

CIVIL UNIONS AND THE MEANING OF THE PUBLIC POLICY EXCEPTION AT THE BOUNDARIES OF DOMESTIC RELATIONS LAW

Emily J. Sack[†]

INTRODUCTION

Though interjurisdictional recognition of same-sex marriage has captured the public's attention in recent months, the issue of granting interjurisdictional recognition to civil unions may be even more complex. There is an existing body of law regarding full faith and credit recognition of marriages, and its exceptions, which can provide guidance for the treatment of same-sex marriages. Civil unions, however, are more difficult to place in the existing full faith and credit framework. In this article, I discuss the legitimate arguments on both sides that civil unions may have a stronger basis for full faith and credit recognition than same-sex marriages, and that the distinctions in civil unions make this recognition less persuasive. After reviewing the current body of case law on the issue and analyzing potential constitutional challenges to state policies that ban civil unions or same-sex marriages, I conclude that civil unions do not, in fact, provide a better strategy for interstate recognition of formal same-sex relationships than same-sex marriage. Despite the initial appeal of arguments that the civil-union concept is a compromise that will be more acceptable to society than same-sex marriage, the long history of recognition of marriage in both constitutional analysis and state

[†] Associate Professor of Law, Roger Williams University School of Law; B.A., Swarthmore College; J.D., New York University School of Law. I presented a draft of this article at a conference on Interjurisdictional Recognition of Civil Unions, Domestic Partnerships, and Benefits, which was held at the Brigham Young University Law School on November 5, 2004. I would like to thank the co-sponsors of the conference, Brigham Young University Law School, and Ave Maria School of Law, particularly Professor Lynn Wardle and Professor Richard Myers, for all of their efforts in organizing and hosting this conference. I would also like to thank all of the conference participants for their excellent comments.

statutory schemes provides a stronger foundation for the recognition of same-sex marriages throughout the states.

In Part I, I briefly review the scope of the “public policy exception” in full faith and credit jurisprudence generally, and as it has been applied to interstate recognition of marriages. If states are to refuse to recognize civil unions that were validly celebrated in another state, they will employ this public policy exception. Therefore, the use of this exception in the recognition of marriages provides a useful foundation for analyzing the case law regarding recognition of out-of-state civil unions.

In Part II, I discuss both the arguments that the distinctions between civil unions and marriage make interstate recognition of civil unions more likely than that of same-sex marriages, as well as the arguments that the case for civil unions is actually weaker than that for same-sex marriage. I then analyze the existing case law on interstate recognition of civil unions, as it has arisen in various contexts, to determine how the courts actually have handled the differences between civil unions and marriage. In this section, I conclude that civil unions do not provide the courts with a stronger argument for interstate recognition than same-sex marriage.

In Part III, I then review constitutional arguments regarding the legitimacy of a state public policy against civil unions. I analyze both potential substantive due process and equal protection challenges to such a policy and discuss the impact of such recent Supreme Court decisions as *Lawrence v. Texas*¹ on this analysis. If a state policy against civil unions is unconstitutional, then it clearly cannot be the basis for a refusal to recognize an out-of-state union. In this context, I analyze the strength of a constitutional challenge to a public policy against civil unions as compared to such a challenge regarding a public policy opposing same-sex marriage. I conclude that while initially it may appear that civil unions provide a stronger basis for a challenge, ultimately, because same-sex marriage invokes the fundamental right to marriage, a constitutional challenge based on recognition of same-sex marriage is likely to be more successful.

Finally, I conclude that the alternative of civil unions has not provided stronger arguments for interstate recognition of formal same-sex relationships and may actually create more complications in this already complex area. I argue that the fight for interstate

1. 539 U.S. 558 (2003).

recognition of same-sex relationships stands a greater chance of success by focusing on same-sex marriage.

I. THE PUBLIC POLICY EXCEPTION AND INTERSTATE RECOGNITION OF MARRIAGE

Under the Constitution, Full Faith and Credit “shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”² The Framers viewed the recognition of one state’s laws, records, and judgments by all other states as necessary to their mission of uniting the states into one country.³ The Full Faith and Credit Clause was designed to ensure consistency in enforcement of legal actions throughout the states and to prevent citizens’ rights and responsibilities from vacillating as they cross state lines. Together with the Privileges and Immunities Clause, with which it is grouped in the Constitution, the Full Faith and Credit Clause promotes free movement throughout the country, as well as mutual respect among the states.⁴

Though no distinction is made in the Full Faith and Credit Clause in the amount of full faith and credit owed to laws, records, and judgments, the Supreme Court consistently has treated these legal actions differently.⁵ The Supreme Court has recently termed the full

2. The Full Faith and Credit Clause’s final sentence, often referred to as the Effects Clause, states: “And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.

3. See THE FEDERALIST NO. 42, at 336 (James Madison) (John C. Hamilton ed., 1998) (comparing the Constitution’s Full Faith and Credit Clause favorably to a weaker version from the Articles of Confederation, Madison stated that the Clause’s power to unify the states was an “evident and valuable improvement” over the earlier provision). During debate on the Clause at the Constitutional Convention, Wilson also commented that the full faith and credit power made the relationship among the states of the United States different from “what now takes place among all Independent Nations.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., rev. ed. 1966) (1911). See also *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935) (“The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.”).

4. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

5. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (noting difference between credit given to legislative acts, the common law, and judgments); *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502-03 (1939).

faith and credit owed to judgments “exacting”;⁶ while considering the recognition of laws from one state in another, however, the Court has employed a choice of law “interests” analysis.⁷

Some potential exceptions to the full faith and credit mandate have also developed in the case law, including the “public policy exception.”⁸ The theory of the public policy exception is that where a state has expressed a strong policy regarding an issue, its own sovereignty would be infringed if it were forced to grant full faith and credit to another state’s law or judgment that embodies a policy deeply contrary to its own. In these situations, the forum state should be able to invoke the public policy exception to avoid the requirements of full faith and credit.

The public policy exception was not created in the Constitution’s Full Faith and Credit Clause, or in any congressional enactment concerning full faith and credit. This exception is a common law development and its application in certain areas is quite unsettled. It is clear that use of a public policy exception to refuse recognition to out-of-state judgments is not permitted.⁹ Where a state’s law is at issue, however, the public policy of the forum state may play a role, because it can demonstrate the level of interest that the state has in the litigation. If the forum state has a sufficient connection with the transaction or the parties, its public policy could provide a basis for applying its own law.¹⁰ Nevertheless, the public policy exception is a limited exception to the general application of the Full Faith and Credit Clause, and the standard for finding a state’s public policy sufficiently strong to refuse full faith and credit is quite high.

6. *Baker*, 522 U.S. at 233.

7. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981). In this analysis, the forum state may apply its own law when its connection with the transaction or the parties is sufficient to give it an interest in the litigation and to meet the requirements of due process. *Id.* at 308; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19, 821-22 (1985).

8. Other potential limitations to the Full Faith and Credit Clause that have developed in the case law include equitable decrees, lack of finality, and the “penal law exception,” none of which are relevant here. *See Emily J. Sack, Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 854-73 (2004) (reviewing the theory and case law regarding these exceptions).

9. *See, e.g., Fauntleroy v. Lum*, 210 U.S. 230 (1908) (requiring Mississippi to grant full faith and credit to a Missouri judgment based on a gambling contract, which had been made in Mississippi, where it was void). The Court ruled that this full faith and credit was required, despite the fact that the Missouri Court had made the judgment on the debt in error, by recognizing the illegitimate contract. *Id.* at 237.

10. *See Allstate*, 449 U.S. at 308; *Phillips*, 472 U.S. at 818-19, 821-22.

A. *Marriage and the Scope of the Public Policy Exception*

The category under which marriage is analyzed for full faith and credit purposes can determine the legitimacy of employing a public policy exception. Both scholars and courts have had difficulty in determining the proper category in which to place marriage.¹¹ It is not a judgment, decided by a court after an adversarial hearing. While it includes the entry of a public record, this does not capture the full import of entry into a marriage. And, while most often considered under a choice of law analysis, a marriage has an existence and is distinct from a determination of which law to apply to a matter that has not yet been decided.¹²

Marriages from a sister state are generally recognized by the forum state if they are valid where celebrated.¹³ The common law, however, has established a public policy exception to this recognition, reflected in the *Restatement (Second) of the Conflict of Laws* ("*Restatement*"), that a state may deny full faith and credit to a valid out-of-state marriage if it violates the forum state's strong public policy and the forum state has "the most significant relationship to the spouses and the marriage at the time of the marriage."¹⁴ As the Commentary to the *Restatement* explains, in practice this has meant that at least one of the spouses was domiciled in the forum state at the time of the marriage and both parties resided there immediately thereafter.¹⁵

Despite the existence of this public policy exception, there are important interests that every state has in recognizing out-of-state marriages. All states have a strong incentive to presume marriages are valid in order to protect children of the marriage, provide consistency and certainty in enforcement of property and other

11. Compare Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 25 (2000) ("[M]arriages . . . are not clearly 'public Acts, Records, [or] judicial Proceedings.'" (quoting U.S. CONST. art. IV, § 1), with Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 225 n.22 (1996) (explaining that marriages contain elements of public acts, records, and judicial proceedings).

12. Wolfson & Melcher, *supra* note 11, at 226.

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

14. *Id.*

15. *Id.* § 283 cmt. k (1971) ("To date . . . a marriage has only been invalidated when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter.").

financial rights, and uphold the expectations of the parties.¹⁶ It is simply untenable for parties' marital status, and concomitant rights and responsibilities, to change depending on what state they happen to be in, either fleetingly or for a longer period.¹⁷ As the case law regarding interstate recognition of marriage demonstrates, the use of the public policy exception is in tension with these strong state interests in validating out-of-state marriages.

B. *The Meaning of a "Strong Public Policy" Against Recognition of an Out-of-State Marriage*

To reach the standard of a "strong public policy" against a certain type of marriage, the courts have generally required, at a minimum, that a similar marriage contracted in the forum state would be void.¹⁸ Even this, however, has not been determinative.¹⁹ Because of the strong interests invoked by the Full Faith and Credit Clause, the refusal to recognize an out-of-state marriage cannot be based simply on the fact that the forum state does not permit this type of marriage under its own laws.²⁰ There are numerous cases where the forum state recognized out-of-state marriages involving underage couples, interracial couples, common law marriages, and adultery—despite public policies against such marriages in the forum.²¹

16. See Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 757 (2003).

17. *Id.* at 757-58.

18. Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1091-92 (2000).

19. *Id.* at 1092.

20. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 139 (2000) ("In numerous and repeated cases, courts have recognized out-of-state marriages even when the marriage violated the domicile's restrictions on underage marriages, on incestuous marriages (such as first cousin or uncle/niece marriages), on adultery or when divorced persons could remarry, and even on polygamous marriages for some limited purposes."); Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 367-68 (2002) (noting case law demonstrating that "a marriage that cannot be contracted within the state may nonetheless be recognized if validly celebrated elsewhere").

21. Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 74-92 (1996) (collecting cases where courts have recognized out-of-state marriages that were contrary to the forum state's public policy). This was true even though such marriages may have violated the forum state's own marriage statutes. *Id.* at 92; see, e.g., *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953). In this well known case, an uncle and half-niece, domiciled in New York, traveled to Rhode Island to be married, which

Of course, the full faith and credit analysis pertaining to same-sex marriage has been critically affected by the federal Defense of Marriage Act ("DOMA").²² Under DOMA,

No state . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.²³

Pursuant to DOMA, states are permitted to refuse to recognize same-sex marriages performed in any other state, even if they are valid under that other state's law.

States enacted their own statutes, often termed "little DOMAs," which were designed to provide an explicit statement of their public policy against same-sex marriage. A clear majority of states have expressed this public policy through either statutes or amendments to state constitutions.²⁴ This would seem to provide the explicit demonstration of a state's strong public policy against same-sex

was permitted under Rhode Island law as an exception to the prohibition on incest for marriages valid under Jewish law. *Id.* at 4-5. The couple then returned to New York, where they lived for thirty-two years. *Id.* at 5. When the wife died, some of their children challenged their father's right to administer the estate. *Id.* The New York Court of Appeals recognized the marriage, though it was against New York's public policy. *Id.* at 7. At least in this context, where the recognition of the marriage was for purposes of administering an estate, and the couple had lived together as married for a long period, the New York court was willing to enforce a marriage obtained in evasion of its own laws.

22. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

23. 28 U.S.C. § 1738C (2000). DOMA also created a federal definition of marriage, stating that "'marriage' means only a legal union between one man and one woman as husband and wife, and that the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2000).

24. "By April 2004, thirty-eight states had DOMAs, four of which are provided in the respective state's constitutions." Am. Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 30 FAM. L.Q. 339, 348 (2004). In August and September 2004, Missouri and Louisiana voters respectively added DOMA amendments to their constitutions. In November 2004, the electorate in eleven other states passed DOMAs as constitutional amendments. Those states were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Associated Press, *Marriage Amendments: A State-By-State Look at the 11 States that Voted on Marriage Amendments Tuesday*, AUGUSTA CHRONICLE (Georgia), Nov. 3, 2004, at A9. On April 5, 2005, Kansas voters approved an amendment to the state constitution that barred recognition of gay marriages. *Kansas 18th State to Ban Gay Marriage*, UNITED PRESS INT'L, Apr. 6, 2005.

marriage, which traditionally has been required to permit a state to refuse to recognize a marriage from another state.

Given how recently the status of civil union has emerged in family law, it remains unclear how cases involving such unions will treat both the substantial body of case law regarding interstate recognition of marriage and the existence of DOMA and the state legislation inspired by DOMA. In Part II, I explore this issue, and focus on how the treatment of same-sex marriage and civil unions may differ in full faith and credit law.

II. THE PUBLIC POLICY EXCEPTION AND CIVIL UNIONS

A. *The Definition of a Civil Union*

In *Baker v. State*,²⁵ the Vermont Supreme Court found that the denial of marriage licenses to same-sex couples violated the state constitution's Common Benefits Clause, which guaranteed equal protection to all of the state's citizens.²⁶ The Vermont court stated, however, that alternative remedies could rectify this violation. The state legislature could choose to expand the application of the marriage laws to include same-sex couples.²⁷ Alternatively, they could create a new legal status for these couples that guaranteed them the same rights, responsibilities, and benefits as civil marriage provides.²⁸

The Vermont legislature chose to create this alternative status, a "civil union," to satisfy the court's edict.²⁹ In the Vermont legislation, a civil union is clearly distinguished from the concept of civil

25. 744 A.2d 864 (Vt. 1999).

26. *Id.* at 886. The Common Benefits Clause states in part that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST. ch. 1, art. VII.

27. *Baker*, 744 A.2d at 867.

28. *Id.* ("Whether this [protection under the Common Benefits Clause] ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature.")

29. *See generally* VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002). In April 2005, Connecticut enacted a civil-union law, which will become effective October 1, 2005. S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.). Unlike Vermont, Connecticut passed the legislation voluntarily, and not in reaction to a court ruling. *See* William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005, at B1.

marriage. It is, however, both more expansive and more formal than recognition of same-sex relations under previously existing domestic partnership laws.³⁰ Couples in civil unions receive benefits, rights, and responsibilities fully parallel to those of couples that marry.³¹ By creating the new status of civil union, the Vermont legislature was able to grant equal rights to same-sex couples, while preserving the traditional institution of marriage for partners of the opposite sex.³²

The formalities and legal impediments associated with marriage law also apply to civil unions. For example, a couple must obtain a license from the state and have the union formalized by an authorized person, such as a judge or member of the clergy.³³ No partner can enter a civil union if he or she is currently married or in another civil union, and once in a civil union, neither partner can marry or enter another civil union.³⁴ As under the marriage laws, partners in a civil union must get a formal court-approved dissolution of the union in order to obtain legal recognition that they are no longer in the union and subject to its rights and responsibilities.³⁵ Vermont domestic relations law, including that relating to divorce, property division, alimony, and child custody and support, applies to parties to a civil

30. See Strasser, *supra* note 20, at 379-81 (reviewing domestic partnership laws that provide limited benefits or apply only to a subset of the population, such as government employees, and are “neither the equivalent of civil unions nor the equivalent of marriage”). Recently, some states have passed broader domestic partnership laws, which provide far more expansive rights to same-sex couples, and apply on a statewide basis, rather than just to a particular subset of the population. See Jason Parish & Joy Haynes, *Same-Sex Marriage and Domestic Partnerships*, 5 GEO. J. GENDER & L. 545, 560-61 (2004) (discussing the enactment of such expansive domestic partnership laws in New Jersey and California). Hawaii has also passed a broad domestic partnership law. *Id.* at 560 n.116.

31. VT. STAT. ANN. tit. 15, § 1204(a) (2002) (explaining that couples in civil unions are entitled to “all the same benefits, protections and responsibilities” that couples entering marriage receive); see also S.B. 963 § 14, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.) (using same language as the Vermont law). The Connecticut statute, like its Vermont counterpart, also clearly distinguishes a civil union from a marriage, which is defined as “the union of one man and one woman.” *Id.*

32. This compromise of granting rights to gay couples, while maintaining marriage for opposite-sex partners, was also the purpose of the Connecticut statute. See Yardley, *supra* note 29 (noting divide in gay community over the bill, with one gay marriage activist group initially opposing the law because it stopped short of same-sex marriage).

33. VT. STAT. ANN. tit. 18, §§ 5160-5164 (2000); see also S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.).

34. VT. STAT. ANN. tit. 15, § 1202; see also S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.).

35. VT. STAT. ANN. tit. 15, §§ 1204(d), 1206; see also 2005 CONN. LEGIS. SERV. P.A. 05-10 (S.S.B. 963), §§ 14, 15 (West).

union.³⁶ This includes the law requiring six months of in-state residency of at least one party in order to bring a complaint for divorce and one-year residency before the date of the final hearing.³⁷

Importantly, the civil union is not limited to residents of Vermont, so that there is no restriction on couples traveling to Vermont solely to enter a civil union, with no intention of establishing domicile in the state.³⁸ As Vermont couples in civil unions travel and move to other states, full faith and credit issues will arise. The accessibility of civil unions to couples from other states makes it inevitable that these issues will arise quickly and in volume. As soon as couples that have entered valid civil unions in Vermont return to their home states, issues relating to recognition of those unions will be present. The combination of open access of out-of-state couples to Vermont unions and the requirement of Vermont residency to dissolve the unions there means that other states will have to address the recognition of civil unions, at least for purposes of dissolution, as couples in their home states wish to end their unions without having to establish residency in Vermont.

36. VT. STAT. ANN. tit. 15, § 1204(d); *see also* S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.).

37. VT. STAT. ANN. tit. 15, § 592 (listing residency requirements for a divorce); § 1206 (“[D]issolution of civil unions shall follow the same procedures . . . involved in the dissolution of marriage . . . including any residency requirements.”). The Connecticut civil union law requires that dissolution of such a union follow existing law for dissolution of a marriage in the state. Under this dissolution law, if both parties were non-residents at the time of the marriage, one party must be resident in the state for one year in order to obtain a dissolution. *See* CONN. GEN. STAT. § 46b-44(c) (2005).

38. *See* REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION (Jan. 2001), at <http://www.leg.state.vt.us/baker/cureport.htm> (explaining that in the first six months that the civil union legislation was in effect, 22% of the parties to a union were Vermont residents, while 78% were from out of state) (on file with the Ave Maria Law Review). By January 2002, the proportion of non-residents entering civil unions had become even greater. *See* REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION (Jan. 2002), at <http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm> (on file with the Ave Maria Law Review). The January 2002 Report stated that only 11% of people entering civil unions were Vermonters. *Id.* Like Vermont, Connecticut does not have a residency requirement to enter in a civil union, so that it is likely that many out-of-state residents will take advantage of the Connecticut law when it takes effect in October 2005. *See* GLAD, *Some Questions and Answers About the New Connecticut Civil Unions Law, First Edition April 27, 2005*, at 20, http://www.glad.org/marriage/CT_Civil_Union_Q_and_A.pdf (on file with the Ave Maria Law Review).

B. *The Distinction Between Civil Unions and Marriage and Its Impact on the Full Faith and Credit Analysis*

Civil unions provide the same benefits and responsibilities to same-sex partners that are available to opposite-sex partners through marriage. However, the difference in title is more than simple terminology. There is a significant symbolic difference between the two statuses that also has potential implications for full faith and credit analysis.

These implications are apparent in an examination of DOMA, which is an important starting point in any full faith and credit analysis relating to civil unions.³⁹ DOMA refers only to “a relationship between persons of the same sex that is treated as a marriage.”⁴⁰ Though it could be argued that a civil union is “treated as a marriage,” this argument is not likely to succeed, since a civil union is explicitly distinguished from a marriage under Vermont law.⁴¹ In response to the Vermont Supreme Court’s directive in *Baker*,⁴² the Vermont legislature deliberately chose to create the status of civil union in order to avoid broadening the concept of marriage to include same-sex couples.⁴³ Therefore, civil unions do not appear to fall within DOMA’s restrictions on full faith and credit. In this circumstance, each state would have to apply the usual law on full faith and credit without reference to DOMA’s invitation to states to

39. See *supra* text accompanying notes 22-24.

40. 28 U.S.C. § 1738C (2000).

41. VT. STAT. ANN. tit. 15, § 1201 (2002) (“Civil union” is defined as “two eligible persons [who] have established a relationship pursuant to this chapter ‘Marriage’” is defined as “the legally recognized union of one man and one woman.”); see also S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.).

42. See *supra* text accompanying notes 25-28.

43. The Vermont legislature has stated:

While a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clauses. Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved. Granting benefits and protections to same-sex couples through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise.

VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002) (Civil Unions), Legislative Findings, 1999, No. 91 (Adj. Sess.), § 1 (10).

refuse such full faith and credit to same-sex marriages from out of state.

State DOMAs that refer only to same-sex marriages similarly can be limited by their own language to apply only to marriage and not to other types of relationships, such as civil unions. These state DOMAs therefore may not necessarily establish a public policy against recognizing same-sex civil unions from other states.⁴⁴ This has been the reasoning of at least one case. In *In re M.G. and S.G.*,⁴⁵ female partners entered into a civil union on July 3, 2000, in Vermont. In 2002, M.G. sought dissolution of the union in West Virginia.⁴⁶ To grant a dissolution, the West Virginia court would have to recognize the Vermont civil union as valid. The court found that West Virginia's state DOMA, which referred to marriage only, did not apply to the case.⁴⁷ Because Vermont specifically distinguished a civil union from a marriage, the court found that the West Virginia statute was not applicable and granted a judgment of dissolution of the civil union.⁴⁸

Therefore, the state DOMAs do not necessarily provide guidance on the public policy of a state regarding civil unions. While some contend that the existence of a DOMA indicates the state's disapproval of all same-sex intimate relationships,⁴⁹ I would argue

44. See *infra* text accompanying notes 52-54.

45. *In re M.G. & S.G.*, No. 02-D-292 (Fam. Ct. W. Va. Jan. 3, 2003) (unpublished decision), cited in 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, 738 n.163 (2004). Though state divorce law did not apply, the court used its equitable powers to dissolve the civil union. See *infra* text accompanying notes 73-84, 125.

46. Cox, *supra* note 45, at 738.

47. *Id.* at 739. The West Virginia statute states:

A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.

W. VA. CODE ANN. § 48-2-603 (Michie 2004).

48. Cox, *supra* note 45, at 739; see also Arthur S. Leonard, *The Divorce Precedes the Marriage*, GAY CITY NEWS, Apr. 11-17, 2003, available at <http://www.gaycitynews.com/gcn215/thedivorce.html> (on file with the Ave Maria Law Review).

49. See Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. Rev. 1235, 1274 (stating that state statutory or constitutional prohibitions on same-sex marriage or substitutes for marriage "will provide a potential basis for determining that a state has a public policy against formal recognition of

that such legislation just as likely indicates a desire to reserve the particular institution of *marriage* to heterosexuals, while either supporting or indicating no opinion about providing rights to same-sex couples outside of marriage. Recent national polls demonstrate a significant difference in the percentage of those polled who oppose same-sex marriage, as compared to those who oppose civil unions.⁵⁰ A majority of those surveyed now support civil unions for same-sex couples.⁵¹ As this demonstrates, opposition to same-sex marriage is by no means a clear indication of opposition to civil unions for gay couples.

As in the situation of determining whether a state has a “strong public policy” against same-sex marriage, to establish a public policy exception to civil unions, a state must meet a high standard.⁵² In the absence of an explicit statement in statutory, constitutional, or common law regarding civil unions, a state would not be able to demonstrate a strong public policy against such unions. A state DOMA that concerned only same-sex marriage should not be construed as a public policy against civil unions and, quite simply, would be irrelevant to that determination.

In addition to the argument that DOMA and the states’ little DOMAs do not include civil unions, there are other reasons to suggest that states may recognize out-of-state civil unions more readily than

same-sex marriages, and the public policy may be extended by analogy to the domestic partnership area”).

50. See *Civil Unions for Gays Favored, Polls Show*, MSNBC, Mar. 12, 2004, at <http://www.msnbc.msn.com/id/4496265> (on file with the Ave Maria Law Review) (reporting results of Washington Post-ABC News and USA Today/CNN/Gallup polls from March 2004, which both “showed a significant [positive] shift in public opinion on civil unions”). Both polls found “deep divisions on same-sex marriage,” but both found that a majority of those surveyed favored civil unions for gay and lesbian couples. *Id.*

51. *Id.* The USA Today/CNN/Gallup poll “found 54 percent of respondents favor[ed] civil unions . . . with 42 percent opposing them.” *Id.* The “Washington Post-ABC News poll found that 51 percent of respondents favor[ed] . . . civil unions,” while the same poll “found that 59 percent of Americans oppose[d] gay marriage.” *Id.*

52. The public policy of the forum state is invoked only as a narrow exception to the general command of the Full Faith and Credit Clause. In particular, where interests such as the stability of rights and responsibilities of spouses and the protection of children are involved, the courts have been highly reluctant to permit an exception to full faith and credit. This is demonstrated in the case law involving interstate recognition of marriages, where refusal to permit a certain type of marriage under its own laws will not allow the forum state to deny recognition to this type of marriage from another state. See *supra* text accompanying notes 16-21. This reasoning is equally applicable to civil unions, which involve the same familial rights and responsibilities as marriage.

same-sex marriages. Much of the case law regarding same-sex marriage focuses on the definition of marriage and the deeply rooted tradition of the institution as existing between opposite-sex partners.⁵³ The wealth of tradition and religious and symbolic meaning attached to marriage brings with it a strong resistance to altering this concept. Unlike marriage, civil unions do not invoke such long tradition, symbolism, or history. It is more difficult for a state to argue that it has a strong public policy against a status that does not have deeply-held traditions which the state does not want to disrupt.⁵⁴

There also are arguments to support the proposition that the distinctions between civil unions and same-sex marriage make it less likely that out-of-state civil unions will be recognized by other states. The civil union is entirely a statutory creation, developed only a few years ago, and it currently is operative only in Vermont.⁵⁵ When a

53. See, e.g., *Morrison v. Sadler*, 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005) (affirming dismissal of suit challenging constitutionality of statutory ban on same-sex marriage and noting that the ban is rationally related to the promotion by traditional opposite-sex marriage of responsible procreation and stable families); *Standhardt v. Superior Court*, 77 P.3d 451, 458 n.9 (Ariz. Ct. App. 2003) (finding state prohibition on same-sex marriage was not unconstitutional). The court also noted that recognizing the right to same-sex marriage would redefine the meaning of marriage, undermining this important tradition. *Id.* at 458.

54. See Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL'Y 229, 249-50 (2004) (stating that in contrast to marriage, "[n]o one ever claimed that the meaning behind a civil union has anything to do with history, tradition, procreation, or sexual differentiation" and that "civil unions stand a chance at granting same-sex couples legal equality"); Arthur S. Leonard, *Ten Propositions About Legal Recognition of Same-Sex Partners*, 30 CAP. U. L. REV. 343, 345-46 (2002) (arguing that the civil-union status was developed specifically "to preserve the preferred status of marriage and to avoid any interpretation equating what is available for same-sex couples with traditional marriage" and so the civil-union status does not provide same-sex couples with equality).

55. Connecticut's civil-union law will become effective in October 2005. See *supra* text accompanying notes 29-33; see also *Li v. State*, 110 P.3d 91 (Or. 2005). In April 2004, the Multnomah County Circuit Court found that the state's marriage statutes act to deny benefits to homosexuals in violation of the Oregon constitution, and followed the Vermont Supreme Court's lead in *Baker* by "allow[ing] the legislature to come up with a remedy consistent with this judicial holding within ninety days of the commencement of the next legislative session or special session, whichever occurs first." *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *8 (Or. Cir. Ct. Apr. 20, 2004). The trial court explicitly stated that the civil-union alternative would satisfy the court's requirements, as "Vermont's approach represents a sound remedy to this issue of first impression." *Id.* The case was appealed to the Oregon Supreme Court. In November 2004, while the case was pending on appeal, the Oregon electorate voted to amend the state constitution to include a "little DOMA" which limited marriage to same-sex partners. *Li*, 110 P.3d at 97; see also *supra* note 24. On April 14, 2005, the Oregon Supreme Court held that because the constitutional amendment prohibited same-sex marriage, the plaintiffs could no longer claim any right to marry in the state. *Li*, 110 P.3d at 98. The plaintiffs argued that they

same-sex marriage is involved, all states recognize the concept of marriage and provide benefits, rights, and responsibilities to couples in that status. The question involved in interstate recognition of same-sex marriage would be whether a forum state has to recognize a *particular type of* marriage involving a same-sex couple. In contrast, providing full faith and credit to out-of-state civil unions would require states to recognize a completely new and foreign institution in order to provide such benefits, rights, and responsibilities to the couple.

Moreover, there is a large body of case law regarding interstate recognition of marriage that can provide a framework for same-sex marriage recognition; such a framework does not exist for civil unions.⁵⁶ In this situation, there would be an argument that the public policy exception could be invoked because a state should not be obligated to provide benefits to couples entering into an institution that does not exist in the forum state.⁵⁷

Though existing case law regarding full faith and credit recognition to civil unions is limited, many of the cases have distinguished civil unions from marriage. Most often, this distinction has been used to deny full faith and credit recognition to civil unions. *Burns v. Burns*⁵⁸ involved terms of a divorce that denied visitation of the children with the other parent if that parent lived with or had

still had a right to the *benefits* of marriage, which they claimed had not been affected by the constitutional amendment; they continued to be entitled to the alternative remedy proposed by the trial court to extend the benefits of marriage to same-sex couples. *Id.* The Oregon Supreme Court rejected that argument, finding that the trial court had improperly gone beyond the pleadings in fashioning that potential remedy as an alternative. *Id.* The Oregon Supreme Court held that the issue of benefits was not properly before the court, reversed the lower court and remanded with instructions to dismiss the case. *Id.* at 98, 102. Since the Supreme Court's decision, there has been movement in the Oregon State Senate to pass a bill creating civil unions in the state. See Michelle Cole, *Civil Unions Bill Heads to Senate*, THE OREGONIAN, June 8, 2005, at D6. However, the bill is expected to face substantial opposition in the House. *Id.*

56. Cox, *supra* note 20, at 136, 140.

57. See Silverman, *supra* note 18, at 1100-01 (explaining that because a civil union is "something less than marriage," a couple cannot transfer this status to another state and receive that state's benefits reserved for marriage); Strasser, *supra* note 20, at 374-75 (arguing that states would be less likely to recognize a civil union from out-of-state than a marriage, because they may view civil unions as "a purely local creation having purely local scope"). Professor Strasser also argues that because the right to enter a civil union has not been recognized as a constitutionally protected right, unlike the right to marry, a forum state would have more leeway to refuse full faith and credit to an out-of-state civil union. *Id.* at 376-77.

58. 560 S.E.2d 47 (Ga. Ct. App. 2002).

overnight stays from a non-married partner.⁵⁹ Subsequent to the divorce, the mother entered into a civil union in Vermont with a female partner, and they proceeded to live together.⁶⁰ The father claimed that the mother was violating the divorce order by living with her female partner.⁶¹ The mother claimed that there was no violation because she had satisfied the “married” requirement of the divorce order by entering into the civil union.⁶² The court reasoned that a civil union was not equivalent to marriage, because Vermont had specifically distinguished the two statuses in its legislation.⁶³ Therefore, the court held that the mother did violate the order; because of the distinction between civil union and marriage, she was living with a “non-married” partner.⁶⁴

In *Rosengarten v. Downes*,⁶⁵ the plaintiff and defendant had entered into a civil union in Vermont.⁶⁶ Plaintiff sought to dissolve the union in Connecticut, where he resided.⁶⁷ The Connecticut Appellate Court affirmed the trial court’s ruling that it did not have subject matter jurisdiction over this dissolution, because Connecticut’s dissolution statute referred only to marriage and the status of civil union was not a marriage recognized under the statute.⁶⁸ The plaintiff argued that the court had jurisdiction based on a catch-all provision of the statute which granted the superior court jurisdiction over “all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court” and that dissolution of a civil union was such a family relations matter.⁶⁹ Again the appellate court affirmed the trial court by finding that “the judges of the Superior Court have not

59. *Id.* at 48.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 48-49.

64. *Id.* at 49.

65. 802 A.2d 170 (Conn. App. Ct. 2002). The case was on appeal, but the plaintiff died before the appeal could be heard. Janice G. Inman, *Dissolving a Same-Sex Marriage*, N.Y. FAM. L. MONTHLY, July 2003, at 1-2.

66. *Rosengarten*, 802 A.2d at 172.

67. *Id.*

68. *Id.* at 174-75. The court noted that Vermont itself had clearly distinguished between civil unions and marriages. *Id.* at 175. Of course, this analysis has been rendered moot by the enactment of a civil-union law in Connecticut, which takes effect in October 2005. See *supra* note 31.

69. *Id.* at 172 (citing CONN. GEN. STAT. § 46b-1(17) (West 2003)).

enacted any rule of practice that would define foreign civil unions as a family matter” and nothing in the legislative history of the statute supports such a reading.⁷⁰ Moreover, the legislature has enacted laws that state that Connecticut does not endorse civil unions.⁷¹ The court then undertook a conflict of laws analysis and ruled that the state’s public policy did not favor recognition of the civil union in order to dissolve it.⁷²

As in *Burns*, the end result in *Rosengarten* was not favorable to interstate recognition of civil unions. The court used the distinction between such unions and marriage to support its argument for denying recognition to civil unions for purposes of dissolution. If the case had involved a same-sex marriage, the court could not have argued so easily that it had no jurisdiction to dissolve the legal status of the couple.

Some courts have explicitly distinguished civil unions from same-sex marriages, while still ruling that the out-of-state civil union must be recognized. These courts, however, have had to rely on their equitable powers in order to do so. In *In re M.G. & S.G.*,⁷³ the court signed a dissolution decree for a lesbian couple that had entered a civil union in Vermont and then resided in West Virginia.⁷⁴ The court noted that the Vermont Civil Union Act clearly stated that a civil union was not a marriage, and therefore West Virginia divorce laws did not apply to the case.⁷⁵ The court noted that “[t]he parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state.”⁷⁶ The court then “ruled that the civil union ‘shall be dissolved upon the grounds of irreconcilable differences’ and that ‘the parties have no further legal responsibility or relationship with each other.’”⁷⁷

70. *Id.* at 177.

71. *Id.*

72. *Id.* at 179-80. The court also found that the state’s failure to enact DOMA legislation did not demonstrate “a willingness to recognize civil unions.” *Id.* at 182.

73. *In re M.G. & S.G.*, No. 02-D-292 (Fam. Ct. W. Va. Jan. 3, 2003) (unpublished decision), cited in Cox, *supra* note 45, at 738; see also *infra* text accompanying note 125.

74. See Cox, *supra* note 45, at 738-40.

75. *Id.* at 739.

76. *Id.*

77. *Id.* at 740 (quoting *In re M.G. & S.G.*, No. 02-D-292 (Fam. Ct. W. Va. Jan. 3, 2003) (unpublished decision)). The judge signed the order on December 19, 2002, but did not formally enter it with the clerk of the court until January 3, 2003. *Id.*

Using its equity jurisdiction, the Massachusetts Probate and Family Court similarly granted dissolution of a civil union based on an irretrievable breakdown of the relationship.⁷⁸ In *Salucco v. Alldredge*,⁷⁹ the court considered an uncontested petition for dissolution of a Vermont civil union.⁸⁰ The court noted that the parties could not obtain a dissolution in Vermont, because plaintiff, a Massachusetts resident, and defendant, an Arkansas resident, would not meet the Vermont residency requirement.⁸¹ Further, they would be unable to obtain a dissolution in either Arkansas or Massachusetts because they were not considered married for purposes of those states' divorce statutes.⁸² Not surprisingly, given the *Goodridge* decision granting formal recognition to same-sex relationships,⁸³ which had come out while this case was pending, the court found that according to the public policy of Massachusetts, the parties "should be afforded all of the responsibilities and rights that flow from a civil union, including a legal remedy for the dissolution of their legal relationship."⁸⁴

C. *The Context in Which Recognition of the Civil Union Arises*

It is well accepted in full faith and credit jurisprudence that recognition of an out-of-state law or act (though not a judgment) can depend on the context in which such recognition arises.⁸⁵ For

78. *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498, No. 02E0087GC1, 2004 WL 864459, *4 (Super. Ct. Mar. 19, 2004).

79. 17 Mass. L. Rptr. 498, No. 02E0087GC1, 2004 WL 864459 (Super. Ct. Mar. 19, 2004).

80. *Id.* at *1.

81. *Id.* at *2.

82. *Id.*

83. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

84. *Salucco*, 2004 WL 864459, at *4.

85. See Cox, *supra* note 45, at 718-22 (while arguing for full, universal recognition of the status of same-sex married partners, rather than requiring piecemeal consideration of individual "incidents" of marriage, Cox also points out that there are situations where a forum state should recognize the validity of the same-sex partnership for purposes of a particular "incident," even if it were to refuse to honor the partnership status universally). As Cox notes, courts have frequently determined that the policy behind the particular incident at issue was stronger than the policy against a particular type of partnership (such as polygamous or interracial), thereby requiring recognition of the marriage for purposes of the particular benefit or right at issue, such as succession to property upon the death of one of the partners. *Id.* at 722-28. Benefits that arise upon termination of the marriage, through death or divorce, are likely to be easier to recognize, because the public policy against the marriage largely has the purpose of preventing the couple from living together in an ongoing relationship. See, e.g., *Miller v. Lucks*, 36 So. 2d 140, 141-42

example, the argument supporting a forum state's right to refuse recognition of an out-of-state civil union on public policy grounds would be at its strongest if the case involved a couple domiciled in the forum state, who had traveled to Vermont only to enter a civil union, and then returned to their home state seeking the benefits arising from their ongoing relationship. In this case, the forum state has a strong interest and significant connection to the parties, and the couple is seeking affirmative benefits for an existing and ongoing civil union. To provide these benefits would require the forum state to recognize this ongoing status and also to grant affirmative rights directly associated with this status.⁸⁶

(Miss. 1948) (recognizing interracial couple's valid out-of-state marriage for purpose of intestate succession, despite Mississippi's ban on interracial marriage, because the policy goal was to prevent interracial couples from living together as husband and wife in the state, and permitting one spouse to inherit property in the state does not undermine this goal).

86. See, e.g., *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2005). The *Hennefeld* case demonstrates a state's reluctance to provide an ongoing benefit to its own residents who have entered a civil union in Vermont, and then returned to their home state. In *Hennefeld*, a disabled veteran and his same-sex partner, New Jersey residents, sought a property tax exemption on residential property located in New Jersey, for which only married couples had been entitled under New Jersey law. *Id.* at 173. The couple, who had lived together in New Jersey for almost thirty years, had obtained a civil union in Vermont in 2000. *Id.* The court held that New Jersey was not required to recognize a Vermont civil union under the state law that existed at the time they entered the civil union. *Id.* at 185. Therefore, they were not entitled to the tax exemption as of the year 2000. In January 2004, New Jersey passed the Domestic Partnership Act, to take effect in July 2004, which grants substantial rights to same-sex partners, and explicitly states that the state will recognize civil unions from other states. *Id.* at 185, 195. The court acknowledged that under the Act, the Vermont civil union would be valid in New Jersey. *Id.* at 185. Nevertheless, the court ruled that the Act "clearly does not provide that Vermont law must, in all respects concerning same-sex unions, usurp conflicting or contrary New Jersey law or public policy." *Id.* at 186. Therefore, the state was not required to provide the plaintiffs with the tax exemption benefit just because they may have been entitled to it under Vermont law. The couple had also entered into a valid marriage in Canada in 2003, which the court held that it was not required to recognize, because recognition of a foreign marriage was based only on comity, a discretionary doctrine. *Id.* at 178. The court did not discuss how it would treat a same-sex marriage from another state, which would be subject to full faith and credit, rather than comity. However, ultimately the court held that the plaintiffs *were* entitled to the exemption under the Act, but only as of July 12, 2004, the date they entered into a domestic partnership under the Act. *Id.* at 202. The same-sex couple was entitled to the exemption only because they were eligible under their home state's law, and not because the state had to recognize all the benefits accompanying a Vermont civil union, despite the fact that as of 2004, the state's public policy was to recognize civil unions from other states.

There are other contexts in which I believe there is a strong argument for granting some affirmative rights for couples in civil unions which may involve recognition of the relationship status but do not relate directly to the relationship. For example, assume that the forum state grants domestic violence protection orders only to couples that are married or formerly married. Should a partner to a same-sex civil union who now lives in the forum state be permitted access

Where recognition of a civil union arises in the context of dissolution, the state has a lesser interest than that involved with providing benefits in an ongoing relationship. Providing recognition to permit the dissolution does not require condoning the relationship and would result in an end to the union. The dissolution does not require the state to grant benefits or spend resources on the partnership. Moreover, the forum state has an interest in ensuring the orderly distribution of property and determination of maintenance, as well as a clear and court-approved order of custody and the provision of support to any involved children.

The issue of dissolution is the context in which many civil-union recognition cases are bound to arise, particularly given the framework of Vermont's civil-union law, which permits non-resident couples to enter a civil union in Vermont, but requires residency of one year in order to obtain a dissolution there.⁸⁷ This is accentuated by the fact that the Vermont domestic relations law requires dissolution of the union to remove the disability on entering another civil union or a marriage.⁸⁸

If the parties' home states will not recognize their civil union in order to grant them a dissolution, they may be placed in a bind from which they cannot escape. They are not able to access a dissolution in either their home state or in Vermont, and therefore they are unable to enter another civil union or to marry without creating significant conflict and confusion over their rights and responsibilities. This strengthens the argument that the state where partners to a civil

to such domestic violence orders? It is true that considering a partner "married" for the purposes of obtaining a protection order would require the forum state to recognize the validity of the civil union. However, unlike providing health benefits or other incidents of marriage, the party here is seeking protection from physical harm. Whatever the state's policy on same-sex relationships is, the state would have little interest in barring a party at physical risk and living within its borders from access to court-ordered protection. The forum state would be more interested in protecting a party living in the state from injury. This would be more legitimate than refusing to provide access to law enforcement protection because the state disapproves of the sexual orientation of the party. Where recognition of a civil union arises in the context of a plea for police protection, I think it is highly unlikely that the state could legitimately invoke a public policy exception. *See* Sack, *supra* note 8, at 852-53.

87. This is also true of the Connecticut civil-union law. *See supra* note 37.

88. VT. STAT. ANN. tit. 15, § 4 (2002) (stating that marriage contracted while either spouse has a living partner to a civil union is void); tit. 15, § 1202 (stating that for civil union to be valid, the parties must not be a party to another civil union or a marriage); *see also* S.B. 963, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), 2005 Conn. Acts 05-10 (Reg. Sess.) (a person is only eligible to enter a civil union if he or she is not a party to another civil union or marriage).

union are domiciled should recognize the union for purposes of granting a dissolution.⁸⁹

In the Iowa case of *In re KJB & JSP*,⁹⁰ the court found that partners to a civil union should not be denied access to a dissolution. The judge granted a dissolution in November 2003, which made the provisions of the parties' "Stipulation in Dissolution of Marriage" part of the Decree. The court did not identify this as a civil-union case or raise issues relating to this and signed the judgment without realizing that it involved two women.⁹¹ After recognizing this issue, the judge allowed the dissolution to stand, noting that state residents should have access to the judicial system.⁹²

Subsequently, some elected officials, a private citizen, and a church challenged the ruling in the Iowa Supreme Court.⁹³ Plaintiffs argued that the judge had no authority to grant the dissolution of the civil union because an Iowa statute states that only a heterosexual marriage is valid in the state. The judge could not redefine marriage and had no authority under the section of the Iowa code that governs divorce to grant a dissolution of this civil union.⁹⁴ After the petition

89. If the home state does not grant a dissolution in this situation, it could lay the groundwork for a confusing and unappealing scenario. A partner to a civil union living in a state that refuses to recognize the civil union could marry in that state and have children. That partner would be recognized as married in the home state but not in Vermont, where the partner is disabled from marrying without a dissolution of the civil union. Situations could be created where a partner has obligations to the partner of the civil union in Vermont and obligations to the spouse and children in other states but not in Vermont. This situation would exist under the Connecticut civil union law as well. These conflicts would create uncertainty in such important areas as inheritance rights, health benefits, and pension plans, as well as the legitimacy and protection of children. By denying partners to a civil union the right to dissolution of the relationship, the home state would create a situation that would weaken or deny rights to spouses and children in any subsequent marriage. This is exactly the kind of chaos that the Full Faith and Credit Clause was meant to prevent.

90. No. CDCD 119660 (Woodbury County Dist. Ct. Iowa Nov. 14, 2003) (unpublished opinion), *cited in* Cox, *supra* note 45, at 742 n.185. The judge issued an amended decree on December 24, 2003. *See* Brief in Support of Petition for Writ of Certiorari at 8, *Alons v. Iowa District Court for Woodbury County*, No. CDCD 119660 (Iowa Apr. 4, 2004) (No. 03-1982) (on file with the Ave Maria Law Review).

91. Kathleen Burge, *Iowa Judge Causes Stir in Granting Gay Divorce*, BOSTON GLOBE, Dec. 13, 2003, at B1 (quoting judge as saying that he had not realized dissolution involved gay couple at time of signing agreement).

92. *Id.*

93. *Alons v. Iowa District Court for Woodbury County*, No. 19/03-1982, 2005 Iowa Sup. LEXIS 84 (Iowa Feb. 3, 2004) (Order Granting Petition for Certiorari). The Iowa Supreme Court directed the parties to brief the issue of the plaintiffs' standing to bring the certiorari action. *Id.*

94. *See* Brief in Support of Petition for Writ of Certiorari at 27-29, *Alons*, 2005 Iowa Sup. LEXIS 84.

for certiorari was filed, the district court judge issued a revised order, stating that while he had no jurisdiction to dissolve a marriage as defined by state law, he did have jurisdiction under his general equitable powers to terminate the civil union; the Iowa Supreme Court subsequently ruled that the nonparties lacked standing to challenge the district court's order, and annulled the writ of certiorari that had been previously granted.⁹⁵

Not all court decisions that have recognized out-of-state civil unions for purposes of dissolution have withstood such political pressure. In *In re R.S. & J.A.*,⁹⁶ a Texas Family Court judge originally granted a dissolution to a same-sex couple who had entered a civil union in Vermont, although the petitioner was then domiciled in Texas.⁹⁷ After the state Attorney General challenged the ruling and the case gained notoriety, the judge vacated his earlier opinion and remanded the case for a full hearing. The petitioner ended up dropping the case and the matter was dismissed.⁹⁸

One case arising out of a dissolution of a civil union and the resulting custody battle has created conflicting court decisions from two states, due to the failure of one state to recognize the validity of the civil union.⁹⁹ Janet and Lisa Miller-Jenkins entered into a civil union in Vermont.¹⁰⁰ During the union, Lisa became pregnant by artificial insemination with the approval of both partners and gave birth to a girl, who was raised by Lisa and Janet together during the

95. Frank Santiago, *Judge Revises His Ruling on Lesbians' Divorce*, DES MOINES REGISTER, Dec. 31, 2003, at 3B. In their brief to the Iowa Supreme Court regarding standing, plaintiffs also argued that the lower court judge lacked the power under equity jurisdiction that he asserted in his amended order. Brief in Support of Petition for Writ of Certiorari at 28-32, *Alons*, 2005 Iowa Sup. LEXIS 84. The Iowa Supreme Court found that the plaintiffs lacked standing because they had no personal stake in the action and could show no actual injury. *Alons v. Iowa District Court for Woodbury County*, 698 N.W.2d 858 (Iowa 2005).

96. No. F-185063 (Dist. Ct. Jefferson County, Tex. Mar. 5, 2003) (unpublished decision), cited in Cox, *supra* note 45, at 736 n.145.

97. Cox, *supra* note 45, at 736.

98. See *id.* After reports of divorce in the media, the Texas Attorney General issued a press release stating that the district court had not had subject matter jurisdiction to hear the case, because Texas law does not recognize dissolution proceedings for a civil union. On March 28, 2003, the judge vacated his own decree. *Id.* The petitioner dropped the case, which was then dismissed in April 2003. *Id.*

99. See, e.g., Press Release, Equality Virginia, Equality Virginia Education Fund Joins Landmark Custody Case Appeal (Dec. 8, 2004), <http://www.equalityvirginia.org/site/pp.asp?c=9eIDJJNoHmE&b=303680> (on file with the Ave Maria Law Review).

100. *Id.*

following year.¹⁰¹ After they ended their relationship, Lisa asked a Vermont court to dissolve the couple's civil union and determine custody of the couple's daughter, who was then two years old.¹⁰² After the Vermont court ordered that Janet have visitation, Lisa, who had moved to Virginia, filed a new action in a Virginia court.¹⁰³ The Virginia judge, relying on the state's DOMA legislation for support, found that he did not have to recognize the jurisdiction of the Vermont court, since Virginia law does not recognize civil unions.¹⁰⁴ In a later proceeding, the Virginia court refused to recognize Janet's parental rights, including any right to visitation, and held that Lisa, the birth mother, was the child's sole legal parent.¹⁰⁵ An appeal of this decision is pending with the Virginia Court of Appeals.¹⁰⁶ The Vermont Family Court subsequently held that both Lisa and Janet were the child's legal parents, and also rejected the Virginia court's attempt to assert jurisdiction.¹⁰⁷ Lisa appealed the Family Court's ruling to the Vermont Supreme Court, where the appeal is currently pending.¹⁰⁸

Though *Miller-Jenkins* stemmed from a dissolution action, the context is quite different because it concerns an ongoing custody matter involving a child. Rather than settling a one-time dispute at the end of the relationship, the court would have to continue to recognize the validity of the civil union (and in turn the validity of the parental rights of both partners) in order to review the custody arrangements into the future. This is similar to the *Burns* case, which

101. *Assisted Conception—Custody Jurisdiction: Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, 31 FAM. L. REP. (BNA) 1051, 1051 (Nov. 30, 2004).

102. *Id.*

103. *Id.*

104. *Miller-Jenkins v. Miller-Jenkins*, No. CH 04-280, slip op. at 2 (Va. Cir. Ct. Sept. 9, 2004) (Order and Certification for Interlocutory Appeal).

105. *Miller-Jenkins v. Miller-Jenkins*, No. CH 04-280, slip op. at 1-2 (Va. Cir. Ct. Oct. 15, 2004) (Final Order of Parentage).

106. See GLAD, *GLAD Fights for Lesbian's Parental Rights*, at http://www.glad.org/GLAD_Cases/Miller-Jenkins.html (Virginia decision currently pending on appeal) (on file with the Ave Maria Law Review).

107. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03, slip op. at 13 & n.6 (Vt. Fam. Ct. Nov. 17, 2004) (Ruling on Plaintiff's Motion to Withdraw Waiver to Challenge Presumption of Parentage), available at <http://pub.bna.com/fl/mjvtopnfront.pdf> (on file with the Ave Maria Law Review). The Vermont Family Court has also held Lisa in contempt for failing to comply with its visitation order. See GLAD, *supra* note 106.

108. See GLAD, *Miller-Jenkins Custody Case Appealed to Vermont Supreme Court*, at <http://www.glad.org/News-Room/press96-6-8-05.html> (Vermont decision pending on appeal to the Vermont Supreme Court) (on file with the Ave Maria Law Review).

involved an ongoing visitation order, rather than the dissolution itself.¹⁰⁹ In both cases, the state's interest was more analogous to a case involving ongoing benefits, rather than to a case resulting in an end to a civil-union relationship.

The *Rosengarten* case remains the only case that clearly refused to recognize a civil union in the context of a dissolution, even where the state had no little DOMA expressing an explicit public policy against such unions.¹¹⁰ Based on prior case law regarding the high standard necessary for use of the public policy exception,¹¹¹ it seems that *Rosengarten* erred in holding that Connecticut had established a public policy against civil unions sufficient to permit the state to deny recognition to a valid out-of-state civil union. While the limited case law in this area makes it difficult to predict, it may well be that *Rosengarten* will be an outlier in cases involving recognition of a civil union solely for the purpose of dissolution of the relationship.

There has only been one case concerning interstate recognition of a civil union in the context of a partner seeking the right to sue a third party for the wrongful death of the other partner.¹¹² Like dissolution actions, a wrongful death action, by definition, occurs after the relationship has ended and involves a one-time determination, rather than an ongoing responsibility by the state. In addition, the benefits are sought from a third party, so there is no claim on state resources, other than the court time to try these cases.

In *Langan v. St. Vincent's Hospital*,¹¹³ the court held that a partner to a civil union should be treated as a spouse for purposes of a wrongful death lawsuit against the hospital.¹¹⁴ The court noted that "[a]lthough [the Vermont civil-union statute] explicitly reserves the title 'marriage' for a union between a man and a woman, it does not so reserve the title 'spouse,' as a civil union partner, like a husband or

109. *Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002); see also *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (2005).

110. See *supra* text accompanying notes 65-73. The civil-union law recently enacted in Connecticut prevents further decisions in that state based on the *Rosengarten* analysis. See *supra* notes 29, 68.

111. See *supra* note 52.

112. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003). The hospital has appealed this case to the New York Appellate Division, Second Department. *The Top Cases Updated*, N.Y.L.J., Feb. 28, 2005, at 29. The court heard oral argument in June 2004, but has not yet issued a decision. *Id.*

113. *Langan*, 765 N.Y.S.2d at 411.

114. *Id.* at 421-22.

a wife, is a spouse for all purposes under Vermont law.”¹¹⁵ The court analyzed the purposes behind the wrongful death statute, which was intended to compensate the financial losses of the decedent’s immediate family members, who were most likely to have expected support.¹¹⁶ Here, the person most likely to have expected such support and to have suffered pecuniary injury was the plaintiff, who was his partner’s immediate family and spouse under Vermont law.¹¹⁷

The court noted that New York has recognized the validity of out-of-state common law marriages, even though they are not permitted under New York law.¹¹⁸ If a New York court will recognize a marriage that has not been solemnized with a civil ceremony, “it is impossible to justify, under equal protection principles, withholding the same recognition from a union which meets all the requirements of a marriage in New York but for the sexual orientation of its partners.”¹¹⁹ The court then found that for purposes of recovery under the wrongful death statute, plaintiff had standing to recover.¹²⁰ The court made clear, however, that it was not evaluating the legality of the civil union for all purposes, but only to determine the issue of whether the plaintiff could be considered a spouse in order to sue under the wrongful death statute.¹²¹

D. *Civil Unions and the Long-Term Effect on Full Faith and Credit Recognition of Same-Sex Relationships*

At the moment, one of the benefits of civil unions, as compared to same-sex marriages, for purposes of interstate recognition is the fact that they are not explicitly included in the federal DOMA or in many

115. *Id.* at 418.

116. *Id.* at 419.

117. *Id.*

118. *Id.* at 414.

119. *Id.* at 420-21.

120. *Id.* at 422; *see also* Smith v. Knoller, No. 319532, slip op. at 3-5 (Cal. Super. Ct. Aug. 9, 2001) (denying motion to dismiss wrongful death claim by same-sex partner, finding that she may qualify as a “surviving spouse” under the statute). Because same-sex partners cannot marry in California, “there exists an insurmountable barrier to the right of a homosexual to bring an action for the wrongful death of his or her partner.” *Id.* at 3. The court found that this was not reasonably related to any legitimate purpose. Because the plaintiff’s sexuality had nothing to do with her loss, there was no rational basis to deny her recovery under the wrongful death statute, which was designed to provide compensation for loss of companionship and other losses caused by decedent’s death. *Id.* at 3-4.

121. *Langan*, 765 N.Y.S.2d at 415.

of the state DOMAs. While this is a valuable point in support of granting full faith and credit recognition to civil unions, it is not likely that it will have much enduring value. A growing number of states are including civil unions in their state legislation modeled on DOMA, and there have been calls to amend DOMA itself in this way.¹²² In the November 2004 elections, eight of the eleven states that added DOMA amendments to their constitutions included a ban on civil unions or other partnership benefits in addition to same-sex marriage.¹²³ The argument that civil unions are in a stronger position than marriages for full faith and credit purposes because they are not covered by the DOMAs does not provide a solid basis for preferring a civil union to same-sex marriage.

Nor does the case law, though limited at this point, demonstrate that civil unions stand a better chance of recognition than same-sex marriages. While many of the cases did distinguish civil unions from same-sex marriages, this either provided a basis for denying the relief sought¹²⁴ or required the court to rely on equity jurisdiction to grant the relief.¹²⁵ In other cases, it was the similarity of civil unions to

122. See, e.g., NEB. CONST. art. I, § 29 (2001) (stating that only marriage between a man and a woman will be recognized, and the “uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska”), *invalidated by* Citizens For Equal Prot. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (finding that the ban on civil unions was overly broad and in violation of the United States Constitution’s guarantee of equal protection); TEX. FAM. CODE ANN. § 6.204 (a)(1)-(b) (Vernon Supp. 2004-2005) (stating that same-sex marriage or civil union, defined as an alternative to marriage that grants parties legal protections granted to spouses of a marriage, is contrary to public policy and void in state).

123. See *Morrison v. Sadler*, 821 N.E.2d 15, 19 n.3 (Ind. Ct. App. 2005) (noting this fact). It is also true that some states have enacted legislation that explicitly states a policy in favor of recognizing out-of-state civil unions. For example, California’s Domestic Partners Rights and Responsibilities Act states:

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

CAL. FAM. CODE § 299.2 (West 2004). New Jersey’s Domestic Partnership Act also explicitly states that New Jersey will grant full faith and credit to legally recognized relationships of same-sex partners from other states. Domestic Partnership Act, 2003 N.J. Laws 246 (2004).

124. See, e.g., *Rosengarten v. Downes*, 802 A.2d 170, 174-75 (Conn. App. Ct. 2002).

125. See, e.g., *Salucco v. Alldredge*, 17 Mass. L. Rptr. 498, No. 02E0087GC1, 2004 WL 864459, at *4 (Super. Ct. Mar. 19, 2004) (while dissolution of a civil union is not possible under the state divorce statute, the Court found that under Massachusetts’s public policy, parties should be accorded the rights that flow from a valid civil union, including dissolution); *In re KJB & JSP*, No. CDCD 119660 (Woodbury County Dist. Ct. Iowa Dec. 24, 2003), *amending* No. CDCD

marriage that was the basis for providing relief.¹²⁶ Therefore, the distinction of civil unions did not appear to impact the courts in the direction of providing recognition to the out-of-state same-sex relationship. The lack of a body of case law or statutory law regarding civil unions and their interstate recognition proved to be an important factor in weakening the case for recognition of civil unions as opposed to same-sex marriages.

Perhaps the most important indicator of a court's decision whether to recognize an out-of-state civil union was the context in which the case arose. Cases solely involving dissolutions without any custody or visitation issues, and wrongful death actions against third parties, were the most likely to recognize civil unions. These cases, which did not require recognition of an ongoing relationship and did not require the state to provide ongoing responsibility or affirmative benefits, were the most likely to grant recognition to the out-of-state civil union.

From an analysis of the case law thus far, it appears that there is no long-term benefit, but rather potential harm, imposed by reliance on a civil-union status as opposed to same-sex marriage. If additional states do choose to provide the option of civil unions, a growing body of statutory law and case law concerning civil unions may make recognition of out-of-state civil unions easier. It is more likely, however, that a growing number of states will include civil unions in their DOMA statutes or constitutional amendments concerning their policy against same-sex relationships. Ultimately, the ability of states to enact DOMAs and to invoke the public policy exception to refuse to recognize either civil unions or same-sex marriages from other states will be resolved through a constitutional challenge to a public policy against such formal same-sex relationships. In Part III, I explore the constitutional issues to analyze whether civil unions stand any better chance of succeeding in such a challenge than same-sex marriages.

119660 (Woodbury County Dist. Ct. Iowa Nov. 14, 2003) (unpublished opinion) (holding that while the court did not have jurisdiction to dissolve a civil union under state marriage laws, it could do so under its equitable powers) (cited in Cox, *supra* note 45, at 742 n.185); *see also supra* text accompanying notes 45, 73-84.

126. *See, e.g.,* Langan, 765 N.Y.S.2d 411, 422 (Sup. Ct. 2003).

III. CONSTITUTIONAL CHALLENGES TO A PUBLIC POLICY EXCEPTION FOR CIVIL UNIONS

The public policy exception only can be invoked, of course, if the policy on which it is based is constitutional. After *Loving v. Virginia*,¹²⁷ a state could not invoke a public policy against interracial marriage in order to justify refusal to recognize an out-of-state marriage.

Therefore, though we are not considering the constitutionality of bars on same-sex relationships directly, the constitutionality of failure to recognize such relationships is a critical issue in the full faith and credit context as well. I have explored potential substantive due process and equal protection challenges to policies denying recognition to out-of-state same-sex marriages elsewhere.¹²⁸ Here I will focus only on the distinctions in legal analysis between a challenge involving same-sex marriage and one involving civil unions.

A distinction important to both substantive due process and equal protection arguments is that while the Supreme Court has clearly recognized a fundamental right to marry protected by the Constitution, there has been no recognition of any such protection for civil unions.¹²⁹ Courts considering constitutional arguments regarding same-sex marriage may use a heightened standard of review, appropriate for fundamental rights. Under such a standard, the state must satisfy a far stricter review of its public policy that refuses to recognize same-sex marriages. In practice, some of the cases considering this issue have not adopted this heightened scrutiny standard, asserting that the fundamental right to marry does not include the right to enter a same-sex marriage, since by definition marriage is a union between a man and a woman.¹³⁰ As a result,

127. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that state ban on interracial marriages is unconstitutional on both equal protection and due process grounds).

128. See Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507 (2005).

129. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”); *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”)).

130. See, e.g., *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *13 (N.J. Super. Law Div. Nov. 5, 2003) (“a prohibition on same-sex marriage is not so much a limitation on the right

same-sex couples denied the right to marry each other have not been denied a fundamental right, as determined by these courts. Other cases considering same-sex marriage have utilized a strict scrutiny standard.¹³¹ This analysis is not available in challenges to bars on civil unions.

*Lawrence v. Texas*¹³² does offer some support for evaluating the right to enter a civil union, as well as the right to same-sex marriage, under some form of a heightened scrutiny standard. In *Lawrence*, the Court first reaffirmed that decisions relating to marriage, procreation, contraception, family relationships, and child rearing are constitutionally protected and then stated that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹³³ The Court further held that homosexuals have a constitutionally protected right to private intimate conduct.¹³⁴ Though the Court did not term these rights fundamental and did not employ a strict scrutiny standard to review the homosexual sodomy statute at issue, it did connect to homosexuals several rights that have been well-settled as

to marry, but a defining element of that right accepted for generations as an essential characteristic of marriage”), *aff’d*, 2005 WL 1388578 (N.J. Super. App. Div. June 14, 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) (“recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of marriage”) (internal quotation omitted); *see also* *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) (noting that while the Supreme Court has recognized marriage as a fundamental right, “no federal court has recognized that this right includes the right to marry a person of the same sex”).

131. *Andersen v. King County*, No. 04-2-04964-4 SEA, 2004 WL 1738447, at *5, *7-8 (Wash. Super. Ct. Aug. 4, 2004) (finding that in previous right to marry cases, the right had been broadly defined, so that a fundamental right and strict scrutiny framework was appropriate to review a statute limiting marriage to opposite-sex couples); *see also* *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *13 (Wash. Super. Ct. Sept. 7, 2004) (applying a strict scrutiny framework to review state marriage statute, both because homosexuals were a suspect class and marriage was a fundamental right under the state constitution). A few weeks after the *Andersen* decision, in *Castle*, the Superior Court in Thurston County, Washington found the state statute prohibiting same-sex marriage unconstitutional under the state constitution’s privileges or immunities clause. *Id.* at *16-17. The Washington Supreme Court consolidated these cases for review, and oral argument was held on March 8, 2005. *See* Press Release, Lambda Legal, Washington State Supreme Court to Hear Arguments Today in Historic Lawsuit Seeking Marriage Equality for Same-Sex Couples (Mar. 8, 2005), <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1660> (on file with the Ave Maria Law Review).

132. 539 U.S. 558 (2003).

133. *Id.* at 574.

134. *Id.* at 578.

fundamental.¹³⁵ This creates a basis for arguing that heightened scrutiny review is appropriate when homosexuals are denied access to these rights. Additionally, the broad language of the Court, which included not only marriage, but also family relationships and private intimate conduct, would arguably bring civil unions as well as same-sex marriage within these protected rights.¹³⁶

While the Court has never considered homosexuals a suspect or quasi-suspect classification under equal protection analysis, the overruling of *Bowers v. Hardwick*¹³⁷ by *Lawrence* may open the door to heightened scrutiny of classifications by sexual orientation. Previously, courts relied on *Bowers* to find that because the Constitution permitted homosexual sodomy to be criminalized, laws that treated homosexuals differently than heterosexuals could be subject only to rational basis review.¹³⁸ Though *Lawrence* itself relied on substantive due process analysis and did not consider the issue of the level of review for classifications based on sexual orientation under equal protection analysis, the Court's holding that homosexual intimate activity is constitutionally protected certainly removes the obstacles to heightened scrutiny imposed by *Bowers*.

Justice O'Connor, who relied on equal protection analysis in her *Lawrence* concurrence, stated, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."¹³⁹ Though not identifying homosexuals as a suspect or quasi-suspect class, Justice O'Connor made clear that such classifications deserved more than the most deferential scrutiny: "We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection

135. *Id.* at 574.

136. *See id.*

137. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

138. *See, e.g.,* *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (stating that the *Bowers* holding that homosexual activity was not a fundamental right protected by substantive due process and that criminalizing such activity is constitutionally permissible dictates that homosexuals cannot be a suspect or quasi-suspect class for equal protection analysis); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (similar); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1987) (similar).

139. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

Clause where, as here, the challenged legislation inhibits personal relationships."¹⁴⁰

Civil unions are not as disadvantaged in equal protection analysis as they may be under substantive due process, since there is no recognized fundamental right to enter a civil union. The equal protection analysis of laws barring same-sex marriage or civil unions remains the same, because they are both classifications based on sexual orientation.¹⁴¹

In addition, both the majority and the concurrence in *Lawrence* made it clear that moral disapproval of a particular group as the sole purpose of legislation would not satisfy even rational basis review.¹⁴² The Court quoted Justice Stevens's dissent in *Bowers* with approval: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."¹⁴³ Justice O'Connor emphasized that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."¹⁴⁴ In *Romer v. Evans*,¹⁴⁵ the Court had found that an amendment to the Colorado Constitution that prohibited all government action designed to protect homosexuals from discrimination was not rationally related to any legitimate government interest.¹⁴⁶ The Court commented that "[the amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."¹⁴⁷ The Court made it clear in *Lawrence* that moral disapproval cannot provide a rational basis for legislation.¹⁴⁸

140. *Id.*; see also *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (holding that a state statute imposing disability on a specific group, homosexuals, violated equal protection).

141. Of course, in considering civil unions, as opposed to same-sex marriages, a court would not have available the additional equal protection argument that the classification infringes on a fundamental right.

142. *Lawrence*, 539 U.S. at 577, 582-83.

143. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting), cited in *Lawrence*, 539 U.S. at 577.

144. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

145. 517 U.S. 620 (1996).

146. *Id.* at 631-32.

147. *Id.* at 632.

148. See *Lawrence*, 539 U.S. at 577-78.

The argument that moral disapproval does not provide a rational basis for legislation can be applied to consideration of both anti-civil union and anti-same-sex marriage legislation. The argument, however, that legislation against same-sex civil unions is not related to any legitimate state interest may be stronger than the constitutional argument against a policy barring same-sex marriage. In *Lawrence*, the Court took pains to distinguish the case at issue from a case involving same-sex marriage, alluding to the fact that there could be other interests separate from moral animus to justify the state's rejection of same-sex marriage that did not arise in non-marriage contexts.¹⁴⁹ In her concurrence, Justice O'Connor took care to limit her argument, and she specifically distinguished the case at issue from marriage: "Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."¹⁵⁰ The Court, however, stated its limitation more broadly, noting that the present case "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹⁵¹ This language could easily include civil unions, as well as marriage, for same-sex couples.

It is true that the institutional preservation interests that concerned Justice O'Connor about marriage do not apply to civil unions. The Court, however, seemed to be more broadly concerned about the difference between the criminal statute at issue in *Lawrence* and any affirmative and formal state recognition of same-sex couples, whether through marriage or civil unions. It is therefore not clear that civil unions would provide a stronger argument than same-sex marriage in a constitutional challenge.

In a constitutional challenge to a public policy exception involving same-sex relationships, civil unions do not seem to be better positioned than same-sex marriages. Civil unions and same-sex marriage would be handled similarly in an equal protection challenge based on classification by sexual orientation. A fundamental rights analysis, either for substantive due process or equal protection, would clearly favor same-sex marriage, because the fundamental right to marriage is well-settled, while there has been no such recognition of

149. *Id.* at 578.

150. *Id.* at 585 (O'Connor, J., concurring).

151. *Id.* at 578.

civil unions. And, while it could be argued that civil unions do not involve any longstanding state traditions and so present more starkly than same-sex marriage the argument that there is no rational basis for legislation banning such unions, this seems at best unclear given the careful choice of words that the *Lawrence* majority employed in limiting its holding.

CONCLUSION

Both the analysis of current case law and of potential constitutional challenges concerning a state's use of the public policy exception do not demonstrate that the civil union status stands a better chance than same-sex marriage of obtaining widespread interstate recognition. The language of the federal DOMA and its state counterparts can be easily amended to include civil unions explicitly, so that those unions will be treated identically to same-sex marriage under these statutes. The existing case law shows that the context in which the interstate recognition issue arises makes far more difference to the case outcome than does the fact that a civil union, rather than a same-sex marriage, is involved. Most often, the fact that a civil union is not a marriage acts as a detriment to recognition, requiring courts that choose to provide full faith and credit to these unions to rely on equity jurisdiction.

It does not seem that the civil-union status will provide an answer to the conflicts posed by states' differing public policies on formal same-sex relationships. In the current situation, civil unions at best will be recognized by some states in some contexts, just as same-sex marriages will be, creating an unstable patchwork that cannot remain the law for very long. The Court will have to resolve directly the constitutionality of the use of a public policy exception to deny recognition to same-sex marriages.

Until then, the civil-union status may provide more complications than benefits. In *Andersen v. King County*¹⁵² a court found that the state's denial to same-sex couples of access to civil marriage violated substantive due process under the Washington Constitution.¹⁵³ Much like the Vermont court in *Baker v. State*, the court left it to the legislature to determine whether the appropriate remedy would be

152. No. 04-2-049664-4 SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

153. *Id.* at *5, *7-8.

same-sex marriage or civil unions.¹⁵⁴ The court, however, commented that “[i]f there is indeed any outside threat to the institution of marriage, it could well lie in legislative tinkering with the creation of alternative species of quasi-marriage.”¹⁵⁵ The court argued that having state-approved options other than marriage could weaken it as an institution: “Better, perhaps . . . to allow all who are up to taking on the heavy responsibilities of marriage, with its exclusivity and its ‘till death do us part’ commitment, to do so”¹⁵⁶ The most successful strategy for same-sex couples seeking recognition is not to focus on the alternative of civil unions, but to continue to fight for the full status of marriage.

154. *Id.* at *11.

155. *Id.* at *12.

156. *Id.*