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## Vermont Civil Unions, Full Faith and Credit, and Marital Status

Lewis A. Silverman

*Touro Law Center*, lsilverman@tourolaw.edu

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# Vermont Civil Unions, Full Faith and Credit, and Marital Status

BY LEWIS A. SILVERMAN\*

## I. INTRODUCTION

In the past decade, the highest courts of two states issued rulings challenging the prohibition of same-sex marriage. In both states, the issue was remanded. In Hawaii, an intervening state constitutional amendment mooted the law suit;<sup>1</sup> in Vermont, the Legislature was directed to grant appropriate relief.<sup>2</sup> Vermont, in its exercise of judicial and legislative functions, has created a new quasi-marital animal: the civil union.<sup>3</sup> This appears to satisfy the judicial mandate to provide the benefits

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\* Assistant Professor of Clinical Law, Touro College, Jacob D. Fuchsberg Law Center. J.D. 1976, Boston University; B.A. 1973, New York University. The author wishes to thank research assistants Valerie Zuckerman and Doreen Cordova for their help.

<sup>1</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *remanded sub nom. Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996), *rev'd*, 994 P.2d 566 (Haw. 1999) (unpublished table decision). Although the initial decision found an equal protection violation under the Hawaii Constitution, a subsequent amendment allowing the Legislature to reserve marriage for opposite-sex couples rendered the case moot, and the Hawaii Supreme Court dismissed it on that ground, carefully declining to vacate its initial ruling. *Id.*

<sup>2</sup> *Baker v. Vermont*, 744 A.2d 864, 886-89 (Vt. 1999).

<sup>3</sup> An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91.

While a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause. 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.

*Id.* § 1(10).

of marriage to same-sex partners, yet their union is specifically not labeled a "marriage."<sup>4</sup>

In response to Hawaii's initial case, many states enacted statutes defining marriage as specifically between a male and a female, thereby indicating that they would not grant full faith and credit under the United States Constitution to any same-sex marriage contracted elsewhere.<sup>5</sup> The United States Congress enacted the Defense of Marriage Act,<sup>6</sup> which sought to interpret the Full Faith and Credit Clause in the same manner. Now Vermont has enacted its Civil Union Law<sup>7</sup> that, while not technically allowing same-sex marriage, creates a new and unique institution. This institution is, in effect, a quasi-marriage. Further, the Civil Union Law restricts participation in a civil union to people who are not otherwise married;<sup>8</sup> it also prohibits partners who are engaged in a legal civil union from marrying anyone else or engaging in any other civil union.<sup>9</sup>

This Article discusses whether the Vermont Civil Union is equivalent to a legal marriage for the purposes of determining someone's marital

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<sup>4</sup> "Civil marriage under Vermont's marriage statutes consists of a union between a man and a woman. This interpretation of the state's marriage laws was upheld by the Supreme Court in *Baker v. State*." *Id.* § 1(1) (citing *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)).

<sup>5</sup> Driven by the fear that Hawaii courts may soon legitimize same-sex marriages, legislators in more than 30 states and in Congress have introduced legislation to ensure the states will not have to recognize such unions.

... At the state level, at least 10 bills prohibiting recognition of gay marriages already have been adopted.

Henry J. Reske, *A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages*, 82 A.B.A. J. 32 (1996).

<sup>6</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)).

<sup>7</sup> 2000 Vt. Acts & Resolves 91.

<sup>8</sup> For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria:

(1) Not be a party to another civil union or marriage.

(2) Be of the same sex and therefore excluded from the marriage laws of this state.

(3) Meet the criteria and obligations set forth in 18 V.S.A. chapter 106.

VT. STAT. ANN. tit. 15, § 1202 (Supp. 2000).

<sup>9</sup> "Marriages contracted while either party has a living spouse or a living party to a civil union shall be void." 2000 Vt. Acts & Resolves 91, § 24.

status. More specifically, will a participant in a Vermont civil union be prohibited from entering into a legal marriage in another state? Will there also be an effect, such as reciprocity or any form of comity,<sup>10</sup> granted to a civil union by a state or municipality that extends domestic partner benefits to its same-sex couples,<sup>11</sup> especially in the establishment or termination of local domestic partnerships? Ultimately, we must consider whether present constitutional jurisprudence requires states other than Vermont to grant full faith and credit,<sup>12</sup> not to the civil union per se, but to its declaration of marital status, which denies the right of marriage to either of the partners in any other jurisdiction.

Part II of this Article presents two hypothetical situations to consider during the rest of this discussion.<sup>13</sup> Part III<sup>14</sup> will discuss the case of *Baker v. Vermont*<sup>15</sup> and the Vermont Civil Union Law.<sup>16</sup> Part IV discusses the Full Faith and Credit Clause of the United States Constitution and the jurisprudence under that clause.<sup>17</sup> This section also analyzes marital status as previously determined by individual states pursuant to the Full Faith and Credit Clause, with special attention on *Williams v. North Carolina*<sup>18</sup> and its progeny. Included in this discussion is a review of the Defense of Marriage Act<sup>19</sup> and whether it has any application in this area. Part V analyzes the law in this area and draws together the previous discussion in

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<sup>10</sup> BLACK'S LAW DICTIONARY 267 (6th ed. 1990) defines "judicial comity" as "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." *Id.*

<sup>11</sup> In the past two decades domestic partnership benefits have been granted by the State of Hawaii and by dozens of municipalities throughout the United States. *See, e.g.*, HAW. REV. STAT. § 572C (Supp. 1999); S.F., CAL., ADMIN. CODE § 62 (1991); *see also* Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

<sup>12</sup> U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

<sup>13</sup> *See infra* notes 21-22 and accompanying text.

<sup>14</sup> *See infra* notes 23-41 and accompanying text.

<sup>15</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

<sup>16</sup> An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91.

<sup>17</sup> *See infra* notes 42-140 and accompanying text.

<sup>18</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>19</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)).

specific relation to the Vermont Civil Union.<sup>20</sup> The analysis suggests the conclusion that, whether or not states decline to extend full faith and credit to a marriage between a same-sex couple that is contracted in another state, sister states will, nevertheless, be required to accept the determination of marital status pursuant to Vermont's Civil Union Law.

## II.

### A. *Hypothetical No. 1*

Will Truman and Jack McFarland<sup>21</sup> are residents of New York City. Will is employed by a municipal agency and registers Jack as his domestic partner under New York City's domestic partnership ordinance.<sup>22</sup> On a glorious autumn weekend in 2000 they travel to Vermont where, in a blaze of color highlighted by the turning leaves, they enter into a civil union. They then return to New York City. Regretfully, domestic bliss does not follow and they soon separate. Sometime later Will enters into a new relationship with Joe. Will seeks to register Joe as his new domestic partner with the City of New York personnel administration. Jack initiates a law suit seeking injunctive relief to have Will declared still a participant in the civil union pursuant to Vermont law and therefore unable to name anyone else as his domestic partner without formally dissolving his civil union.

### B. *Hypothetical No. 2*

Will Truman and Jack McFarland are residents of Vermont. They enter into a Civil Union pursuant to Vermont's Statute. Sometime thereafter they move to State X. Domestic bliss, however, does not move with them. Some time thereafter Will meets Grace Adler, a rich socialite, and decides that sexual orientation is less important than money. He and Grace get married. Jack learns of the marriage and seeks a declaratory judgment in State X that the marriage is void because Will is disabled from marrying because his previous civil union with Jack in Vermont was never legally dissolved.

## III. VERMONT CIVIL UNIONS

Initial hopes for the approval of same-sex marriage rested on the State of Hawaii. The Supreme Court of Hawaii in 1993, in *Baehr v. Lewin*,<sup>23</sup>

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<sup>20</sup> See *supra* notes 141-48 and accompanying text.

<sup>21</sup> With apologies to the producers, writers, and cast of the NBC sitcom *Will & Grace*.

<sup>22</sup> NEW YORK CITY, N.Y., ADMIN. CODE § 3-240 (2000).

<sup>23</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

declared the ban on same-sex marriage unconstitutional based on the Equal Protection Clause in the Hawaii Constitution.<sup>24</sup> On remand, the trial court also found the ban unconstitutional,<sup>25</sup> but before the case could work its way back to the Hawaii Supreme Court, state voters adopted a constitutional amendment granting the legislature the power to reserve marriage to opposite-sex couples.<sup>26</sup> The Supreme Court of Hawaii ultimately declared the case moot, although specifically declining to vacate its prior ruling.<sup>27</sup>

In the same month that litigation ended in Hawaii, the State of Vermont visited the issue of same-sex marriage. In *Baker v. Vermont*,<sup>28</sup> the Supreme Court of Vermont held that the denial of benefits to same-sex couples was a violation of the state constitution's Common Benefits Clause.<sup>29</sup> The court held that a same-sex couple in Vermont, even if prohibited from marrying, was still entitled to the legal benefits of marriage granted to a male-female couple.<sup>30</sup> The supreme court directed the State Legislature to adopt either a domestic partnership statute or to grant the right to marry to same-sex couples.<sup>31</sup>

The Legislature, in its response, ultimately created a new creature: the civil union.<sup>32</sup> Although the state's marriage statute was clarified to define marriage as specifically between a male and a female,<sup>33</sup> the Legislature went further. It created a new type of quasi-marriage that granted to same-sex couples entering a civil union all the benefits of marriage granted by state law to any other married Vermont couple.<sup>34</sup>

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<sup>24</sup> *Id.* at 63-68.

<sup>25</sup> *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. 1996), *rev'd*, 994 P.2d 566 (Haw. 1999) (unpublished table decision).

<sup>26</sup> HAW. CONST. art. 1, § 23. "The legislature shall have the power to reserve marriage to opposite-sex couples."

<sup>27</sup> *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (unpublished table opinion).

<sup>28</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

<sup>29</sup> *Id.* at 866.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 886-87.

<sup>32</sup> An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91.

<sup>33</sup> *Id.* § 1(1).

<sup>34</sup> "As used in this chapter: (2) 'Civil union' means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses." VT. STAT. ANN. tit. 15, § 1201(2) (Supp. 2000).

The purpose of this act is to respond to the constitutional violation found by the Vermont Supreme Court in *Baker v. State*, and to provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples' as required by

The Civil Union is much more than just a sophisticated "domestic partnership." Domestic partnership legislation has been adopted by the State of Hawaii and by numerous cities and other municipalities throughout the country.<sup>35</sup> There are two essential functions of such an ordinance. The first is registration; that is, to allow couples who believe they fall within the definition to register with the municipality. The second function is the receipt of benefits. Sometimes these functions are combined in a single ordinance; sometimes they are separate. What is noteworthy about the benefits provisions, however, concerns the grant of authority. With the exception of the Hawaii statute, all the other jurisdictions that have adopted this type of legislation are under a limited grant of authority from the state. In some instances the breadth of benefits has been successfully challenged as beyond the delegation of authority under controlling state law.<sup>36</sup>

More importantly, the establishment of a domestic partnership is purely the determination of the two parties involved, and the municipality's only function is to accept the self-selected couple's registration. Registration implies no official sanction or acceptance, although one could certainly argue that the mere fact of allowing the registration at all implicates some form of municipal approval.

This is where the civil union differs. The civil union is an official form of recognition granted to same-sex couples in a manner similar to that granted to married couples. To enter into a civil union, the parties must obtain a license and must participate in a civil or religious ceremony to establish the union, the same as for a marriage. The civil union ceremony is not restricted to Vermont residents.<sup>37</sup> Any couple that travels to Vermont may celebrate a civil union, thereby separating the ceremonial establishment of the union from the benefits conferred, as the latter are not available

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Chapter I, Article 7th of the Vermont Constitution.

2000 Vt. Acts & Resolves 91, § 2(a). *See also* VT. STAT. ANN. tit. 15, § 1204 (Supp. 2000) (securing the same rights to parties of civil unions as those enjoyed by spouses in marriage).

<sup>35</sup> *See, e.g.*, HAW. REV. STAT. § 572C (Supp. 1999); S.F., CAL., ADMIN. CODE § 62 (1991); O'Brien, *supra* note 12.

<sup>36</sup> *See, e.g.*, Lilly v. Minneapolis, No. MC93-21375, 1994 WL 315620 (Minn. Dist. Ct., June 3, 1994), *aff'd*, 527 N.W.2d 107 (Minn. App. Ct. 1995). *But see* Crawford v. Chicago, 710 N.E.2d 91 (Ill. App. Ct. 1999).

<sup>37</sup> VT. STAT. ANN. tit. 18, § 5160(a) (2000). "The license shall be issued by the clerk of the town where either party resides or, if neither is a resident of the state, by any town clerk in the state." *Id.* *See also* Carey Goldberg, *Gay and Lesbian Couples Head for Vermont to Make It Legal, but How Legal Is It?*, N.Y. TIMES, July 23, 2000, at A12.

outside Vermont. Further, the procedure for the dissolution of a civil union appears to be identical to that of a marriage.<sup>38</sup> In no jurisdiction where a domestic partnership exists must one seek judicial imprimatur to dissolve the relationship. Unlike the mere registration of a domestic partnership, the ceremonial requirement of the civil union creates a relationship officially recognized by the State of Vermont. More than merely having the municipality note the pair's own determination of themselves as a couple, the civilly-united couple's legal status flows from the state itself. The state creates it and the state accepts it.

While the Legislature concedes that only benefits granted under the Vermont statutes will be eligible for coverage,<sup>39</sup> the Civil Union Law nevertheless defines who may and who may not enter into a civil union.<sup>40</sup> Most importantly, and distinguishing the civil union from domestic partnerships, the statute also disables a person in a civil union from entering into another civil union or a marriage.<sup>41</sup> By restricting the ability of a member of a civil union to marry, Vermont has accepted this new form of relationship as the equivalent of marriage. In fact, it cannot be terminated unless dissolved in a manner virtually identical to a civil divorce for married couples.

#### IV. THE FULL FAITH AND CREDIT CLAUSE

One could surmise that Vermont's sister states would jump at the opportunity to voluntarily recognize this new quasi-marriage and would honor the marital disability status in the Civil Union Law. We must, however, consider the possibility that one or more states will decline to do so.

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<sup>38</sup> See 2000 Vt. Acts & Resolves 91; VT. STAT. ANN. tit. 15, § 1206 (2000).

The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements.

*Id.*; see also *id.* § 1204 (describing the benefits, protections, and responsibilities of parties to a civil union). "The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union." *Id.* § 1204(d).

<sup>39</sup> An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91, § 2(a); VT. STAT. ANN. tit. 15, § 1204 (Supp. 2000).

<sup>40</sup> VT. STAT. ANN. tit. 15, § 1202.

<sup>41</sup> 2000 Vt. Acts & Resolves 91, § 24.



The issue becomes whether the other states will be compelled to accept Vermont's legislative declaration that an individual engaged in a civil union may not otherwise marry. The inquiry has its foundation in the Full Faith and Credit Clause of the United States Constitution.

Article IV, Section I states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>42</sup>

Courts have been compelled, in a variety of contexts, to determine an individual's marital status. General examples include prosecutions for bigamy, determinations of administrators for intestate estates, claims for wrongful death, claims for spousal insurance proceeds, prosecutions for juvenile delinquency, and determinations of immigration status. The inquiry as to marital status revolves around two related, but distinct issues. In the first situation, the court must determine whether a marriage was validly contracted. In the second, the query concerns the valid dissolution of a marriage. In both situations, one state is rendering a decision on events that occurred in a different state, and the ultimate issue is whether the claimed marital status (marriage or divorce) shall be honored under the Full Faith and Credit Clause of the federal Constitution.

#### *A. History of the Clause*

The Full Faith and Credit Clause of the United States Constitution,<sup>43</sup> while it did not receive much debate at the Constitutional Convention,<sup>44</sup> was enacted to require universal acceptance by the states of the laws and legal judgments of the United States and the sister states. While the case

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<sup>42</sup> U.S. CONST. art. IV, § 1.

<sup>43</sup> *Id.*

<sup>44</sup> For a discussion of the history and purpose of the Full Faith and Credit Clause, see Jennie R. Shuki-Kunze, Note, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power under the Full Faith and Credit Clause*, 48 CASE W. RES. L. REV. 351 (1998). See also Paige E. Chabora, *Congress' Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997); James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998).

law involving this clause has not been overwhelming, the question of state recognition of marriage and divorce by other states has been discussed in numerous decisions. The U.S. Supreme Court has addressed the issue in a few cases and the states have been forced to interpret the section on frequent occasions. Often the states have discussed the clause in accepting or declining to accept marital status as determined by a marriage or divorce in another jurisdiction.<sup>45</sup>

In its initial review of the clause, the Supreme Court discussed the effect of an act of the First Congress that provided for the authentication of records and judicial proceedings. The Court stated that a “record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken” and “it must have the same faith and credit in every other Court.”<sup>46</sup> This doctrine was affirmed in *Hampton v. M’Connel*. In declining to distinguish *Mills*, the Court held: “[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.”<sup>47</sup>

On subsequent occasions, the Court has affirmed the wide breadth of the Full Faith and Credit Clause. For example, in *Fauntleroy v. Lum*, the Court required Mississippi to uphold a Missouri judgment for a debt created by “gambling transactions in cotton futures,” which was a misdemeanor in Mississippi at the time.<sup>48</sup> The Court held that, once resolved, a second court may not review a first judgment as a matter of law, except as to want of subject matter or personal jurisdiction.<sup>49</sup>

Of particular importance regarding the effect of the Full Faith and Credit Clause on Vermont’s Civil Union Act is whether a statute is entitled to recognition from other states. This question was answered affirmatively in *Broderick v. Rosner*, where the Court held statutes to be “‘public acts’ within the meaning of the clause.”<sup>50</sup> Even where Congress has not

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<sup>45</sup> See *infra* Part IV.B.

<sup>46</sup> *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813).

<sup>47</sup> *Hampton v. M’Connel*, 16 U.S. (3 Wheaton) 234, 235 (1818).

<sup>48</sup> *Fauntleroy v. Lum*, 210 U.S. 230, 233 (1908).

<sup>49</sup> *Id.* at 237. “A judgment is conclusive as to all the *media concludendi* and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based on a mistake of law. Of course a want of jurisdiction over either the person or the subject-matter might be shown.” *Id.* (citations omitted).

<sup>50</sup> *Broderick v. Rosner*, 294 U.S. 629, 644 (1935) (citations omitted). “Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must . . . be given full faith and credit by all the other States.” *Id.* at 645; see also *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145,

prescribed the method of choosing between competing state statutes,<sup>51</sup> the inquiry must still be made.<sup>52</sup>

There are exceptions to the clause,<sup>53</sup> but even these exceptions do not allow one state to substitute its own laws to overrule a judgment previously issued in another state. In fact, the exceptions most frequently concern two issues: lack of subject matter or personal jurisdiction. The Court has noted that "it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*."<sup>54</sup> Thus, one state does not have the authority to adjudicate the status of property in a sister state.<sup>55</sup> On the other hand, while divorce adjudicates the marital *res*, it is not strictly an *in rem* proceeding, and divorce judgments are subject to the same rules for the applicability of full faith and credit as other types of judgments.<sup>56</sup> Even the issue of personal jurisdiction over the defendant is not always open to collateral attack, especially if the issue was fully litigated in the first state. If the defendant, dissatisfied with the result, attempts a collateral attack in a sister state, the second state must give full faith and credit to the existing judgment.<sup>57</sup>

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154-55 (1932) (declaring that it is settled that a statute is a "public act" within the meaning of the Full Faith and Credit Clause).

<sup>51</sup> See *Bradford Elec.*, 286 U.S. at 154-55.

<sup>52</sup> *Alaska Packers Ass'n v. Indus. Comm'n of Cal.*, 294 U.S. 532 (1935).

<sup>53</sup> See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273 (1935). Generally, one state is not required to enforce the penal laws of another. In *Milwaukee County*, the Court assumed, without so holding, that one court need not allow its courts to be used for a sister state to enforce its revenue laws, but that a judgment already obtained for unpaid taxes was still entitled to full faith and credit. *Id.*

<sup>54</sup> *Thompson v. Thompson*, 226 U.S. 551, 561 (1913).

<sup>55</sup> *Olmsted v. Olmsted*, 216 U.S. 386, 395 (1910) ("The legislature of Michigan had no power to pass an act which would affect the transmission of title to lands located in the State of New York."); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (finding no violation of the Full Faith and Credit Clause where the state where property is located applies its own law for the devolution of title, even if another state desires subject matter jurisdiction over the title).

<sup>56</sup> *Atherton v. Atherton*, 181 U.S. 155 (1901) (finding husband's domicile as the sole marital domicile and requiring New York to honor the Kentucky divorce decree upon adequate service to the wife).

<sup>57</sup> *Davis v. Davis*, 305 U.S. 32, 40 (1938).

[The wife] may not say that [the husband] was not entitled to sue for divorce in the [Virginia] court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took

Also, the Court has not shied away from requiring that full faith and credit be given to state judgments regarding family issues. For example, the Court has consistently held that federal courts have no jurisdiction over the subject of divorce.<sup>58</sup>

*B. Is the Marriage Valid? Lex Loci*

Each state, the District of Columbia, and the territories maintain separate and unique rules for contracting into marriage. The statutes regulate not only marital procedures, including licensing and solemnization, but also regulate substantively in specifying who may and may not marry. Such substantive laws include those addressing age, consanguinity or affinity, and polygamy. Marriages contracted under common-law procedures are no less subject to state regulation.<sup>59</sup>

The U.S. Supreme Court has acknowledged that marriages “not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.”<sup>60</sup> The issue in *Loughran* was the validity of a Florida marriage where the wife had previously been the guilty party in a District of Columbia divorce and was therefore prohibited from remarrying. The District of Columbia refused to enforce her dower and alimony rights

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exceptions to the commissioner’s report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation.

*Id.* at 40 (citation omitted). Plainly, a litigant gets one bite at the apple, not two.

<sup>58</sup> *Barber v. Barber*, 62 U.S. 582, 584 (1858). “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.” *Id.* at 584.

<sup>59</sup> *Metro. Life Ins. Co. v. Chase*, 294 F.2d 500, 503-04 (1961) (noting that, where the alleged common law marriage is entered into in the District of Columbia by domiciles of New Jersey on a temporary visit, the law of the state of domicile applies as “the one most interested in the status and welfare of the parties”); *United States v. Lawton*, 19 M.J. 886, 889 (1985) (“Military law recognizes the legitimacy of marriages by service personnel if valid in the state in which they are contracted. This is true whether the marriage complies either with state licensing or ceremonial requirements or applicable rules governing common law marriages.” (citation omitted)); *Smallwood v. Bickers*, 229 S.E.2d 525, 526-27 (Ga. App. 1976) (holding that plaintiff should have been permitted to prove a valid marriage to decedent in Alabama after his divorce in Georgia from his first wife and that the Georgia statutory prohibition on remarriage had no territorial effect).

<sup>60</sup> *Loughran v. Loughran*, 292 U.S. 216, 223 (1933).

against her husband's estate, claiming the Florida marriage was invalid because of the prohibition.<sup>61</sup> The Supreme Court reversed, noting that the "mere statutory prohibition" against remarriage could only be given territorial effect.<sup>62</sup> The Court declined to consider whether the Florida marriage might be invalid if the parties had gone there solely to evade the District's prohibition, finding that the section on prohibition was not, by reference, included in the evasion statute.

*Loughran* illustrates three well-established principles regarding the determination whether one state must give full faith and credit to a marriage contracted elsewhere. First, the general principle of *lex loci* governs; that is, one looks to the law of the jurisdiction wherein the marriage is solemnized to determine its validity. Second, states may enact statutes to prevent their domiciliaries from evading restrictions on remarriage. Finally, there is a public policy exception under which one state may decline to honor a marriage contracted elsewhere if it violates the public policy of the reviewing state.<sup>63</sup>

Marriage is particularly a creature of the state.

The law has long recognized that while marriage is founded on contractual principles, it is a status which society, acting through the State,

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ("Such a statute does not invalidate a marriage solemnized in another state in conformity with the laws thereof.")

<sup>63</sup> *Id.* Other principles are applicable in the context of marriages contracted in foreign countries. Most notably, recognition of foreign marriages implicates comity, not full faith and credit, and the rules may differ depending on the jurisdiction. *See* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.2, at 431 & n.36 (2d ed. 1988).

Recognition of foreign marriage is, of course, of some interest to the question at hand, because some foreign countries are now recognizing quasi-marriages for same-sex couples. Of particular interest is the recently-passed Dutch model, an actual marriage for same-sex couples, although that nation's Parliament appears to have restricted the availability of such unions to situations where at least one party is a Dutch citizen or has his or her domicile or habitual residence in the Netherlands. *See* Kees Waaldijk, *Dutch Gays Win Marriage Rights*, *LESBIAN/GAY LAW NOTES*, at 2 (Jan. 2001). Still, the possibility exists that such a couple may thereafter legally find themselves in the United States seeking enforcement of some benefit as a married couple. The objections may be similar to those against polygamous marriages. Again, the rule of law is comity, not full faith and credit, and thus beyond the scope of this Article. *See, e.g.,* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, 31 *MCGEORGE L. REV.* 641 (2000).

fosters and encourages. The State has a vital interest in matters surrounding a marriage and for this reason has the right to enact laws governing marriages. It is generally recognized that a marriage performed in another State which is valid under its laws will be recognized as valid in this State.<sup>64</sup>

Early courts implied that it was the duty of the states to *encourage* marriage, thus recognition out-of-state was essential.

It is the uniform policy of civilized countries, especially those affected by the influence of Christianity, to encourage marriage as the basis of organized society, and to recognize as valid all such as do not offend the essentials of that faith. From this flows the doctrine that a marriage, lawful in the state where contracted, is valid everywhere.<sup>65</sup>

Generally, courts have recognized that marriage performs many valuable functions for society and that it is to society's benefit to affirm the validity of a marriage, whenever possible.<sup>66</sup>

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<sup>64</sup> State v. Austin, 234 S.E.2d 657, 662-63 (W. Va. 1977) (citation omitted). Defendant left West Virginia to utilize the laws of Maryland to marry a person under the age of consent in West Virginia, and was subsequently convicted of contributing to the delinquency of a minor. Because under the laws of both West Virginia and Maryland, the marriage was only voidable and not void, and because marriage emancipates a minor and it is not a crime to reside with one's spouse, the conviction was reversed. *Id.* at 662-64; *see also* Spencer v. People, 292 P.2d 971 (Colo. 1956) (holding that entrance into a marriage contract, regardless of age, is not an act of delinquency).

<sup>65</sup> Modianos v. Tuttle, 12 F.2d 927, 928 (1925). In *Modianos*, a Louisiana resident celebrated a marriage by procuration (proxy) in Turkey. The court held that the applicable prohibition extended only to marriages contracted within the state, and that the celebration by proxy was only for the sake of convenience and was not designed to evade the statutory prohibition. The wife, therefore, was allowed to become a citizen without regard to any quota. *Id.* at 928-29.

<sup>66</sup> For further discussion of the social benefits of marriage, see, for example, RICHARD D. MOHR, A MORE PERFECT UNION—WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS (1994); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998); Anthony Dominic D'Amato, Note, *Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages*, 1995 U. ILL. L. REV. 911; Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681 (1990).

Generally, the validity of a marriage is determined by the law of the state where the marriage is solemnized—the “lex loci”—of the marriage. While there may be exceptions to this rule, the policy of many states is to uphold any marriage entered into in good faith.<sup>67</sup> This principle is outlined in the *Restatement (Second) Conflict of Laws*, which seeks to uphold good faith marriages, especially when (1) a state other than the state of domicile is the state of paramount interest, (2) one party is not domiciled there, and (3) neither intends to reside there after marriage.<sup>68</sup> Even the military recognizes and honors the law of the contracting state in determining the validity of the marriages of service personnel.<sup>69</sup>

To be sure, the law does not generally prohibit the residents of one state from marrying in another state. As stated by one court:

The status of citizens of a state in respect to the marriage relation is fixed and determined by the law of the state, but marriages of citizens of one state celebrated in another state, which would be valid there, are generally recognized as fixing the status in the state of the domicile with certain exceptions, such as marriages which are incestuous, according to the generally recognized belief of Christian nations, polygamous, or which are declared by positive law to have no validity in the state of the domicile.<sup>70</sup>

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<sup>67</sup> See, e.g., *Garrett v. Chapman*, 449 P.2d 856, 858 (Or. 1969).

<sup>68</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

The *Restatement* reads as follows:

§ 283. Validity of Marriage

- (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage. . . .
- (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

*Id.* For a thorough treatment of the *Restatement* position regarding the validity of marriage, see Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, at 342-52 (1998).

<sup>69</sup> *United States v. Lawton*, 19 M.J. 886 (1985).

<sup>70</sup> *Stevens v. Stevens*, 136 N.E. 785, 786 (Ill. 1922). In this case, the couple left Illinois to marry in Indiana specifically to avoid an evasion statute. Though the marriage was valid in Indiana, Illinois subsequently found invalid the marriage of its domiciles. *Id.* at 787. In the current era of no-fault divorce and general

One exception to this rule appears to be that the residents of one state may not specifically go to another state only for the purpose of entering into a common law marriage, at least unless their domicile changes.<sup>71</sup>

Some states have enacted statutes to specifically recognize the validity of marriages contracted elsewhere. Under such statutes, even where the marriage may not be legally contracted in the reviewing state, it will be recognized if valid where solemnized.<sup>72</sup> The Uniform Marriage and Divorce Act proposes the following language for approval of other marriages: "All marriages contracted . . . outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place *in which they were contracted* or by the domicil of the parties, are valid in this State."<sup>73</sup>

Public policy exceptions to the interstate recognition of marriage appear to be limited. Although no state currently allows any marriage to be

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elimination of prohibitions on remarriage, one queries whether such a prohibition might now run afoul of the Privileges and Immunities Clause of the Fourteenth Amendment.

<sup>71</sup> *Metro. Life Ins. Co. v. Chase*, 294 F.2d 500 (3d Cir. 1961). Although it appears that the New Jersey domiciliaries did not travel to the District of Columbia specifically to enter into a common law marriage, such was the claim retroactively made by the alleged wife after the death of her putative husband. In fact, she claimed a continuation of an already existing common law relationship, arguing that the trip to the District of Columbia merely heightened it to the level of marriage. Generally, though, there must be specific intent to establish a common law marriage by two parties with the capacity to marry in a jurisdiction permitting such marriages to be contracted. *See, e.g., Jennings v. Hurt*, 554 N.Y.S.2d 220 (App. Div. 1990).

<sup>72</sup> *Spencer v. People*, 292 P.2d 971, 973 (Colo. 1956) (en banc); *Leszinske v. Poole*, 798 P.2d 1049, 1053 (N.M. 1990). In *Spencer*, the Colorado statute at issue did not allow bigamy or polygamy but allowed underage marriages validly celebrated in Utah. *Spencer*, 292 P.2d at 973. The New Mexico statute in *Leszinske* contained no such limitations. *Leszinske* was a custody case where the mother, after her divorce, married her uncle in Costa Rica, a marriage defined as incestuous under New Mexico law. The divorce trial court had granted her custody conditioned on such a marriage and the father appealed. *Leszinske*, 798 P.2d at 1051. The divorce decree was entered and the new marriage took place prior to the issuance of written findings of fact and conclusions of law but after the oral decision of the trial judge. *Id.* The court of appeals found that California, which was to be the state of domicile and home state of the subject children, would recognize an uncle-niece marriage validly contracted in Costa Rica. *Id.* at 1056. The trial judge, therefore, properly considered the parties' circumstances in the custody determination. *Id.*

<sup>73</sup> UNIF. MARRIAGE AND DIVORCE ACT § 210 (1970), 9A U.L.A. 156 (1987) (emphasis added).



solemnized where one of the parties is still legally married, there or elsewhere, nevertheless bigamy and polygamy are oft-stated limitations on marriage.<sup>74</sup>

The same is true for incest, but even here the policy is not uniform because state laws are not uniform on prohibited degrees of consanguinity. A leading case is *In re May's Estate*.<sup>75</sup> There, an uncle and his half-niece, both of the Jewish faith, appear to have traveled to Rhode Island specifically for the purpose of utilizing its marriage statute, which created an exception to the incest rules for such a relationship.<sup>76</sup> They then returned to New York where they lived for thirty-two years.<sup>77</sup> Upon the wife's death, three of the children challenged their father's right to letters of administration.<sup>78</sup> In finding the marriage valid, the court reiterated the general proposition that absent a statute in the state of domicile regulating marriages performed elsewhere, the legality of the marriage should be determined by the law of the place of celebration.<sup>79</sup> The court further held that there was "no 'positive law' in [New York] which serve[d] to interdict the . . . marriage."<sup>80</sup>

It is noteworthy, however, that there are cases holding to the contrary. For example, in *Mortenson v. Mortenson*, Arizona declined to recognize a New Mexico marriage between first cousins because it specifically violated Arizona's evasion prohibition.<sup>81</sup> The court noted: "A marriage declared void by our statute cannot be purified or made valid by merely stepping across the state line for purpose of solemnization. We cannot permit the public policy of this state to be defeated by such tactics."<sup>82</sup>

The public policy exception to the general recognition of a foreign marriage is limited. At least one court has held that the marriage must be recognized as valid unless it violated a "strong" public policy in the

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<sup>74</sup> See *Garrett v. Chapman*, 449 P.2d 856 (Or. 1969).

<sup>75</sup> *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 7. The court did note, however, that "had the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State—which if entered into [in New York] would be void—shall have no force in [New York]." *Id.*

<sup>81</sup> *Mortenson v. Mortenson*, 316 P.2d 1106 (Ariz. 1957).

<sup>82</sup> *Id.* at 1107. Interestingly, the Supreme Court of Arizona never made a finding that appellee and decedent went to New Mexico for the sole purpose of evading Arizona's statute. *Id.*

domicile state.<sup>83</sup> Another court has stated the rule to limit non-recognition to marriages “repugnant” to its laws or policies.<sup>84</sup> Another has stated the exceptions to include “marriages which are contrary to the general view of Christendom.”<sup>85</sup> Even then, the marriage may still be recognized. In one case, a New Jersey court noted the “strong public policy of protecting children against underage marriages,”<sup>86</sup> yet recognized a Maryland underage marriage because, even under New Jersey law, it was only voidable, not absolutely void.<sup>87</sup> The Uniform Marriage & Divorce Act seems to recognize the trend towards interstate recognition by eliminating the “strong public policy” exception.<sup>88</sup>

Although one Illinois court refused to recognize an Indiana marriage in contravention of a post-divorce waiting period,<sup>89</sup> other states have held differently.<sup>90</sup> In *Loughran v. Loughran*, the Supreme Court held that the District of Columbia’s remarriage restriction could only be given territorial effect.<sup>91</sup>

It appears, in fact, that the public policy exception will not even be considered unless a similar marriage contracted in the state of domicile is absolutely void. Therefore, underage marriages, being only voidable, are

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<sup>83</sup> *Barrons v. United States*, 191 F.2d 92, 94 (9th Cir. 1951). The court held that a proxy marriage in Nevada was not inconsistent with Nevada law; further, there was no strongly conflicting public policy in the domicile state. *Id.* at 96-99.

<sup>84</sup> *State v. Austin*, 234 S.E.2d 657, 663 (W. Va. 1977) (“[A] state is not required to recognize a marriage performed in another State which is repugnant to the former State’s statutes or public policy.” (citing *Spradlin v. State Comp. Comm’r*, 113 S.E.2d 832 (W. Va. 1960))).

<sup>85</sup> *Modianos v. Tuttle*, 12 F.2d 927, 928 (E.D. La. 1925).

<sup>86</sup> *Ex rel. S.I.*, 173 A.2d 457, 460 (N.J. 1961). Nevertheless, the court sustained the delinquency petition, although the common law rule was that marriage emancipated a minor, especially a female. *Id.*; see also *In re Henry v. Boyd*, 473 N.Y.S.2d 892 (App. Div. 1984).

<sup>87</sup> *Ex rel. S.I.*, 173 A.2d at 460.

<sup>88</sup> See *Leszinske v. Poole*, 798 P.2d 1049, 1054 (N.M. 1990).

<sup>89</sup> *Stevens v. Stevens*, 136 N.E. 785 (Ill. 1922).

<sup>90</sup> *Smallwood v. Bickers*, 229 S.E.2d 525 (Ga. App. 1976); *Garrett v. Chapman*, 449 P.2d 856 (Or. 1969).

<sup>91</sup> *Loughran v. Loughran*, 292 U.S. 216, 223 (1934). While the District of Columbia had a statutory provision declaring void certain marriages even if contracted elsewhere, the Court held that the statute specifically related to marriages that were void because of incest or polygamy, or voidable because of lunacy, underage, impotence, or procured by force or fraud. *Id.* at 224. It also appears that Florida, and not the District of Columbia, became the domicile of the marriage in question. *Id.* at 225.

generally entitled to recognition, even where a couple specifically evaded the domicile's age restriction.<sup>92</sup> In fact, the Michigan Supreme Court ruled that, even though a marriage would be void in Michigan because a party was underage, a suit for annulment could only be entertained in the state of celebration (Indiana). Even though the parties had gone to Indiana for the specific purpose of evading Michigan's age restrictions and there was no marital domicile in Indiana, only that state could annul the marriage under the *lex loci* doctrine.<sup>93</sup> Interstate recognition is only denied where the legislature has, as a matter of public policy, declared such a marriage has no validity or is completely void.<sup>94</sup> Even being void in the state of domicile, however, does not automatically cause lack of recognition if valid in the state where contracted.<sup>95</sup> Other examples where courts found no public policy exception to the interstate recognition of marriage include proxy marriage.<sup>96</sup>

Some states have interpreted the evasion statutes as "nothing more than a statutory extension of the common law rule that a State is not required to recognize a marriage performed in another State which is repugnant to the former State's statutes or public policy."<sup>97</sup> Many violations of the evasion statutes, however, have been held not to rise to the level of a public policy violation.<sup>98</sup> On the other hand, Illinois refused to recognize an Indiana marriage where it found that the couple had gone there only to evade a prohibition on remarriage. In *Stevens v. Stevens*, the Illinois Supreme Court held:

[To] recognize the validity of such marriage celebrated by crossing the state line to evade the laws of this state would render legislation futile and ascribe practical imbecility to the Legislature to make and enforce public

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<sup>92</sup> *Spencer v. Spencer*, 292 P.2d 971 (Colo. 1956); *Ex rel. S.I.*, 173 A.2d at 457; *State v. Austin*, 234 S.E.2d 657 (W. Va. 1977).

<sup>93</sup> *Noble v. Noble*, 300 N.W. 885 (Mich. 1941); *see also Romatz v. Romatz*, 78 N.W.2d 160 (Mich. 1956).

<sup>94</sup> *Modianos v. Tuttle*, 12 F.2d 927 (E.D. La. 1925); *Mortenson v. Mortenson*, 316 P.2d 1106 (Ariz. 1957).

<sup>95</sup> *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

<sup>96</sup> *Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951); *Modianos*, 12 F.2d at 927.

<sup>97</sup> *State v. Austin*, 234 S.E.2d 657, 663 (W. Va. 1977).

<sup>98</sup> Even where a couple went to Maryland to evade New Jersey's age restrictions, the marriage was recognized as valid because it was only voidable under New Jersey law and not automatically void. *Ex rel. S.I.*, 173 A.2d 457, 460 (N.J. 1961).

policy and govern the domestic relations of its citizens, and . . . such a marriage is absolutely void.<sup>99</sup>

### C. *Williams v. North Carolina and Marital Status*

The application of the Full Faith and Credit Clause to a determination of marital status has been addressed by the U.S. Supreme Court in the seminal case of *Williams v. North Carolina (Williams I)*.<sup>100</sup> In *Williams I*, both defendants, longtime residents of North Carolina, traveled to Nevada, where each obtained a divorce from a North Carolina spouse.<sup>101</sup> The divorce decrees found that each had been a “bona fide and continuous resident” of Nevada for more than six weeks immediately preceding the commencement of the actions.<sup>102</sup> On the same day that the second decree was granted, Williams and Hendrix married in Nevada; they then returned to North Carolina where they were prosecuted for bigamy.<sup>103</sup> Their defense was that they were duly divorced by and remarried in the state of Nevada, and that North Carolina was therefore required to honor the new marriage pursuant to the Full Faith and Credit Clause.<sup>104</sup>

The U.S. Supreme Court agreed, finding that North Carolina’s interest in Nevada’s domiciliaries could not be superior to the interest of Nevada.<sup>105</sup> The Court went on to say:

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<sup>99</sup> *Stevens v. Stevens*, 136 N.E. 785, 787 (Ill. 1922). Interestingly, the restriction against remarriage alleged by the wife was contained in an Arkansas divorce decree. At the time of the divorce, however, she was already an Illinois resident, and the Illinois statute contained grounds and restrictions comparable to Arkansas. *Id.* at 786-87.

<sup>100</sup> *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942).

<sup>101</sup> The wife of Defendant O.B. Williams was personally served by a sheriff in North Carolina. The husband of Defendant Carrie Hendrix was served by publication in a Las Vegas newspaper with mailing to his last post office address. Neither spouse was served in Nevada nor did either enter any appearance in the divorce actions. *Id.* at 289-90.

<sup>102</sup> *Id.* at 290.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Interestingly, the Court also found that the word “reside” in the Nevada statute meant a domicile rather than a “mere residence.” This can be an issue in the determination of *lex loci* because, while many states use the term “domicile” in allowing use of the courts for the purpose of divorce, others, such as New York, clearly use residence. *Id.* at 298. Compare *Sosna v. Iowa*, 419 U.S. 393 (1975), with N.Y. DOM. REL. L. § 170 (McKinney’s 1999).

While no state appears to restrict its marriage laws to domiciliaries or residents, a few states do have evasion laws which prohibit a domiciliary from marrying in a sister state specifically to avoid a restriction on marriage. See, e.g., *supra* note 83 and accompanying text. Vermont’s Civil Union Law is not restricted to Vermont domiciliaries or residents. VT. STAT. ANN. tit. 78, § 5160(a) (2000).

[E]ach state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marital status of the spouse domiciled there, even though the other spouse is absent. . . . It therefore follows that, if the Nevada decrees are taken at their full face value . . . , they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages.

. . . .

. . . The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise . . . is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders.<sup>106</sup>

As the subject relates to the topic of this Article, some courts may try to prevent recognition of Vermont's civil union on moral grounds. In a statement potentially applicable to this particular issue of morality, the Court has noted that while "the realm of morals and religion" rests with the states,<sup>107</sup> a conflict between the public policy of two states was not sufficient justification to except from the Full Faith and Credit Clause the determination of marital status granted in accord with the requirements of procedural due process.<sup>108</sup>

After *Williams I*, North Carolina did not accept the Supreme Court decision; the bigamy prosecutions were pursued, the state alleging that Nevada had not had proper jurisdiction over the defendants to render the divorces.

Upon review after *Williams I*, a North Carolina jury found that the defendants had not abandoned their North Carolina domiciles when they went to Nevada. The latter state, therefore, could not exercise proper jurisdiction over the North Carolina defendants and thus the divorces were rendered nullities. Upon review a second time, this determination was

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<sup>106</sup> *Id.* at 298-300.

<sup>107</sup> *Id.* at 303.

<sup>108</sup> [W]hen a court of one state acting in accord with . . . procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.

*Id.*

upheld by the U.S. Supreme Court,<sup>109</sup> although the bigamy prosecutions were ultimately dropped.<sup>110</sup> While the Court held that Nevada's determinations of domicile was entitled to "respect, and more,"<sup>111</sup> the Court allowed sister states to question the jurisdiction on which they were based. The Court further found, in the particular context, that North Carolina had accorded proper weight to the Nevada finding and the jury's ultimate finding that defendants were non-domiciliaries could therefore be upheld.<sup>112</sup> In summarizing the importance of its holding in *Williams I*, the Court stated:

Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.<sup>113</sup>

*Williams I* established the principle that, in the determination of marital status, the celebrating state's law shall be applied. That means that the state that grants the marriage or grants the divorce, assuming it has a valid jurisdictional basis for doing so, determines the marital status of an individual, which is then binding on other states.

Full faith and credit, however, is only limited to those issues properly before the court. *Williams I* held that marital status was properly before the Court because of its quasi-in-rem status. But a divorce where a non-resident defendant is not personally served within the jurisdiction nor appears is ineffective in extinguishing any other rights a party may have under the laws of their own state of domicile.<sup>114</sup>

Recognizing that *Williams II* could give rise to wholesale challenges to jurisdiction, the Court subsequently limited collateral challenges to cases where domicile was either not raised as an issue or where a non-resident

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<sup>109</sup> *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

<sup>110</sup> See Thomas R. Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).

<sup>111</sup> *Williams II*, 325 U.S. at 233.

<sup>112</sup> *Id.* at 237.

<sup>113</sup> *Id.* at 230.

<sup>114</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) ("It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."); *Estin v. Estin*, 334 U.S. 541 (1948).

party did not have an opportunity to litigate. The Court held that where both parties fully participated in the divorce proceeding and the jurisdictional issue was resolved without opposition, the jurisdiction cannot be relitigated in another forum merely because one party is domiciled elsewhere.<sup>115</sup>

#### *D. Defense of Marriage Act*

In 1996 Congress adopted the Defense of Marriage Act.<sup>116</sup> The Act states in all its simplicity that the Full Faith and Credit Clause of the Constitution of the United States need not be applied to same-sex marriages. The first part of the Act declares that the States are not required to grant full faith and credit to a same-sex marriage.<sup>117</sup> This is the first federal law to create a substantive definition within marital law, specifically a definition of what is not a marriage. This is most unusual considering that for most of our history federal courts have accepted a domestic relations exception from federal jurisdiction and generally declined to grant jurisdiction to specific issues regarding marriage and divorce.<sup>118</sup> It is also

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<sup>115</sup> *Sherrer v. Sherrer*, 334 U.S. 343 (1948). In *Sherrer*, the Court noted:

It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in *ex parte* proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated.

*Id.* at 355-56.

<sup>116</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998)).

<sup>117</sup> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.* § 1738C.

<sup>118</sup> See *Barber v. Barber*, 62 U.S. 582 (1858).

quite unusual for Congress to limit a constitutional provision by stating that an inferior jurisdiction need not honor the Constitution.<sup>119</sup>

While Congress has previously adopted legislation defining the Full Faith and Credit Clause, this statute was designed to provide for technical compliance with the clause.<sup>120</sup> In other circumstances, Congress has attempted to enhance the states' requirement and duty to apply full faith and credit to certain types of orders that, until then, had not been considered within the realm of the clause. Congress adopted parts of the Parental Kidnapping Prevention Act<sup>121</sup> and the Full Faith and Credit of Child Support Orders Act<sup>122</sup> to require states to grant full faith and credit to decisions of other states that, until then, had been considered modifiable and therefore not final.<sup>123</sup> Both statutes also enhance uniform state

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<sup>119</sup> Under our federal system, rights and powers are divided between the federal government and the states, but the Constitution applies to all equally. While the federal government may not possess constitutional authority to legislate in all areas, when it legally exercises its authority, its rule is superior and supercedes any state action to the contrary. U.S. CONST. art. VI, § 1, cl. 2. In this system DOMA is unique. It exercises a function not clearly within the purview of the federal government (by creating a definition of marriage) and then attempts a negative interpretation of the Full Faith and Credit Clause by telling the states what they need not honor under the Constitution. It is highly likely that, in addition to all the other questions about the constitutionality of DOMA, there is a Tenth Amendment violation as well.

<sup>120</sup> 28 U.S.C. § 1738 (addressing authentication of records and the like).

<sup>121</sup> Parental Kidnapping Prevention Act of 1980 (PKPA), Pub. L. 96-611, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (1994 & Supp. IV 1998)). Congress, as part of the PKPA, determined that states shall give full faith and credit to custody determinations of sister states. *See* 28 U.S.C. § 1738B(a).

<sup>122</sup> Full Faith and Credit of Child Support Orders Act, Pub. L. 103-383, 108 Stat. 4063 (1994) (codified at 28 U.S.C. § 1738B (Supp. IV 1998)).

<sup>123</sup> [A]mong the results . . . are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611, § 7(a)(4), 94 Stat. 3568, 3569.

(a) FINDINGS.—The Congress finds that . . . among the results of the conditions described in this subsection are—(A) the failure of the courts of the States to give full faith and credit to the judicial proceedings of the other States . . . .

(b) STATEMENT OF POLICY.—In view of the findings made in



laws,<sup>124</sup> and, at least in child support matters, a separate statute requires every state to have adopted the Uniform Interstate Family Support Act as a condition for receiving financial assistance for local programs.<sup>125</sup>

The second part of the Defense of Marriage Act states that the federal government shall not recognize same-sex marriages and shall deny federal benefits to spouses in this type of marriage.<sup>126</sup> DOMA defines "marriage" and "spouse" for clarification of its second clause (federal benefits), yet this is somewhat of an anomaly because the federal government does not, per se, recognize marriage; "marriage" is a creature of the States.<sup>127</sup> It is

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subsection (a), it is necessary to establish national standards under which the courts of the various States shall determine their jurisdiction to issue a child support order and the effect to be given by each State to child support orders issued by the courts of other States.

Full Faith and Credit of Child Support Orders Act, Pub. L. 103-383, § 2, 108 Stat. 4063, 4064 (1994).

<sup>124</sup> The PKPA was designed to enhance, clarify, and give uniform imprimatur to the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. 115 (1988). The federal law, however, resulted in a proposed new statute, the Uniform Child Custody Jurisdiction and Enforcement Act (1997), 9 pt. IA U.L.A. 649 (1999), which resolved differences between the PKPA and the UCCJA.

The Uniform Interstate Family Support Act (1996), 9 pt. IB U.L.A. 235 (1999), was promulgated to unify several different versions of previously uniform support laws.

<sup>125</sup> "In order to satisfy section 654(20)(A) of this title, on and after January 1, 1998, each State must have in effect the Uniform Interstate Family Support Act, as approved by the American Bar Association of February 8, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of such date by the National Conference of Commissioners on Uniform State Law." Pub. L. 104-193, § 322, 110 Stat. 2221 (1996) (codified at 42 U.S.C. § 666(f) (Supp. IV 1998)).

<sup>126</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and U.S.C. § 1738C (Supp. IV 1998)).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

*Id.* § 7.

<sup>127</sup> Even when the federal government has attempted to invalidate a marriage, it has always utilized the appropriate state law, never a superceding federal law of marriage and divorce. *See, e.g., United States v. Layton*, 19 M.J. 886 (1985);

conceivable that a state could allow same-sex marriages to be celebrated, thereby enabling legally-married couples to seek tax benefits and other federal benefits. But this provision of DOMA attempts to forestall that scenario.

DOMA was adopted in reaction to the initial Hawaii decision in *Baehr v. Lewin* and the trial court's decision on remand that declared the state's ban on same-sex marriage unconstitutional.<sup>128</sup> Passed in an election year and signed in secret by President Clinton, the act purports to carve out a "public policy" exception to the Full Faith and Credit Clause. This exception has never, however, been sanctioned by the Supreme Court, and many argued that the Act was unconstitutional in the hearings preceding its Congressional approval.<sup>129</sup> Further, many states had already adopted similar legislation regarding same-sex marriage. Because the words of DOMA, at least regarding interstate recognition, are permissive rather than mandatory, the statute appears to offer nothing beyond a "sense of Congress" which is non-binding.<sup>130</sup>

Many scholars have argued that the Defense of Marriage Act is patently unconstitutional and that Congress has no power to limit the Clause, only power to prescribe specific methods to grant such recognition.<sup>131</sup> One of the

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*Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951); *Modianos v. Tuttle*, 12 F.2d 927 (E.D. La. 1925).

<sup>128</sup> See H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905.

<sup>129</sup> *Id.*

<sup>130</sup> If the congressional language is considered mandatory, not permissive, and is found to be beyond the authority of Congress, then the other clause must also fail. If the Full Faith and Credit Clause requires interstate recognition of same-sex marriages, it should also require the federal government to recognize them.

<sup>131</sup> The Congressional Report accompanying DOMA devotes a considerable amount of discussion to its constitutionality, because the issue was challenged at the hearings preceding the passage of the law. See H.R. REP. NO. 104-664. Upon enactment, scholars quickly produced many articles analyzing DOMA and assessing whether it violates the Full Faith and Credit Clause. Most (but not all) scholars agreed that DOMA was patently unconstitutional.

For an example of an analysis utilizing conflict of laws theories to avoid the full constitutional issue and deny full faith and credit, see Rebecca S. Paige, Comment, *Wagging the Dog—If the State of Hawaii Accepts Same-Sex Marriage Will Other States Have To?: An Examination of Conflict of Laws and Escape Devices*, 47 AM. U. L. REV. 165 (1997).

There are numerous articles that challenge the constitutionality of the Defense of Marriage Act. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Mark

arguments advanced is that Congress does not have power to limit the effect of the Full Faith and Credit Clause, only power to prescribe procedural mechanisms for its enforcement.<sup>132</sup> Another argument challenges DOMA in light of *Romer v. Evans*,<sup>133</sup> finding an equal protection violation in that DOMA has no rational or legitimate government purpose.<sup>134</sup> Congress's argument that there is a public policy exception to the Full Faith and Credit Clause has never been accepted by the Supreme Court.<sup>135</sup>

The conundrum is that, by definition, a Vermont civil union is not a marriage. It is a hybrid creature—perhaps a “super” domestic partnership—yet it extends, at least to Vermont residents, the rights and privileges of marriage. Had the Vermont Legislature specifically authorized same-sex couples to enter into full-scale, legal marriages, then the previous discus-

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Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997); Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998); Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425 (1997); Heather Lauren Hughes, Note, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R. - C.L. L. REV. 237 (1998); Julie L.B. Johnson, Comment, *The Meaning of “General Laws”: The Extent of Congress's Power under Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997); Jason Andrew Macke, Note, *Of Covenants and Conflicts—When “I Do” Means More than It Used to, But Less Than You Thought*, 59 OHIO ST. L.J. 1377 (1998); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997); Mark Tanney, Note, *The Defense of Marriage Act: A “Bare Desire to Harm” An Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99 (1997).

For an example of commentary supporting the constitutionality of DOMA, see Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998). Professor Wardle's Article also includes a comprehensive appendix listing scholarship on the subject of same-sex marriage recognition (much of which includes analyses of the constitutionality of DOMA). *Id.* at 234.

<sup>132</sup> Chabora, *supra* note 45; Patten, *supra* note 45, at 955-56.

<sup>133</sup> *Romer v. Evans*, 517 U.S. 620 (1996) (holding that animus alone cannot provide rational basis for legislation).

<sup>134</sup> See Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997).

<sup>135</sup> See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

sion about the interstate effect of the Full Faith and Credit Clause would become a major issue. But because the law limits the concept of the civil union to something less than marriage, couples who invoke the solemnization rituals of the Civil Union Law do not achieve the full title and status of marriage. An attempt to then transfer the status to another state and seek benefits therefrom, or even from the federal government, should fail by simple definition without even reaching the DOMA issue. Even Vermont domiciliaries joined in civil union cannot seek marital haven in the statute (such as for federal benefits). The statute is limited to state benefits, it specifically excludes same-sex couples from the definition of marriage, and it was necessitated by a case construing a clause in Vermont's state constitution.

Concededly, marriage performs many valuable functions for society. As one commentator has noted, "marriage advances the state's interest in developing intimate and stable relationships which in turn build 'social stability' and act as an emotional and economic support system as well as a forum for physical intimacy."<sup>136</sup> More so than the societal benefits, however, special legal rights, benefits, and privileges are extended to those couples who are partners in a legally established marriage, and to their children as well.<sup>137</sup> It is no wonder, then, that Congress has invested such energy in retention of the special enhanced status granted to marriage, even to the point of adopting constitutionally-suspect legislation that refuses to extend parity or equality to other concepts of familial relationships between adults. It was this enhanced status of marriage that the Vermont Supreme Court declined to extend to the function of family and that may not bode well for an equal protection challenge to DOMA.<sup>138</sup>

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<sup>136</sup> D'Amato, *supra* note 67, at 928.

<sup>137</sup> A 1997 compilation by the U.S. General Accounting Office identified at least 1049 federal laws classified with marital status as a factor and, as such, presumably, would not apply to same-sex couples as a result of the Defense of Marriage Act. GENERAL ACCOUNTING OFFICE, GAO/OCG-97-16, REPORT TO THE HONORABLE HENRY J. HYDE, CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES (1997), available at 1997 WL 67783. For a general discussion of other rights and benefits of marriage, see Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411 (1999) and the authorities cited therein.

<sup>138</sup> Equal protection challenges to DOMA are not addressed in this Article. *Baker v. Vermont* was adjudicated on state constitutional grounds and there was some departure from Fourteenth Amendment jurisprudence, although there were many similarities. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). *Romer v. Evans* offers no comfort to those seeking to challenge DOMA on equal protection

DOMA did not anticipate the scenario of an alternate form of legally-cognizable relationship. It specifically limits its application to a "relationship between persons of the same sex that is treated as a marriage";<sup>139</sup> a civil union, however, is not treated as a marriage. The attempt to implicate the Defense of Marriage Act in determining the effect of a civil union should therefore fail. The statute by its own words does not apply, and, therefore, no DOMA challenge should arise under the Civil Union Law.

## V. ANALYSIS

The previous discussions should answer concerns and resolve the issue whether a civil union is a marriage entitled to full faith and credit. They do not, however, resolve the issue of marital status under the Civil Union Law. The Civil Union Law specifically prohibits a partner in a civil union from marrying, or engaging in another civil union, until the civil union is dissolved.<sup>140</sup> Therefore, although a same-sex couple is not "married" within the meaning of Vermont's law, having entered into a lawful civil union the parties are statutorily prevented from marrying elsewhere.

Left unresolved, however, is the issue whether another state will accept the ramifications of the Civil Union Law's determination of marital status. The status of being a civil union partner is, at least in Vermont, a disability from marriage.<sup>141</sup> It has already been noted that, even if a person (not presently married) is disabled from marrying in one state, he or she may marry in another state.<sup>142</sup> Even if the couple immediately returns to the initial state, that state may still recognize the marriage under the *lex loci* doctrine. The only exception seems to be those states that have a specific bar to their residents invoking the marriage laws of a sister state for the sole purpose of evading their marriage disability. In this small group of states, the marriage will not be recognized.<sup>143</sup>

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grounds. In that case, the Court found a violation on a rational basis analysis, the only function of the statute being anti-gay animus. *Romer*, 517 U.S. at 620. Depending on how a challenge is framed, the respect given by the Court to marriage might well allow DOMA to survive at least a preliminary challenge where marital status is the issue. *See Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>139</sup> 28 U.S.C. § 1738C (Supp. IV 1998).

<sup>140</sup> *See supra* notes 8-9.

<sup>141</sup> *See supra* notes 8-9.

<sup>142</sup> *See supra* Part IV.B.

<sup>143</sup> *See, e.g., Mortenson v. Mortenson*, 316 P.2d 1106 (Ariz. 1957).

Still, that does not resolve the entire issue. In some circumstances, the issue arises where a same-sex couple, residents of State *X*, who travel to Vermont for the sole purpose of celebrating a civil union, then return to State *X* where they go their separate ways and one seeks to marry (or enter into a domestic partnership) without legally dissolving the civil union. There is another group, however. This group consists of Vermont domiciliaries who celebrate a civil union and thereafter remain in Vermont. Subsequently, after the passage of time, one or both leave Vermont, establish a domicile elsewhere, and seek to marry or enter a domestic partnership with someone else without dissolving the civil union. Here, there can be no attack on the initial *lex loci*; Vermont was the state of residence. If they had entered into a legal marriage in Vermont, then one (or both) traveled elsewhere, no state would allow another marriage without first requiring a dissolution of the marriage by death, divorce, or annulment. The legal status of marriage, as conferred by Vermont as the *lex loci*, would bind every other state under the Full Faith and Credit Clause.<sup>144</sup> Applying the same principles, the legal status of civil union, with its statutory prohibition of marriage, should also bind the sister states under the Full Faith and Credit Clause.<sup>145</sup> Vermont says that the couple may not marry others because they are partners in a quasi-marital relationship. As the legal relationship is not a marriage, yet a relationship that emulates marriage, the civil union is, in fact, previously unknown in American jurisprudence.<sup>146</sup>

There is even yet another possibility. Many municipalities recognize the domestic partnership. From Hawaii's Reciprocal Beneficiaries Law to the ordinances of many municipalities there is an effort within the limited powers of most local governments to grant rights and benefits to domestic partners who are unable to marry because of the national bar against same-sex marriage. Domestic partnerships usually involve some kind of municipal registration by the employee-partner in order for the other to receive benefits such as health coverage. Dissolution is, usually, relatively simple. One partner simply notifies the registering authority, unilaterally, that the partnership has ceased, and the benefits likewise cease.

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<sup>144</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>145</sup> There is also the issue of citizens of one state being granted or denied privileges and immunities under the Fourteenth Amendment. *See Strasser, supra* note 69, at 376-80.

<sup>146</sup> Common law marriage is not considered here. Though a legally binding marriage, its difference from more traditional marriages is in the form of celebration, not in the nature of the contract itself.

It is possible that many of these municipalities may consider the Vermont civil union to be legally equivalent to a domestic partnership in their own jurisdiction. They may be willing to recognize the civil union as a domestic partnership without further registration and subsequently extend the appropriate benefits. What may be more interesting, however, is the issue of dissolution. Vermont's Civil Union Law is specific: a civil union may only be dissolved in a manner similar to dissolving a Vermont marriage. Should one member of a domestic partnership fail to follow that procedure, the local municipality may conclude that the domestic partnership is still in effect and continue to extend benefits and recognition to the civil union partner until Vermont dissolves the civil union.

Even more intriguing, can domestic partners invoke their own state's divorce laws to dissolve their Vermont civil union? It is clear that an opposite-sex couple may marry in State *X*, thereafter move to State *Y*, and invoke State *Y*'s divorce mechanism to terminate their marriage. But if a couple are civilly united in Vermont and thereafter move to State *Y*, will State *Y* equate the civil union with marriage and allow use of its divorce mechanism, or will State *Y* refuse to recognize the civil union as marriage, thereby sending the couple back to Vermont to dissolve the civil union?

Full faith and credit may, in the above situations, require one state to recognize the Vermont civil union. A person civilly united in Vermont may be disabled from entering into a marriage or domestic partnership in a sister state. It seems a far stretch of the imagination to anticipate that the other states will open their divorce courts to a same-sex couple that has participated in a ceremony in Vermont that has not resulted in a marriage, although both are now prevented (at least in Vermont) from marrying someone else until there is a dissolution.

It is now time to return to our two hypotheticals.<sup>147</sup> In the first, Will and Jack are registered pursuant to New York City's domestic partnership ordinance. They celebrate a Vermont civil union, return to Manhattan, and Jack gets dumped for someone else. It appears that New York City is under no obligation to prevent Will from registering his new domestic partner in lieu of Jack. The language of the Civil Union Law only prevents Jack from entering into a marriage or civil union. It says nothing about domestic partnerships. Full faith and credit does not flow from a marriage or civil union disability in Vermont to a domestic partnership in New York City.

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<sup>147</sup> Similar, abbreviated situations are discussed in Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 25-26 (2000).

On the other hand, New York could recognize the civil union as a higher form of domestic partnership. New York could accept the doctrine of *lex loci*; that is, New York could determine that the law of Vermont considers Will disqualified from marrying or entering into any legal entity where a right or benefit similar to marriage is granted and thus New York cannot either. A person in a legal marriage may not register anyone else for benefits granted only to a spouse; New York could accept the restrictions of the civil union and bar Will from granting domestic partner benefits to anyone other than Jack until the civil union is dissolved. It is even possible that New York could say that the domestic partnership could no longer be terminated unilaterally because the transformation to a civil union requires a dissolution. It is unlikely, however, that New York State would allow Will and Jack to seek a dissolution pursuant to its Domestic Relations Law; its specific sections authorize only divorce or annulment of marriages. This leaves Will in a quandary: stuck in the legal entity of civil union, yet not a resident of Vermont to invoke its dissolution procedures. Jack, of course, is sitting pretty.

The second hypothetical considers Vermont not only the *lex loci* of the civil union but the partners' domicile as well. Will and Jack then move to State *X* where Will meets and marries Grace. Jack sues to declare the marriage void. Here State *X* may decline to recognize the civil union as a marriage and, therefore, Will cannot be disabled from marrying Grace because he is not otherwise married. Under this analysis, State *X* does not reach the issue of the Civil Union Law's disability because State *X* declines to equate a civil union with a marriage. Full faith and credit is not technically necessary because State *X* rules that the two relationship entities are not similar—a civil union is a creature unique to Vermont; its marital disability is limited to Vermont.

On the other hand, State *X* could accept the Civil Union Law's definition of the ramifications of civil union: one partner at a time. If Jack is a legal partner, Grace may not become a spouse until the civil union with Jack is dissolved. By recognizing Will's disability, full faith and credit is thereby granted to the civil union. State *X* need not extend its own benefits and privileges of marriage to the civil union, but it may prevent Will from marrying Grace until the civil union is dissolved. Jack, again, is sitting pretty.

The same principles may apply to the federal government. It appears unlikely, pursuant to the Defense of Marriage Act, that the federal government will extend spousal benefits and privileges to a civil union partner. Nevertheless, because the federal government must accept the



validity of a marriage pursuant to the law of the state of celebration, it may be required to grant full faith and credit to the Civil Union Law's disability provision and therefore deny those same benefits to the "spouse" of a subsequent "marriage." One could argue that the very limiting language of DOMA, even assuming its constitutionality, limits its outlook to same-sex "marriages." The civil union is not a marriage; therefore DOMA does not apply. Further, the United States, no less than the states themselves, may be required to grant full faith and credit to Vermont's legislative statement of marital disability. A civil union partner may thereafter marry a person of the opposite gender, but the "spouse" may not be considered as such under federal law. Therefore, such benefits and privileges as joint income tax filings, spousal military benefits, etc., would be inaccessible.

### CONCLUSION

Vermont's Civil Union Law seems to provide every bit as much of a marital disability as any marriage contracted in any state. A partner to a civil union may not marry in Vermont because he or she is in a quasi-marriage. (One might even call the civil union a *de facto* marriage.) If Will Truman travels from Vermont to New York and tries to engage in a second domestic partnership with Joe, or if he tries to marry Grace without first dissolving his Vermont civil union, his new domestic partnership marriage should be null and void because he does not have the legal ability to contract into another marital or quasi-marital relationship. It further appears that a second jurisdiction must, under many circumstances, acknowledge and accept the Vermont Civil Union statute under the Full Faith and Credit Clause.

While not accepting the idea of a legal same-sex marriage *per se*, once specifically recognized by any state, a sister state may still be required to grant full faith and credit to the declaration of marital status as determined by Vermont. This will have the practical effect of preventing someone from entering into other legal, marital or quasi-marital relationships while still a partner in a Vermont civil union. Sister states and the federal government, therefore, will be giving indirect sanction to the same-sex relationship and are required to do so under the Full Faith and Credit Clause.

Marriage in the twenty-first century is likely to undergo many changes.<sup>148</sup> Civil unions are just the first of a new breed of legally

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<sup>148</sup> See Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—or Not at All?*, 34 FAM. L.Q. 271, 292-300 (2000).

sanctioned relationships beyond the specific confines of marriage. Whether granted to homosexual couples or heterosexual couples, these new entities sanction and recognize a reality that already permeates our contemporary society; non-marital relationships already exist and some legal sanction has already been granted to them.<sup>149</sup> As new forms of legal relationships sprout from creative legislatures and courts, other states will be required, under the Full Faith and Credit Clause, to accept them and their legal ramifications.

Civil unions are just the first wave of these new quasi-marriages. To deny full faith and credit to the Vermont Civil Union Law because of opposition to same-sex marriage would portend poorly for society in the new millennium.

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<sup>149</sup> See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

