains.<sup>130</sup> Rhode Island’s Attorney General also takes this position and has advocated for extending the scope of strong public policy to include such statutory rights.<sup>131</sup>

The best place to examine this type of law under the test will be under the natural law component of the test for public policy, where used. While courts have discussed natural law as a major consideration in ascertaining whether there is a public policy exception, it is little explored.<sup>132</sup> The best discussion of this is within Judge Ciparick’s concurrence in *Godfrey*.<sup>133</sup> A court, under her analysis, must look to whether a marriage would be “fundamentally offensive and inimical” to the public policy of the state. Therefore, the existence of laws extending even a scintilla of protection to same-sex couples, be it in the form of employment and insurance benefits or adoption and parenting rights, would suggest that such relationships are not abhorrent or somehow

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129. *See id.*

130. *Godfrey v. Spano*, 920 N.E.2d 328, 340 (N.Y. 2009) (Ciparick, J., concurring).

131. *See* Brief of State of Rhode Island as Amicus Curiae in support of parties, *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (No. 2006-0340 M.P.).

132. *See, e.g., Godfrey*, 920 N.E.2d 328, 338-39 (Ciparick, J., concurring).

133. *Id.*

against the naturally accepted order.<sup>134</sup>

What Judge Ciparick suggests is that the existence of any protection for same-sex couples indeed shows that such a relationship is not deemed abhorrent to the natural law of the state. The Rhode Island Supreme Court has indeed recognized a de facto parental status for the same-sex non-biological partners.<sup>135</sup> The state also has no prohibition on same-sex couples' adoption of children.<sup>136</sup> Additionally, Rhode Island has expansive statutory law prohibiting discrimination based on sexual orientation.<sup>137</sup>

F. Does *Chambers* Establish Strong Public Policy Disfavoring Recognition of Foreign Same-Sex Marriages?

It could be suggested, that by finding that the jurisdiction of the Family Court does not extend to same sex marriage, the Rhode Island Supreme Court was making a statement finding a strong public policy disfavoring same-sex marriages performed validly outside of Rhode Island.<sup>138</sup> This, however, cannot be true based on the narrow issue presented to the court: whether the Family Court had jurisdiction to hear the case.<sup>139</sup> The issue presented was not same-sex marriage, and, as the court made explicitly clear in its opinion, judgment on that issue should be reserved for the legislature.<sup>140</sup>

An example of how courts can circumvent narrow holdings

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134. See *id.*

135. *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

136. Brief of State of Rhode Island as Amicus Curiae in support of parties, *Chambers v. Ormiston* at \*14, 935 A.2d 956 (R.I. 2007) (No. 2006-0340 M.P.).

137. R.I. GEN. LAWS § 11-24-2 (2002) (prohibiting discrimination in public accommodations based on sexual orientation); *Id.* §§ 28-5-5, 28-5-5.1 to 28-5-7 (2003) (prohibiting employment discrimination based on sexual orientation); *Id.* § 34-37-1 (1995) (prohibiting discrimination based on sexual orientation in the sale, rent, leasing or management of housing accommodations); *Id.* § 34-37-4.3 (1995) (prohibiting financial institutions from discriminating based on sexual orientation).

138. See *Chambers v. Ormiston*, 935 A.2d 956, 963 (R.I. 2007).

139. *Id.* at 958.

140. *Id.* at 967 (Suttell, J., dissenting) ("We are in complete agreement with the majority on one critical point, however. The legal recognition that ought to be afforded same-sex marriages for any particular purpose is fundamentally a question of public policy, more appropriately determined by the General Assembly after full and robust public debate.").

that could be read to express a public policy was seen in *Martinez v. County of Monroe*. There, New York's intermediate appellate court found that the Court of Appeals' ruling in *Hernandez*, rejecting the argument that same sex couples had a right under the state constitution to receive marriage licenses did not establish public policy that same-sex marriages performed elsewhere could not be recognized in New York.

The Court of Appeals noted that the legislature *may* enact legislation recognizing same-sex marriages and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York. It is also worth noting that, unlike the overwhelming majority of states, New York has not chosen, pursuant to the federal Defense of Marriage Act [28 USC § 1738C], to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state.<sup>141</sup>

Although an intermediate appellate court from New York is not binding on the Rhode Island Supreme Court, the rationale of *Martinez* gives a reason why *Chambers* does not establish public policy against same-sex marriage in Rhode Island. The issue in *Chambers* was what the legislature intended by granting the Family Court jurisdiction over "marriage."<sup>142</sup> The majority decided that the legislature's understanding was that marriage was between a man and a woman.<sup>143</sup> The court said that the legislature could indeed change this characterization.<sup>144</sup> Despite whatever intent the legislature may have had, and despite their common knowledge of the institution of marriage at the time, they did not, and have not since, taken the explicit measure to define the narrow class of individuals that marriage should include (or exclude), as has been done for a variety of other marriages. Indeed, there is support for the contention that legislative drafters will often try to anticipate future usage of the statute that they are drafting, and attempt to exclude such future conduct.<sup>145</sup>

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141. *Martinez*, 50 A.D.3d 189, 192-93 (N.Y. App. Div. 2008) (italics in original) (internal citations omitted).

142. *See Chambers*, 935 A.2d at 963.

143. *Id.* at 965.

144. *See id.*

145. Skinner, *supra* note 1, at 845-46 (citing Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U.

Ultimately, such a holding based on a narrow interpretation of a plausible legislative intent is not clear enough to justify prohibiting certain marriages from recognition, a conclusion that follows from the *Ex Parte Chace* framework as well as the opinions of other state courts.

### CONCLUSION

The *Chambers v. Ormiston* decision is another layer in the complicated history of the legal wrangling over same-sex marriage. While the issue of same-sex marriage features prominently in courts as one of state constitutional law, *Chambers* could have been the first to add the dimension of exploring a road to recognition through conflicts of law principles, an issue just as divisive as a constitutional analysis. Comity, if employed today as it was in *Ex parte Chace*, would clearly grant same-sex couples the right of recognition, and the benefits it entails, in Rhode Island.<sup>146</sup> The *Chambers* decision distorts the laws of comity by subjugating it to post-hoc judgments based on a court's best guess at legislative intent.<sup>147</sup>

Even worse, it causes confusion regarding same-sex couples' legal rights. Rhode Island should thus apply principles of comity and recognize same-sex marriages. As argued by Attorney General Patrick Lynch, there is nothing to bar recognition of same-sex marriages performed in states and countries where it is legal. However, when the state's highest court suggested that married same-sex couples cannot divorce in Rhode Island, it raised an important question: which benefits of marriage will be recognized?

The core concept is clear: when two same-sex persons have married in a jurisdiction that permits it, they have entered into a legal union protected by that jurisdiction's laws. Comity grants them protection in all states that have not explicitly indicated whether same-sex marriages will be recognized. Because the doctrine of comity protects all validly married couples – even controversial ones – it should work the same with respect to same-

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KAN. L. REV. 325, 367 (2004)).

146. See *Ex parte Chace*, 58 A. at 980.

147. See *Chambers v. Ormiston*, 935 A.2d 956, 961 (R.I. 2007).

sex couples.<sup>148</sup>

This rationale does not apply to states that have positively blocked this type of marriage. If same-sex couples can think of comity as a shield that will protect them as they move from state to state, they can think of laws explicitly barring same sex marriage as a wall, prepared to not allow the shielded couple to enter. Where there is no wall, the shield should defend the couple.

The argument for pursuing same-sex marriage recognition under the doctrine of comity is particularly persuasive in Rhode Island, surrounded on both sides by states where same-sex marriage is legal. In New York, where recognition under comity is gaining momentum, the state's entire eastern border abuts jurisdictions that place no exclusions on civil marriages between any two consenting, unmarried adults. Regardless of geography, the comity argument should act as an avenue for same-sex couples in states that have not chosen to proactively limit the character of civil marriages to a more homogeneous appearance.

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148. See *Medway v. Needham*, 16 Mass. 157, 159 (MA 1819).