

# THE PUBLIC POLICY DOCTRINE AND INTERJURISDICTIONAL RECOGNITION OF CIVIL UNIONS AND DOMESTIC PARTNERSHIPS

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## INTRODUCTION

Interjurisdictional recognition of same-sex marriages and quasi-marital statuses is an issue of major cultural significance. Aside from the life issues (abortion, euthanasia, assisted suicide, and the status of the human embryo),<sup>1</sup> the underlying issues of how to treat these same-sex relationships are the most significant social issues of our time. As the Catechism of the Catholic Church states:

The family is the original cell of social life. It is the natural society in which husband and wife are called to give themselves in love and in the gift of life. Authority, stability, and a life of relationships within the family constitute the foundations for freedom, security, and fraternity within society.

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The importance of the family for the life and well-being of society entails a particular responsibility for society to support and strengthen marriage and the family.<sup>2</sup>

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1. See Richard S. Myers, *A Critique of John Noonan's Approach to Development of Doctrine*, 1 U. ST. THOMAS L.J. 285, 286 (2003) (noting that the life issues, in particular the issue of abortion, are the major legal and moral issues of our time).

2. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2207, 2210 (2d ed. 1997) (emphasis removed) (internal footnote omitted). See generally PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (2004); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004).

In the conflict-of-laws setting, the underlying moral issues are generally addressed indirectly, but it is oft-noted that the conflicts setting can create real pressures to reexamine the underlying moral questions.<sup>3</sup> The answers to the conflicts issues that are the subject of this symposium will, then, have considerable importance for the broader moral debate.

Despite the importance and the difficulty of the core issues, the conflicts issues involved are relatively straightforward.<sup>4</sup> I will address the issues in the context that is the most troublesome for states around the country that adhere to a more traditional understanding of these social issues: to what extent will states such as Massachusetts,<sup>5</sup> Vermont,<sup>6</sup> or California<sup>7</sup> be able to export their social experimentations in this area. The most serious question for states such as Ohio<sup>8</sup> (where I grew up) or Michigan<sup>9</sup> (where I now live) is whether a same-sex couple from one of these states who enters into a same-sex relationship (a marriage, a civil union, or a domestic partnership) in a state where such relationships are legal and then returns to the state where the couple resides will be able to have the

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3. See generally Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998).

4. I addressed the issue of interjurisdictional recognition of same-sex "marriages" in an article published in 1998. *Id.* This article updates the analysis in my previous article and extends the analysis to the interjurisdictional recognition of the quasi-marital statuses that have developed in the intervening years.

5. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). In *Goodridge*, the Massachusetts Supreme Judicial Court concluded that it violated the state constitution to limit marriage to heterosexual relationships and announced a new definition of marriage—"the voluntary union of two persons as spouses, to the exclusion of all others." *Id.* at 969.

6. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). In response to the *Baker* decision, the Vermont legislature created the status of "civil unions." VT. STAT. ANN. tit. 15, § 1201 (2002).

7. California has created the status of "domestic partners." CAL. FAM. CODE § 297 (West 2004).

8. In November 2004, Ohio passed a constitutional amendment that provides:

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

OHIO CONST. art. XV, § 11.

9. In November 2004, Michigan passed a constitutional amendment that provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25.

relationship enforced. This is the issue suggested, for example, by the title of Professor Barbara Cox's well known *Wisconsin Law Review* article entitled *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*<sup>10</sup> I will address this issue in the marriage context, and also in the context of quasi-marital statuses.<sup>11</sup>

My conclusions can be easily summarized. First, the Full Faith and Credit Clause of the United States Constitution does not require a state to honor laws of other states that are contrary to its public policy. Second, in a conflict of laws analysis, the public policy doctrine affords states the freedom to refuse recognition of same-sex marriages, civil unions, or domestic partnerships. To the extent these quasi-marital statuses are treated as marriages, the public policy doctrine provides adequate support for the refusal to recognize these relationships if a state chooses to adopt a policy of non-recognition. To the extent these relationships are treated as contracts, public policy

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10. Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033. This context is not at all an isolated phenomenon. As William Duncan's article notes, for example, the vast majority of Vermont civil unions are contracted by couples from outside the state of Vermont. See William C. Duncan, *Survey of Interstate Recognition of Quasi-Marital Statuses*, 3 AVE MARIA L. REV. 617, 618 (2005). Because of the prevalence of this precise situation and the legitimate concerns of more traditional states of having their marriage laws evaded, I will focus primarily on the hypothetical raised in the text. The recognition issue will obviously arise in other contexts and it may well be appropriate to focus on an "incidents of marriage" approach in these settings. See generally Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699 (2004). The principal interest of a state such as Ohio or Michigan is in avoiding being forced to recognize an ongoing relationship within its borders that it does not sanction. This will likely arise in two main settings—the evasion situation noted in the text, and also when, for example, a Massachusetts couple in a same-sex "marriage" later moves to a state such as Ohio or Michigan. In this article, I will focus on this core concern. I will deal primarily with the evasion situation, although I think that Ohio or Michigan would be well within their rights to refuse to recognize a same-sex relationship even if contracted while the couple was domiciled in a state that recognized such marriages. I will put off for another day this change-of-domicile situation, and other examples that might not raise the concern of being forced to recognize an ongoing relationship of which the state does not normally approve.

11. However, there remains a dispute about this issue. See Duncan, *supra* note 10, at 626-28 (discussing the differing approaches to the application of the federal Defense of Marriage Act); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1102 (2001) (stating that the federal Defense of Marriage Act does not apply to civil unions); Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1246 (discussing uncertainty about whether the federal Defense of Marriage Act applies to domestic partnerships). I will assume here that the federal Defense of Marriage Act, 28 U.S.C. § 1738C (2000), does not control this issue and analyze the issue under normal conflicts principles.

similarly affords support for the refusal to recognize these relationships. Finally, a state's exercise of the public policy exemption is not unconstitutional discrimination against the laws of a sister state.<sup>12</sup>

### I. THE FULL FAITH AND CREDIT CLAUSE AND VIOLATION OF PUBLIC POLICY

In this context, the choice of law issue is clear. It is well established that a marriage is not a judgment<sup>13</sup> and surely the same conclusion would apply to quasi-marital statuses. So, we are considering the full faith and credit a state owes to the law of a sister state. It is quite clear that full faith and credit principles do not require states to honor laws of other states when their public policy would be offended by so doing.

Very recent Supreme Court cases strongly affirm this principle. In *Baker v. General Motors Corp.*,<sup>14</sup> for example, the Supreme Court reaffirmed the well established distinction between the way in which full faith and credit operates when dealing with laws as opposed to judgments. With regard to laws, "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"<sup>15</sup> With regard to judgments, the Court stated that "the full faith and credit obligation is exacting."<sup>16</sup> The Court further stated "a court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy. . . . But our decisions support no roving 'public policy exception' to the full faith and credit due judgments."<sup>17</sup> In actuality, *Baker* narrowed the duties

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12. I will here limit the constitutional discussion to the only objection that specifically addresses the conflicts aspects of this problem.

13. See, e.g., Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 164-67 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 389-91 (1998). But see William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393, 401-26 (2005).

14. 522 U.S. 222 (1998).

15. *Id.* at 232 (quoting *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

16. *Id.* at 233.

17. *Id.*

that courts owe even to the *judgments* of sister states.<sup>18</sup> Its importance here, however, is its strong reaffirmation that states are entitled to rely on their own public policy to justify applying their own law in the face of the contrary policies of sister states.

*Franchise Tax Board v. Hyatt*<sup>19</sup> is even clearer on this point, and I think it is worthwhile discussing this case in some detail. *Hyatt* involved a dispute over state income taxes between the Franchise Tax Board of California (“CFTB”) and Gilbert Hyatt. CFTB alleged that Hyatt had underpaid his California income taxes, and imposed assessments and penalties, both of which were challenged by Hyatt in an administrative proceeding in California.<sup>20</sup> While this process was ongoing, Hyatt (who had allegedly changed his residency from California to Nevada) filed a suit against CFTB in Nevada state court alleging that CFTB had committed certain intentional torts and negligent acts during the course of the California proceedings.<sup>21</sup> CFTB sought dismissal of the Nevada suit in part on the ground that California sovereign immunity law required the dismissal of the action.<sup>22</sup> The Nevada Supreme Court held that the negligence claims ought to have been dismissed but that the intentional tort claims should proceed to trial.<sup>23</sup>

In so holding, the Nevada Supreme Court refused to apply California’s law of sovereign immunity.<sup>24</sup> In applying principles of comity, the Nevada Supreme Court dismissed the negligence claims because Nevada afforded its agencies the same protection from suit.<sup>25</sup> Therefore, applying California’s immunity law would not violate Nevada’s policy. The Court took a different view of the intentional tort claims. The United States Supreme Court summarized the holding as follows:

Because Nevada “does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts

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18. See Borchers, *supra* note 13, at 178.

19. 538 U.S. 488 (2003).

20. *Id.* at 490-91.

21. *Id.* at 491.

22. *Id.* at 491-92.

23. *Id.* at 492; *Franchise Tax Bd. v. Eighth Judicial District Court*, No. 35549, 2002 Nev. LEXIS 57, at \*1 (Apr. 4, 2002), *aff’d sub nom.* *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003).

24. *Franchise Tax Bd.*, 2002 Nev. LEXIS 57, at \*8.

25. *Id.* at \*9.

committed in the course and scope of employment," the [Nevada] Court held that "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" should be accorded greater weight "than California's policy favoring complete immunity for its taxation agency."<sup>26</sup>

The Court affirmed this holding, and ruled that the Constitution did not require Nevada to give full faith and credit to California's sovereign immunity law.<sup>27</sup> In so holding, the *Hyatt* Court reaffirmed the teaching of *Baker* that full faith and credit "is less demanding with respect to choice of laws" than it is with respect to judgments.<sup>28</sup> It reaffirmed that "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"<sup>29</sup> Nevada was "competent to legislate" on the matter under review because Nevada had constitutionally adequate contacts to apply its own law to an intentional tort that allegedly injured a Nevada citizen within the state of Nevada.<sup>30</sup>

The United States Supreme Court rejected the view that Nevada should be prevented from interfering with California's "capacity to fulfill its own sovereign responsibilities."<sup>31</sup> The Court explained that it had abandoned the balancing of interest approach reflected in cases such as *Alaska Packers*<sup>32</sup> and instead had moved to an approach that permits a state to apply its own law even in the face of "the contrary law of another."<sup>33</sup> In *Hyatt*, the Court rejected the argument that it

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26. *Hyatt*, 538 U.S. at 493-94 (quoting Appendix to Petition for Certiorari).

27. *Id.* at 490.

28. *Id.* at 494.

29. *Id.* (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)) (internal quotations omitted)).

30. *Hyatt*, 538 U.S. at 494-95. Here the Court cited the lenient standard set forth in cases such as *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Pursuant to these cases, "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum*, 472 U.S. at 818 (quoting *Allstate*, 449 U.S. at 312-13). It is well understood that this is a very lenient standard. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 3.24-.25 (4th ed. 2004).

31. *Hyatt*, 538 U.S. at 495.

32. *Alaska Packers Ass'n. v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

33. *Hyatt*, 538 U.S. at 496 (quoting *Sun Oil*, 486 U.S. at 727) (internal quotations omitted).

should create a new rule to protect “core sovereign responsibilities” of the state whose law was not applied.<sup>34</sup> The Court explained that it was disinclined to “elevate California’s sovereignty interests above those of Nevada.”<sup>35</sup> The Court unanimously concluded: “[W]e decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interest to resolve conflicts of laws under the Full Faith and Credit Clause.”<sup>36</sup>

The preceding cases do not involve marriage or quasi-marital statuses, to be sure. The cases do, however, set forth the basic principle that would govern in the context under review in this symposium. With regard to marriage, *Baker* and *Hyatt* support the principle set forth in the Restatements of Conflict of Laws that states are sometimes permitted to invoke their public policy to invalidate marriages considered valid at the place of celebration.

## II. CONFLICT OF LAWS PRINCIPLES AND VIOLATION OF PUBLIC POLICY

In considering the validity of a marriage, the *Restatement (First) of Conflict of Laws* used a presumptive rule in favor of the law of the place of celebration of the marriage. Section 121 provided that “a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.”<sup>37</sup> The *First Restatement*, however, also contained an important exception if the marriage violated the strong public policy of the domicile of either party.<sup>38</sup> The *Second Restatement* takes the same basic approach. Section 283 provides:

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34. *Id.* at 498. The Court explained that it had decided a similar issue in *Nevada v. Hall*, 440 U.S. 410 (1979). In *Hall*, California residents who had been involved in an accident in California with an employee of the University of Nevada sued the state of Nevada and others in California state court. The United States Supreme Court held that the Constitution did not require California to apply Nevada’s sovereign immunity law when to do so would interfere with California’s public policy. In *Hyatt*, the Court exhibited no willingness to revisit its holding in *Hall* and demonstrated no interest in balancing competing sovereign interests. See *Hyatt*, 538 U.S. at 497-99.

35. *Hyatt*, 538 U.S. at 498.

36. *Id.* at 499.

37. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934).

38. Section 132 provided:

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

- (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 § 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.<sup>39</sup>

This principle gives states adequate authority for the refusal to honor a same-sex marriage from Massachusetts. A state that wanted to assert its public policy to refuse to recognize a Massachusetts same-sex marriage would be able to do so.<sup>40</sup>

Modern critics of this position sound a lot like adherents to the most rigid vested rights approach to choice of law, even though these critics would presumably not have much to say in favor of the vested rights approach in other contexts. According to these modern critics, the place of celebration rule is viewed as sacred. Departures from the

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- (a) polygamous marriage,
  - (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
  - (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,
  - (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.

*Id.* § 132 (original spelling). Moreover, perhaps anticipating a time when there would not be such general uniformity about the nature of marriage, comment b to section 132 stated:

Clauses (a), (b) and (c) state respects in which a marriage may offend a strong policy of the domiciliary state. This statement, however, is not intended to be an exclusive enumeration and if a marriage offends a strong policy of the domicil in any other respect, such marriage will be invalid everywhere.

*Id.* § 132 cmt. b (original spelling).

39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

40. This conclusion does not depend on the federal Defense of Marriage Act. As Professor Silberman has noted, “[A] proper understanding of the role of choice of law and ‘full faith and credit’ reveals that states were never under compulsion to recognize out-of-state same-sex marriages and thus, the federal legislation was unnecessary in this respect.” Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 193 (1996) (footnote omitted).

place of celebration rule, especially through the invocation of the “public policy exception,” are viewed with great suspicion.<sup>41</sup>

The traditional public policy exception was indeed justly criticized. As Professors Monrad Paulsen and Michael Sovern explained, the exception was sometimes invoked in a situation in which “[a] claim based on a transaction with all its important contacts in State A is denied enforcement in State B because of the content of State A’s law.”<sup>42</sup> This outcome was difficult to defend because “the public policy rule understood in this way may deprive a deserving claimant of compensation without the gain of any sensible objective of the forum.”<sup>43</sup>

Yet, as Paulsen and Sovern maintained, this objection does not apply at all to the way in which the public policy doctrine has been used most frequently.

The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded as parochialism. The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum’s right to have its law applied to the transaction because of the forum’s relationship to it.<sup>44</sup>

In the context considered in this article, the “public policy exception” label is, in reality, a misnomer. When public policy is being invoked by a same-sex couple’s home state to deny recognition to a “marriage” they celebrated in Massachusetts, public policy is not being invoked in an objectionable manner to defeat a foreign claim when the forum has no connection to the matter at hand. The approach of both Restatements (although phrased in terms that appear to use public policy as an exception) is just a choice of law rule to justify the invocation of forum law. And, in the context presented here, this is done when the forum certainly has an interest in the application of its own law.

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41. For a more in-depth discussion of this point, see Myers, *supra* note 3, at 49-59.

42. Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 COLUM. L. REV. 969, 970 (1956).

43. *Id.* at 971.

44. *Id.* at 981.

Contrary to the view expressed by the modern critics, it is not at all troublesome that the forum is expressing disagreement with the substantive content of the law of Massachusetts. That is what happened in *Hyatt*, and a unanimous Court was completely untroubled by that conclusion. The forum (Nevada) simply had a different view of the proper substantive law (in fact this is what happens in every true conflict case), and the Court permitted the forum to prefer its own resolution of the substantive issue involved. This is something states are permitted to do in our federal system.

In the marriage area, this conclusion is clear as a matter of normal conflicts doctrine. This is, for example, the conclusion reached by scholars such as Professor Lea Brilmayer in her testimony before the Senate Judiciary Committee in March of 2004. There, in a submission for the record, Professor Brilmayer stated:

[M]arriages entered into in one state have never been considered constitutionally entitled to automatic recognition in other states. This is in part because marriages are not like judicial judgments, which are announced only after lengthy formal court proceedings in which both sides are represented by counsel. It is also because of the special importance in American law of family relationships, which . . . makes family law distinctive. Finally, it has always been too easy for people to avoid their home-state law by traveling to another state to take advantage of more lenient marriage laws. For all of these reasons, states have always had greater freedom to re-examine the validity of marriages entered into elsewhere than they have to re-examine the merits of a judicial award in a tort or contract case. The state has a right to take into account its local "public policy."<sup>45</sup>

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45. *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the United States Senate Committee on the Judiciary*, 108th Cong. 63, 68-67 (2004) (prepared statement of R. Lea Brilmayer, Professor, Yale University School of Law) (footnote omitted).

### III. CONFLICT OF LAW PRINCIPLES AND QUASI-MARITAL STATUSES

I think the conclusions reached above also apply to quasi-marital statuses.<sup>46</sup> To the extent these statuses are treated as marriages, the principles noted above give states—that wish to do so—the right, for example, to dissent from Vermont’s recognition of a “civil union.” To the extent these quasi-marital statuses are treated as contracts, the same conclusion applies.

I believe that the most relevant contract analogy is to the treatment of contractual choice of law clauses. This area is ripe for further exploration: there is very little treatment of it in the literature, but the rationales for refusing to enforce choice-of-law clauses can be readily applied to quasi-marital statuses.

The dominant approach to the enforceability of contractual choice-of-law clauses is to presume that such clauses are enforceable, subject to the public policy of the forum state. For example, in *J.S. Alberici Construction Co. v. Mid-West Conveyor Co.*,<sup>47</sup> the Delaware Supreme Court refused to enforce a choice of law clause that would have permitted a contractor to enforce an indemnification agreement for the contractor’s own negligence.<sup>48</sup> Mid-West, the general contractor, was a Delaware corporation with its corporate headquarters in Kansas.<sup>49</sup> Mid-West had been hired by Chrysler, a Delaware corporation with its corporate headquarters in Michigan, to work on a refurbishing project at an assembly plant in Newark, Delaware.<sup>50</sup> Mid-West hired various subcontractors, including Alberici, which was a Missouri corporation with its headquarters in Missouri.<sup>51</sup> The contract contained a choice of law clause in favor of Kansas law and

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46. There is a burgeoning literature on this topic. See, e.g., Cox, *supra* note 10; Elaine M. De Franco, Comment, *Choice of Law: Will Wisconsin Recognize a Vermont Civil Union?*, 85 MARQ. L. REV. 251 (2001); Christopher D. Sawyer, Note, *Practice What You Preach: California’s Obligation to Give Full Faith and Credit to the Vermont Civil Union*, 54 HASTINGS L.J. 727 (2003); Silverman, *supra* note 11; Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002); Whitten, *supra* note 11; Anita Y. Woudenberg, Note, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 VAL. U. L. REV. 1509 (2004).

47. *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518 (Del. 2000).

48. *Id.* at 519.

49. *Id.*

50. *Id.*

51. *Id.*

Kansas law would enforce such an indemnification agreement.<sup>52</sup> Although it noted it generally honors choice of law clauses, the Delaware court explained that it would not do so if this would be repugnant to the public policy of Delaware.<sup>53</sup> Because a Delaware statute contained an explicit statement that such a clause “is against public policy and is void and unenforceable,” the Delaware court refused to enforce the indemnification provision.<sup>54</sup> The court concluded, “[W]e find this statutory language compels the conclusion that enforcing Kansas law on this issue would be clearly repugnant to the public policy of Delaware.”<sup>55</sup>

The Supreme Court of Georgia took a similar approach in *Convergys Corp. v. Keener*,<sup>56</sup> which involved a non-compete agreement. The court applied this basic principle: “The law of the jurisdiction chosen by parties to a contract to govern their contractual

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52. *Id.*

53. *Id.* at 520.

54. *Id.* (quoting DEL. CODE ANN. tit. 6, § 2704(a)) (emphasis removed).

55. *Id.* at 521.

56. *Convergys Corp. v. Keener*, 582 S.E.2d 84 (Ga. 2003). This case has a complicated procedural history. The case was filed in federal district court in Georgia. The court granted the plaintiff’s motion for summary judgment and enjoined the defendant from enforcing a non-compete agreement despite the existence of a contractual choice of law clause pursuant to which the non-compete agreement would have been enforceable. *Keener v. Convergys Corp.*, 205 F. Supp. 2d 1374, 1377, 1382 (S.D. Ga. 2002). The federal district court noted that this result might encourage non-Georgia employees to move to Georgia to free themselves from non-compete agreements entered into in other states. The court stated, however, that “[t]he aches and pains of federalism (pro-marriage advocates in some States have decried other States’ ‘quickie-divorce’ laws), however, have long formed part of the American legal fabric.” *Id.* at 1379. On appeal, the Eleventh Circuit certified a question to the Georgia Supreme Court. *Keener v. Convergys Corp.*, 312 F.3d 1236 (11th Cir. 2002). The certified question was as follows:

Whether a court applying Georgia conflict of laws rules follows the language of Restatement (Second) of Conflicts of Laws § 187(2) and, therefore, first must ascertain whether Georgia has a “materially greater interest” in applying Georgia law, rather than the contractually selected forum’s law, before it elects to apply Georgia law to invalidate a non-compete agreement as contrary to Georgia public policy.

*Id.* at 1241. The Georgia Supreme Court answered the question in the negative, because the Georgia Supreme Court refused to apply the *Second Restatement* and concluded that such a showing was unnecessary before it would refuse to enforce a choice of law clause that would contravene Georgia policy. *Convergys Corp.*, 582 S.E.2d at 85. The case returned to the Eleventh Circuit, which affirmed the federal district court’s grant of summary judgment. The Eleventh Circuit did modify the scope of the injunction issued by the district court. That injunction had enjoined the defendant from enforcing the non-compete agreement in any court in the world, and the federal appellate court limited the injunction to Georgia only. *Keener v. Convergys Corp.*, 342 F.3d 1264, 1268-69 (11th Cir. 2003).

rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state.”<sup>57</sup> The court continued: “Covenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses, and hence their validity is determined by the public policy of this state.”<sup>58</sup> Under this approach, the court refused to apply a choice of law clause that selected Ohio law. The employment contract had been entered into in Ohio by an Ohio resident for work that began in Ohio.<sup>59</sup> The employee later moved to Illinois where most of his work was performed.<sup>60</sup> The employee left his employ with the Ohio company and moved to Georgia where he began work with a competitor of his former employer.<sup>61</sup> The Georgia Supreme Court in *Keener* refused to honor the Ohio choice of law clause and applied Georgia law to invalidate the non-compete agreement.<sup>62</sup>

Delaware and Georgia both adhere to the traditional approach to choice of law. Although there are some differences to be sure, the courts that use modern approaches to choice of law also recognize a public policy limit to party autonomy. Most courts analyze the validity of contractual choice of law clauses under the *Second Restatement's* section 187.<sup>63</sup> Section 187 provides that the law chosen by the parties will be applied unless:

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state with a materially greater interest than the chosen state in the determination of the particular issue

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57. *Convergys Corp.*, 582 S.E.2d at 85-86 (quoting *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368, 369 (1977)).

58. *Id.* at 86 (quoting *Nasco*, 238 S.E.2d at 369).

59. *Keener*, 205 F. Supp. 2d at 1376-77.

60. *Id.* at 1376.

61. *Convergys Corp.*, 582 S.E.2d at 85.

62. *Id.* at 84, 87.

63. *See Myers, supra* note 3, at 53; *see also* SCOLES ET AL., *supra* note 30, § 18.8.

and which . . . would be the state of the applicable law in the absence of an effective choice by the parties.<sup>64</sup>

*Application Group, Inc. v. Hunter Group, Inc.* (“AGI”)<sup>65</sup> is a California case that provides an example of how section 187 operates. In the *AGI* case, the California court refused to enforce a choice of law clause (in favor of Maryland law) that would have resulted in upholding a non-compete clause in an employment contract. The court acknowledged that it was presented with a true conflict but ended up preferring the interests of California over the interests of Maryland because the court concluded that California had a materially greater interest and that enforcement of the contract under Maryland law would be contrary to a fundamental policy of California.<sup>66</sup>

Results in cases such as *AGI* are controversial.<sup>67</sup> The *AGI* court described the case in this fashion:

[W]e must decide whether California law may be applied to determine the enforceability of a covenant not to compete, in an employment agreement between an employee who is not a resident of California and an employer whose business is based outside of California, when a California-based employer seeks to recruit or hire the nonresident for employment in California.<sup>68</sup>

The choice of law clause was not chosen simply as an effort to evade the law of the state with the dominant connection to the contract and

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64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

65. 72 Cal. Rptr. 2d 73 (Ct. App. 1998).

66. *Id.* at 86.

67. See Christina Wu, Note, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State’s Law?*, 51 UCLA L. REV. 593 (2003) (criticizing the opinion in *AGI*). Although he disagrees with the views expressed in *AGI*, Dean Symeonides notes that the decision “remains a good example of how California courts would resolve a conflict between California’s policy against non-compete covenants and the countervailing policy of the first employment state, when there is no litigation in the other state.” Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 59 (2003). Cases such as *AGI* are difficult because they do not involve a situation where the choice of law clause is being used in an attempt to evade the law of the only state with an interest. In *AGI*, the first employment state has a significant interest in enforcing the non-compete clause. Yet despite that, as Dean Symeonides notes, the California court’s refusal to honor the choice of law clause is within the mainstream of judicial thinking. *Id.*

68. *Application Group*, 72 Cal. Rptr. 2d at 79.

the parties, which is arguably what happens when a same-sex couple goes to Massachusetts or Vermont in an attempt to obtain a status (marriage or a civil union) that the couple could not accomplish in their home state. Yet, as the *AGI* decision indicates, courts still refuse to enforce these clauses when the public policy of the forum would be violated.

The basic idea reflected in these cases is a strong emphasis on private ordering, or, put another way, a strong respect for freedom to contract. The tough issues arise only when the issue is one that the parties could not resolve by an explicit contractual provision. Yet, section 187 permits the parties to accomplish the same result through a choice of law clause, except when a strong public policy is implicated. I should note that in most of the cases involving choice of law clauses the courts enforce these clauses.<sup>69</sup> My purpose in mentioning a couple of modern examples of the refusal of courts to enforce these clauses, based on the public policy of the forum, is to note that the methodology of invoking local public policy as “an exception” to the presumptive choice of law rule is alive and well.

The courts’ approach in these contractual choice of law cases is much like the approach reflected in the *Restatement’s* approach to judging the validity of marriages. There is presumptively a strong respect for private ordering, which the parties achieve in this context by traveling to a state with a more favorable law. States are generally willing to respect this outcome (states express this deference to the parties’ choice by adopting as a presumptive choice of law rule that the place of celebration will govern), but states reserve the right to invoke their public policy when their important interests are implicated. I should note that in the marriage context a state ought to be regarded as having an even stronger interest in invoking its policy with regard to how to define marriage. States have always been regarded as having a strong interest in the institution of marriage, and this interest would seem to be stronger than the state’s general interest in freedom of contract that is reflected by the presumptive rule favoring the enforceability of contractual choice of law clauses.

Therefore, if a quasi-marital status is treated as a contract, then the principles of section 187 could be invoked to permit a state—that wished to do so—to refuse to honor this attempt to evade forum law. As a matter of normal conflicts doctrine, there is no problem with this

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69. See Myers, *supra* note 3, at 53.

resort to the public policies of the forum, as can be seen by the overwhelming adoption of section 187.

#### IV. THE CONSTITUTIONALITY OF A STATE'S EXERCISE OF THE PUBLIC POLICY EXCEPTION

Perhaps because the conclusions expressed above are so well settled as a matter of conflicts law, many scholars have tried to develop constitutional challenges to these conclusions. There are four main arguments. The first is an argument that is most often associated with Professor Larry Kramer. He has argued that the public policy exception is unconstitutional because it reflects unconstitutional discrimination against the laws of a sister state.<sup>70</sup> The other three arguments are not really attacks on the conflicts doctrine; they are in reality attacks that are primarily leveled against the constitutionality of a state invoking certain policies as a direct manner. So, some argue that reserving marriage to heterosexuals violates the establishment clause,<sup>71</sup> substantive due process,<sup>72</sup> and/or equal protection.<sup>73</sup> These arguments are sometimes invoked in the recognition context because it ought to be unconstitutional for a state to rely on an unconstitutional public policy as a basis for refusing to recognize the law of a sister state. In this article, I will consider only the first of these four arguments, since that is the only argument that is unique to the conflicts aspects of the issue.

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70. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

71. The Establishment Clause provides that: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend I. I discussed the establishment clause objection to the invocation of the public policy in my Creighton article. See Myers, *supra* note 3, at 59-65.

72. The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. For discussion of the doctrine of substantive due process, see Richard S. Myers, *An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching*, 72 U. DET. MERCY L. REV. 771 (1995); Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557 (1988). In a recent decision, a federal court in Florida rejected a substantive due process challenge to both the federal DOMA and Florida's DOMA. See *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1298 (M.D. Fla. 2005).

73. The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The case mentioned in the prior footnote, *Wilson v. Ake*, also rejected an equal protection argument.

In his *Yale Law Journal* article, Professor Kramer made the following contention:

[T]he public policy doctrine ought to be deemed unconstitutional—not just in same-sex marriage cases, mind you, but across the board. The argument, in a nutshell, is that the Full Faith and Credit Clause prohibits states from selectively discriminating in choice of law based on judgments about the desirability or obnoxiousness of other states' policies.<sup>74</sup>

This argument cannot withstand scrutiny.<sup>75</sup> The first thing to note about Professor Kramer's argument is that it is inconsistent with the *Hyatt* case discussed above. There, the United States Supreme Court approved of a Nevada decision to apply its own public policy on the sovereign immunity issue presented, even in the face of California's contrary policy.<sup>76</sup> The Court explicitly recognized that Nevada was candidly disagreeing with the substantive judgment of California on the sovereign immunity issue presented.<sup>77</sup> The Court was completely untroubled by this conclusion and, in fact, reaffirmed in clear terms that states are permitted to do precisely that so long as the issue is one on which the state is competent to legislate.<sup>78</sup> The "competency to legislate" turns on the state satisfying the very lenient standard set forth in *Allstate Insurance Co. v. Hague*<sup>79</sup> and *Phillips Petroleum Co. v. Shutts*.<sup>80</sup> In the context under discussion here, where an out-of-state marriage or civil union or domestic partnership is under review in a state where the parties have their home, this standard would be easily satisfied.<sup>81</sup>

It is quite clear, therefore, that Professor Kramer's view is inconsistent with that of the current Supreme Court, as articulated in

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74. Kramer, *supra* note 70, at 1966-67 (footnote omitted).

75. See Myers, *supra* note 3, at 56-59; see also L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 31, 37-40 (1998).

76. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 493-96, 499 (2003).

77. See *id.* at 493-94.

78. See *id.* at 494.

79. 449 U.S. 302 (1981); see also *supra* note 30 and accompanying text.

80. 472 U.S. 797 (1985); see also *supra* note 30 and accompanying text.

81. There can be no serious objection to the assertion that a state is competent to regulate the marriages of its citizens. See *Ellis v. Estate of Toutant*, 633 N.W.2d 692, 700 (Wis. Ct. App. 2001) ("Without question, each state . . . has the power to declare what marriages between its own citizens shall not be recognized as valid in its courts . . .").

the unanimous *Hyatt* decision. Moreover, Professor Kramer's argument is inconsistent with basic constitutional doctrine dealing with the type of "discrimination" that is prohibited. As I stated several years ago in an article critiquing Professor Kramer's position, "The kind of discrimination that is constitutionally suspect is discrimination against out-of-staters, simply because they are out-of-staters. If 'there is some reason, apart from their origin, to treat them differently . . .' then the strong presumption against discrimination is not implicated."<sup>82</sup> The refusal to recognize a same-sex relationship is nothing like this form of prohibited discrimination. The state is not refusing to honor such a relationship because it is "foreign"; the state is expressing substantive disagreement with the other state's law in a situation where the second state has an interest in so doing. As *Hyatt* and other cases make clear, there is nothing unconstitutional about a state taking this view.

### CONCLUSION

My conclusions are straightforward. A home state is not required to recognize a same-sex relationship (of whatever type) that is created by a state that approves of any of these relationships. The home state is permitted to invoke its own public policy to refuse to recognize such relationships. Basic conflicts doctrine permits a state to do so and the Constitution does not preclude a state from so choosing.

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82. See Myers, *supra* note 3, at 57 (footnotes omitted).