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Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union

by
CHRISTOPHER D. SAWYER*

Introduction

While there is much debate about the inter-jurisdictional effect of the new civil unions created in Vermont, this Note approaches the problem from a new perspective. Currently, a few states boast statutory frameworks that confer on parties to non-marital same-sex relationships the substantial benefits traditionally afforded only to married couples. What effect, under the Full Faith and Credit Clause of the U.S. Constitution must one of these progressive states give to a same-sex union created in another? This Note discusses that question specifically with regard to California and Vermont and will be limited to California's obligation—as a state that already provides same-sex couples some of the rights traditionally available only to married couples—to give full faith and credit to a civil union created in Vermont.

Although California is fertile ground for a claim to the full faith and credit of Vermont's civil union because of its domestic partnership statutes, uncertainties and complexities abound. Because the civil union is not a marriage by definition, it is therefore uncertain whether various marriage-evasion statutes apply to it at all. A full faith and credit analysis often demands extending a state's policy on a comparable local law to the foreign law in question. However,

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because the civil union is dissimilar to its closest counterpart in California, it is difficult to know exactly what is California's policy regarding the Vermont civil union. Furthermore, because the civil union is so similar to a marriage and yet not identical, it is difficult to know which analyses may be borrowed from local marriage policy and which may not.

Part I of this Note will discuss, in brief, the history of law reform during the last ten years with respect to same-sex marriages and same-sex legal relationships. In doing so, it will set the stage for the discussion of full faith and credit. Part II will discuss major issues regarding full faith and credit with respect to the civil union. This section considers what marriage-evasion statutes apply, what impact the federal Defense of Marriage Act has on civil unions, and whether a civil union is an "act" within the meaning of the clause. Finally, Part III will discuss California policy on full faith and credit and same-sex relationships, looking specifically at California's policy on enforcing the statutes of sister states, marriage-evasion generally, and same-sex unions. Ultimately, this Note will argue that California policy mandates that a local court must recognize the benefits conferred upon a person who entered into a civil union in the state of Vermont.

I. Background

A. In the Beginning There Was Only Marriage: Full Faith and Credit & *Lex Loci*

Originally, marriage had no same-sex counterpart in the American legal system. The effect that a state gave to a foreign marriage or statute was settled by traditional conflicts of law principles. Those principles operate differently in different situations. In a situation involving the laws of a state and a foreign country, for example, a state may apply its own principles without federal intervention subject only to what restrictions may arise out of international treaties.[1] In contrast, in a situation involving the laws of two sister states, a state's own principles of conflicts take a back seat to the Full Faith and Credit Clause and the Privileges and Immunities Clause of the United States Constitution.[2] In the situation of marriages specifically, under traditional choice-of-law principles, the

1. 12 CAL. JUR. 3D (REV.) *Conflict of Laws* § 11 (1999).
2. *Id.*

validity of a marriage contracted in a another state is generally determined by the law of the state in which it was celebrated or contracted This is the rule of *lex loci contractus*.[3] As applied in some jurisdictions, section 283(1) of the *Restatement (Second) of Conflicts of Law* takes a slightly different approach:

> The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in [the section pertaining to general choice of law principles]. . . . 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.[4]

By the foregoing formulation, it once appeared that if a single state decided to legalize same-sex marriage, its forty-nine sister states would likely be obligated to recognize such a marriage if validly contracted. As a result, the last decade was an exciting and controversial era in law reform for advocates and opponents of same-sex marriages and partnerships.

B. Hawaii and *Baehr v. Lewin*

The action began in Hawaii in May 1993 when the state supreme court handed down its now-famous *Baehr v. Lewin* decision.[5] In *Baehr*, several applicants' marriage licenses were denied solely on the ground that the applicants were of the same sex.[6] Those applicants filed a complaint on May 1, 1991, alleging a violation of their right to privacy and equal protection as guaranteed by the Hawaii Constitution.[7] The Hawaii Supreme Court held that the Hawaii Constitution does not give rise to a fundamental right of persons of the same sex to marry.[8]

Nonetheless, the court did draw specific attention to Hawaii Revised Statute section 572-1. Section 572-1 restricted marital relations to those between a male and female.[9] The court held that this statute established a sex-based classification which is subject to "strict scrutiny" in an equal protection challenge.[10] The court

3. 32 CAL. JUR. 3D (REV.) *Family Law* § 72 (1994).
4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).
5. 852 P.2d 44 (Haw. 1993).
6. *Id.* at 49.
7. *Id.* at 50.
8. *Id.* at 57.
9. *See* HAW. REV. STAT. § 572-1 (Supp. 2001).
10. Baehr, 852 P.2d at 68.

therefore vacated the circuit court's grant of Lewin's motion on the pleadings, and remanded the matter for further proceedings to determine if the statute met the strict scrutiny challenge.[11] The trial court was instructed that on remand the burden would rest on the defendant to overcome the presumption that the statute was unconstitutional by demonstrating that it furthers a compelling state interest and is "narrowly drawn to avoid unnecessary abridgements of constitutional rights."[12]

On December 3, 1996, the trial court enjoined the state from denying the license based on sex.[13] The court found the sex-based statutory classification, on its face and as applied, unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.[14] On January 23, 1996, the Hawaii Supreme Court affirmed.[15]

It thus appeared that the plaintiffs had won an enormous victory for the advancement of same-sex marriages. It seemed that if Hawaii were to legalize same-sex marriages, other states would be required to recognize such marriages absent a strong policy against them. Many feared that this radical development in Hawaii could effectively control the development of same-sex marriage jurisprudence across the country.

In response, however, the Hawaii legislature proposed a state constitutional amendment.[16] The proposed amendment was passed by election on November 3, 1998.[17] Article I, section 23 of the Hawaii Constitution now provides that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[18] The legislature, seemingly in an attempt to circumvent another equal protection claim, contemporaneously passed the Reciprocal Beneficiaries Act,[19] which entitled same-sex partners to many of the rights of married couples.[20]

11. *Id.*
12. *Id.*
13. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).
14. *Id.*
15. Baehr v. Miike, 910 P.2d 112, 116 (Haw. 1996).
16. *See* HAW. CONST. art. I, § 23.
17. *See id.*
18. *See id.*
19. HAW. REV. STAT. § 572C-1 (Supp. 2001).
20. *See id.*

C. The Defense of Marriage Act

In the two-year gap between *Baehr v. Miike* and the amendment to article I of the Hawaii Constitution, new federal and state legislation appeared. In October 1996, Congress passed the Defense of Marriage Act ("DOMA").[21] The DOMA is codified in two parts, providing:

> 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.[22]

and:

> 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.[23]

Although its constitutionality is not universally accepted by legal scholars, the effect of the DOMA is that a state would not be required to recognize a Hawaiian same-sex marriage under full faith and credit. Furthermore, the DOMA signals that the federal government will not recognize same-sex marriages for any federal purposes or benefits such as, but not limited to, federal income taxation benefits.[24] This law seemed to eliminate the possibility that Hawaii's Reciprocal Beneficiaries Act could have a national impact on the rights of same-sex couples. Vermont soon changed the landscape.

D. Vermont and *Baker v. State*

On December 20, 1999, the Vermont Supreme Court handed down its decision in *Baker v. State*.[25] In *Baker*, three same-sex couples filed a complaint against the State of Vermont, the towns of Milton and Shelburne, and the City of South Burlington.[26] The trial court dismissed the complaint, ruling that the marriage statutes could not

21. 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7 (2000).
22. 1 U.S.C. § 7.
23. 28 U.S.C. § 1738C.
24. *See* 1 U.S.C. § 7.
25. 744 A.2d 864 (Vt. 1999).
26. *Id.* at 867–68.

be construed to permit the issuance of a license to same-sex couples.[27] On appeal, the Vermont Supreme Court concluded that under the Common Benefits Clause of the Vermont Constitution,[28] "plaintiffs may not be deprived of the statutory benefits and protections afforded to persons of the opposite sex who choose to marry."[29] The Common Benefits Clause provides, in pertinent part:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .[30]

Justice Amestoy wrote:

> We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.[31]

The legislature was thus charged with devising a scheme to provide same-sex couples the same benefits accorded to married couples. On April 25, 2000, the Vermont legislature chose such a system and passed the Vermont Civil Union bill,[32] which became fully effective January 1, 2001.[33] The enacted bill distinguished the civil union from marriage but extended to same-sex members of the union all the benefits extended to married couples.[34] The act provided:

> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.[35]

The civil union bill specifically defined marriage to mean "the legally recognized union of one man and one woman."[36] A "civil

27. *Id.* at 868.
28. VT. CONST. ch. I, art. 7.
29. Baker, 744 A.2d at 867.
30. VT. CONST. ch. I, art. 7.
31. Baker, 744 A.2d at 867.
32. VT. STAT. ANN. tit 15, §§ 1201–07 (Supp. 2001).
33. *See* Elaine M. De Franco, Comment, *Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union?*, 85 MARQ. L. REV. 251, 255–56 (2001).
34. *See* VT. STAT. ANN. tit. 15, §§ 1201–07.
35. *Id.* § 1204(a).
36. *Id.* § 1201(4).

union," by contrast, "means that two eligible persons have established a relationship pursuant to [the chapter on civil unions], and may receive the benefits and protections and be subject to the responsibilities of spouses."[37] Parties may not enter into a civil union with a person closely related by blood.[38] Nor may a party to a civil union be in another civil union or marriage.[39] In short, members of a civil union face the same responsibilities and receive the same benefits of married couples at the state level.[40] At the federal level, of course, the DOMA prevents true parity with married couples.

E. State Defense of Marriage Acts

The federal DOMA was not the only player in the inter-jurisdictional restriction of same-sex rights. In response to *Baehr* and *Baker*, many states enacted marriage-evasion statutes—sometimes referred to as "little DOMAs"—of their own. However, these state statutes came in many different forms. For example, in March 2000, California voters overwhelmingly passed Proposition 22, a ballot initiative that essentially disavowed recognition of same-sex marriages.[41] The proposition was codified and made effective the next day and provided that "[o]nly a marriage between a man and a woman is valid or recognized in California."[42] Also in 2000, by contrast, Nebraska amended its constitution to provide that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a *civil union*, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[43]

This language places the Nebraska policy in stark contrast to that of California. It is no stretch to assume that the inclusion of the words "civil union" in the Nebraska amendment was in direct response to Vermont's new Civil Union Bill. Clearly, a claim to full faith and credit for a civil union in Nebraska would face potential insuperable obstacles. By contrast, California's statute applies only to refuse recognition of same-sex *marriages* and makes no statement on

37. *Id.* § 1201(2).

38. *See id.* § 1203.

39. *See id.* § 1202.

40. *See id.* § 1204.

41. *See* Toni Broaddus, *Vote No If You Believe in Marriage: Lessons from the No on Knight/No on Proposition 22 Campaign*, 15 BERKELEY WOMEN'S L.J. 1 (2000).

42. CAL. FAM. CODE § 308.5 (West Supp. 2002).

43. NEB. CONST. art. I, § 29 (emphasis added); *see also* De Franco, *supra* note 33, at 259.

civil unions per se.[44] In fact, California legislation now includes a statewide domestic partnership statute that provides certain civil partnership rights to same-sex couples.[45] It would seem that the mere existence of this domestic partnership statute practically precludes the California legislature from enacting a marriage-evasion statute with language that disallows same-sex civil unions.[46]

F. Summary

It should be apparent, then, that we are in a time of tension between progressive and traditional attitudes towards same-sex partnerships and marriages. While Vermont, Hawaii, and California seem to be charting new territory on their own, their developments have created a substantial national impact. Other states and the federal government have quickly and purposely scrambled to define their respective attitudes on the matter so as to preserve the local status quo with the wand of state sovereignty. Many commentators have argued that these efforts have been an affront to the dignity of the Full Faith and Credit Clause of the United States Constitution.[47] A question that has not truly been posed thus far, however, is what obligation does Vermont, Hawaii, or California have to enforce a same-sex non-marital union solemnized in another of the three? To begin to answer that question, Part II will discuss the general mechanics of the Full Faith and Credit Clause with respect to the civil union.

II. Full Faith and Credit

A. Introduction

Article IV, Section 1 of the United States Constitution provides that "[f]ull Faith and Credit must be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[48] However, states owe different credit to laws (legislative measures and common law) than to judgments.[49] The obligation is "exacting" as to

44. *See* CAL. FAM. CODE § 308.5.

45. *See* CAL. FAM. CODE § 297 (West Supp. 2002).

46. See discussion *infra* Part IV.C.

47. *See, e.g.*, 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).

48. U.S. CONST. art. IV, § 1.

49. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) (holding that an injunction which was entered by a Michigan county court did not reach beyond the

judgments,[50] such that a judgment entered in one state must be respected in another provided that the first state had jurisdiction over the parties and the subject matter.[51] Indeed, the United States Supreme Court has held that "credit must be given to the judgment of another state although the forum [state] would not be required to entertain the suit on which the judgment was founded."[52]

However, the same rule does not necessarily apply to statutory law. The Constitution does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter on which the state is competent to legislate.[53] The Supreme Court in *Nevada v. Hall* observed that the Full Faith and Credit Clause only requires a state to apply another state's statutory law when not in violation of its own legitimate public policy.[54] Some states, like California, have their own policy rules that further limit or direct the use of local policy in deciding whether to afford credit to the acts and records of other states.[55] Furthermore, marriages are subject to a variety of additional choice of law rules depending on the jurisdiction.[56]

Before the policy rules of California are discussed in the next section, this section will discuss some basic but important issues regarding the validity of applying full faith and credit at all in the current situation: whether the DOMA places restrictions on a state's obligation to give effect to another state's civil union scheme; to what extent California's little DOMA impairs recognition of a civil union under full faith and credit; and whether a civil union fits the definition of an "act" or "record" for purposes of the clause.

B. The DOMA & Full Faith and Credit

The DOMA purports to restrict a state's obligation to give full faith and credit to a valid same-sex marriage created in a different

controversy to control proceedings elsewhere, and thus, plaintiff could testify in Missouri action brought against defendant without offense to Full Faith and Credit Clause).

50. *Id.* at 233.

51. *See* Nevada v. Hall, 440 U.S. 410 (1979) (holding that the Full Faith and Credit Clause did not require California to limit recovery to the $25,000 maximum limitation in Nevada's statutory waiver of its immunity from suit in its own courts).

52. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935) (concluding that a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes).

53. *Baker*, 522 U.S. at 232.

54. *Nevada*, 440 U.S. at 422.

55. *See* discussion *infra* Part III.A.

56. *See* discussion *supra* Part II.A.

state.[57] It is not clear whether the DOMA applies equally to civil unions. However, the reasons why the DOMA should not be a roadblock to this discussion are threefold: the civil union is not a marriage; the civil union is probably not sufficiently "treated as a marriage" to bring it within the DOMA's jurisdiction; and even if the DOMA did control the interstate effect of the Vermont civil union, it would only serve to remove a federal obligation, and California would still be bound by its own choice of law rules. The pertinent language of the DOMA provides:

> No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is *treated as a marriage* under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[58]

Although it is unclear what it means for a relationship to be "treated as a marriage," it seems clear that the civil union is not defined as a marriage by the Vermont statute, which provides:

> "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 . . . .[59]
>
> "Marriage" means the legally recognized union of one man and one woman.[60]
>
> 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 to 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. . . .[61]
>
> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.[62]

By the definitions in the statute, it appears that Vermont does not mean to treat the civil union as a marriage under its laws. In fact, it appears that a civil marriage and a civil union are created different as a compromise between satisfying the Common Benefits Clause of the Vermont Constitution and upholding the longstanding traditions

57. *See* discussion *supra* Part I.C.
58. 28 U.S.C. § 1738C (2000) (emphasis added).
59. VT. STAT. ANN. tit. 15, § 1201(2) (Supp. 2001).
60. *Id.* § 1201(4).
61. *Id.* §§ 1202(1), 1202(2).
62. *Id.* § 1204(a).

of civil marriage.[63] Additionally, recent decisions in the Georgia Court of Appeals have interpreted Vermont's civil union bill to hold that the civil union is not to be treated as a marriage at least for determinations of custody.[64] If it is true that the civil union is not "treated as a marriage under the laws" of Vermont, the DOMA should have no effect on the full faith and credit given to the civil union, and we should be free to examine the civil union in terms of a regular full faith and credit analysis.

Even if the civil union is "treated as a marriage" sufficiently to be within the jurisdiction of the DOMA, this only serves to remove California's *federal* obligation to give full faith and credit. California is still subject to its own rules concerning the effect of sister state statutes. Furthermore, the Full Faith and Credit Clause does not mandate recognition of an act or statute to the same extent that it mandates recognition of a court judgment.[65] Even prior to the DOMA, California was not *required* to give full faith and credit to another state's statute if the statute contravened California's public policy.[66] Determining whether California must recognize a civil union from Vermont will ultimately require an inquiry into California policy because California, by its own law, obliges itself to recognize a sister state's statute when that statute is not contrary to its own public policy.[67] The DOMA serves only to remove California's *obligation* to recognize *judgments* from other states but has no substantial effect on other states' *statutes*.[68] The DOMA, then, should not play an integral

63. 2000 Vt. Acts & Resolves 91, § 1(10).

64. *See, e.g.*, Burns v. Burns, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002). In *Burns*, Susan Burns divorced her husband, Darian, in December 1995. *Id.* at 48. Darian retained full custody of the couple's three minor children. *Id.* Three years later, the court issued a consent order modifying visitation rights and providing: "[t]here shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree." *Id.* (alteration in original). On July 3, 2000, Susan Burns traveled to Vermont and obtained a civil union with a female companion not related to Susan. *Id.* Two months later Darian filed a motion for contempt, alleging that Susan violated the trial court's order by exercising her visitation rights while cohabiting with her female lover. *Id.* The trial court found that the provisions of its order applied equally to both parties and that a civil union was not a marriage. *Id.* The Georgia Court of Appeals affirmed, finding that a civil union was not a marriage, noting the specific language of the legislative findings that accompanied the Vermont Civil Union bill that provided that "a system of civil unions does not bestow the status of a civil marriage." *Id.* at 49 (quoting 2000 Vt. Acts & Resolves 91, § 1(10)).

65. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998).

66. *Id.*

67. *See infra* Part III.

68. It is possible that a civil unionized couple might seek a declaratory judgment from a court in Vermont and thereby defeat the policy inquiry mandated for Acts and Records but not for Judgments.

part in our discussion of what effect a sister state must give to the civil union.

C. California's DOMA & Full Faith and Credit

The California Defense of Marriage Act[69] codifies California's policy not to give effect to a valid same-sex marriage created elsewhere.[70] This marriage-evasion statute should not apply to the civil union for several reasons. For one, the language of the statute simply provides that "[o]nly a marriage between a man and a woman is valid or recognized in California."[71] Unlike its federal counterpart, California Family Code section 308.5 does not require that the relationship be "treated" as a marriage or mention single-sex relationships at all. And, as discussed above, there should be no question that Vermont defines the civil union as something other than a marriage. Secondly, California's existing domestic partnership statutes specifically extend rights to same-sex relationships.[72] It would therefore be counterintuitive to argue that California's marriage-evasion statute applies to deny recognition of rights to same-sex relationships in any form. Finally, if California wanted to preclude recognition of a civil union specifically, it could have done so expressly by statute as other states such as Nebraska[73] have done.

D. Is the Civil Union an "Act, Record, or Judicial Proceeding"?

At first glance, it might seem necessary to discuss whether a civil union really fits the definitional requirements of the Full Faith and Credit clause.[74] Is the civil union an "Act"? Is it a "Record"? As it turns out, there is no need to strain to find a place for the statutorily-created civil union amid the "public Act, Record, or judicial Proceeding" language of the clause—it is well settled that a statute is an "Act" within the meaning of the clause.[75]

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69. CAL. FAM. CODE § 308.5 (West Supp. 2002).

70. *Id.*

71. *Id.*

72. *See* CAL. FAM. CODE § 297 (West Supp. 2002).

73. *See Defense of Marriage Act: Hearings on S. 1740 Before the Senate Judiciary Comm.*, 104th Cong. 32 n.33 (1996) (statement of Prof. Lynn D. Wardle citing fifteen states that have included in their marriage-evasion statute language that pertains also to civil unions).

74. Article four, section 1 of U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

75. *See* Ala. Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532 (1935); Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914).

A party to a civil union could seek a declaratory judgment in a Vermont court, declaring the full extent of the party's rights under the civil union. Because a court judgment would not only satisfy the language of the Full Faith and Credit Clause, but also obligate recognition in a sister state, a party could then seek to have the judgment enforced and escape the policy inquiry required for enforcing another state's statute. Interestingly, this would resurrect the relevance of the DOMA in our discussion. If the DOMA truly applied to a civil union as well as a marriage, even a declaratory judgment from a Vermont trial court recognizing a party's rights under a civil union would be subject to the forum state's policy inquiry because the forum state would no longer be required to give full faith and credit to the civil union. This serves to reiterate the importance of California policy to this topic, discussed carefully in the next section.

III. California Policy

A. Background

As the previous section discussed, California Family Code section 308.5 does not positively deny the operation of the Vermont civil union in California.[76] The DOMA, at most, places the discretion at the state level.

It is therefore necessary to discuss the civil union's fate in California according to California public policy doctrine. It is, of course, difficult to predict the policy of a state in acknowledging a right newly created by another state. California precedent has nonetheless provided some guidelines in determining its own policy.

In the silence of any express rule affirming, denying, or restraining the operation of foreign laws, California courts presume the tacit adoption of them by their own government, unless they are repugnant to its policy.[77] Many rights acquired under the laws of other states are now protected by the Full Faith and Credit Clause, and may not be refused under California domestic policy.[78] In fact, the First District Court of Appeal in California has held that even regular California policy is not strong enough to justify a refusal to grant full faith and credit.[79] California requires a "strong public

76. *See* CAL. FAM. CODE § 308.5 (West Supp. 2002).

77. *See* In re Lathrop's Estate, 131 P. 752, 754 (Cal. 1913).

78. *See* 12 CAL. JUR. 3D (REV.) *Conflicts* § 11 (1999).

79. *See* Metro. Creditors Serv. v. Sadri, 19 Cal. Rptr. 2d 646 (Ct. App. 1993).

policy" against another state's practice before it will refuse to recognize it.[80]

California's narrower[81] public policy doctrine has been further interpreted to apply only where another state's law violates "recognized standards of morality, would contravene the positive policy of the state or some deep-rooted tradition of the commonweal, would be contrary to principles of abstract justice, or would be injurious to the welfare or general interests of the people of [the] state."[82] Furthermore, a mere difference in law does not mean it is against public policy,[83] and even laws that offend California policy will be recognized, in some instances, for certain purposes. For example, a polygamous marriage may be recognized in California to give succession rights to widows.[84]

How, then, do we determine whether a foreign, same-sex, non-marital civil union violates the strong public policy, deep-rooted traditions, or recognized standards of California morality? California precedent tells us that that its policy is primarily indicated by the California Constitution, secondly by its statutes, and finally by its case law.[85] This section will analyze California policy by these standards and others.

80. *See* 12 CAL. JUR. 3D (REV.) *Conflicts* § 12 (1999); *Metro. Creditors*, 19 Cal. Rptr. 2d at 649.

81. *See Metro. Creditors*, 19 Cal. Rptr. 2d at 648.

82. 12 CAL. JUR. 3D (REV.) *Conflicts* § 22 (1999) (citations omitted).

83. *See* McGrew v. Mut. Life Ins. Co., 64 P. 103 (Cal. 1901) (holding that a divorce in obtained in Hawaii for an insane man by his guardian was not invalid simply California law did not expressly permit a divorce action by the husband's guardian).

84. *See* In re Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (holding that where only the question of descent of property is involved, "public policy" as to polygamous marriages, legal at the place of contract but illegal in California, is not affected).

85. *See* Thome v. Macken, 136 P.2d 116, 119 (Cal. Ct. App. 1943):

> Where there are constitutional or statutory provisions, they govern as to what is the public policy. Where the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. The United States Supreme Court said in United States v. Trans-Missouri Freight Association [that] [t]he public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts . . . but when the lawmaking power speaks upon a particular subject . . . public policy in such a case is what the statute enacts.

(citations omitted).

B. California Constitution as an Indicator of California Policy

The California Constitution guarantees rights and freedoms in a fashion that resembles the Common Benefits Clause[86] of the Vermont Constitution on which *Baker v. State* was decided. In so doing, it suggests a policy that would favor extending full faith and credit to the Vermont civil union. California's Constitution provides that all people have inalienable rights, including the right to pursue and obtain safety, happiness, and privacy; that no person may be deprived of liberty without due process of law or denied equal protection of the laws; and that no citizen or class of citizens may be granted privileges or immunities not granted on the same terms to all citizens.[87]

In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,[88] the California Supreme Court interpreted the California equal protection clause to include homosexuals in its protection.[89] There, individuals and equal rights associations sought declaratory, injunctive, and monetary relief against the Pacific Telephone & Telegraph Company on the ground that it engaged in discriminatory employment practices that violated the equal protection guarantee of the California Constitution.[90] The Court held that the state equal protection clause clearly applied in the employment realm and that it applied to homosexuals as well as to all others.[91]

California's constitution, therefore, has been interpreted to have no strong and legitimate policy interest in denying individuals in same-sex relationships rights, protections, benefits, and responsibilities comparable to those provided to married couples. In

86. VT. CONST. ch. I, art. 7.

87. CAL. CONST. art. I §§ 1, 7.

88. 595 P.2d 592 (Cal. 1979).

89. *Id.* at 597.

90. *Id.* at 595.

91. *Id.* at 597. The court explained:

> Plaintiffs contend that PT&T's alleged discriminatory employment practices violate the equal protection guarantee of the California Constitution by arbitrarily denying qualified homosexuals employment opportunities afforded other individuals. In analyzing this constitutional contention, we begin from the premise that both the state and federal equal protection clauses clearly prohibit *the state or any governmental entity* from arbitrarily discriminating against any class of individuals in employment decisions. Moreover, past decisions of this court establish that this general constitutional principle applies to homosexuals as well as to all other members of our polity; under California law, the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job from which he has been excluded.

Id. (emphasis in original).

fact, it appears that the California Constitution mandates a policy *in favor* of providing all eligible couples, regardless of their gender or sexual orientation, the opportunity to obtain comparable rights. Under existing California law, the legal recognition of a civil marriage is the only available source for a couple to access many rights, protections, benefits, and responsibilities.[92] Because civil marriage is not available to same-sex couples, the existing framework, in practice, is not consistent with to the spirit of the California Constitution.

C. California Statutes as an Indicator of California Policy

California's domestic partnership statute[93] acknowledges the state's policy and interest in recognizing same-sex relationships, providing equal treatment to individuals in these relationships, and ending discrimination on the bases of gender and sexual orientation.[94] The domestic partnership statute enables domestic partners to make medical decisions for incapacitated loved ones, adopt a partner's child, use sick leave to care for a partner, recover damages for

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92. *See* A.B. 1338, Gen. Assem., Reg. Sess. (Cal. 2001–02). The California codes currently provide a variety of rights available only to married person including:

> laws relating to domestic relations, . . . including rights and obligations of support during and after the relationship, community property, and evidentiary privileges[;] laws relating to child custody and visitation and stepparent adoption[;] laws relating to title, probate, administration of estates, intestate succession, or other incidents of the acquisition, ownership, or transfer of real or personal property during life or at death, as well as laws relating to access to marital student housing, senior citizen housing, and rent control protections[;] laws relating to obligations to make disclosures regarding spousal relationships and to take other steps to prevent conflicts of interest and self-dealing[;] laws relating to government benefits, including . . . workers' compensation, unemployment insurance, public assistance, transfer of licenses upon death, and the ability to apply for absentee ballots and other documents for a spouse[;] laws relating to taxes, including, but not limited to, joint filing of income tax returns, marital tax rates, marital tax exemptions, estate tax exemptions, nontaxable treatment of employer-provided spousal insurance benefits, and nonreassessment of real property upon a spouse's death[;] laws relating to health insurance coverage for spouses, family care and medical leave, bereavement leave, and coverage of spouses under medical, dental, life, and disability insurance[;] laws relating to legal claims related to, or dependent upon, spousal status, including, but not limited to, claims for wrongful death, intentional or negligent infliction of emotional distress, loss of consortium, and victim's compensation rights[;] laws relating to hospital visitation, medical consent, conservatorship, guardianship, anatomical gifts, disposition of remains, and rights of burial in family cemeteries[;] and laws prohibiting marital status discrimination.

Id.

93. CAL. FAM. CODE § 297 (West Supp. 2002).

94. *See id.*

wrongful death, and be named as conservator of a partner's will.[95] Most recently, California passed Senate Bill 1661, which establishes six weeks wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child.[96] The inclusion of domestic partners in this new legislation clearly furthers California's efforts to legitimize the special legal relationship between same-sex couples.

At the very least, the mere existence of the domestic partnership statute in California suggests that California could not have a "strong policy" against extending rights to same-sex relationships that are available to different-sex couples through marriage. Furthermore, while the domestic partnership statute does not go to the full extent of the Vermont Civil Union in extending all benefits to same-sex couples, a mere difference in law does not necessarily indicate a strong public policy against the foreign law.

The historical and statutory notes of the statute provide even more insight into California's policy on extending benefits to same-sex partners. California Governor Gray Davis issued the following signing message when he signed the domestic partnership statute in October 2001:

> In California, a legal marriage is between a man and a woman. I believe the only things that can undermine the bonds of a strong marriage are ignorance and fear.
>
> This legislation does nothing to contradict or undermine the definition of a legal marriage, nor is it about special rights. It is about civil rights, respect, responsibility, and, most of all, it is about family.
>
> Therefore, I am honored to sign one of the strongest domestic partner laws in the nation.[97]

It appears evident, then, that California wants to encourage the inclusion of homosexuals in its protections of rights and that California sees same-sex relationships as legitimate families as an alternative to marriage. In more general terms, California statutes serve as evidence of the state's policy to protect the rights of same-sex couples by prohibiting discrimination on the basis of sexual orientation in many areas including, but not limited to, employment,[98]

95. *See* CAL. FAM. CODE § 297 historical and statutory notes (West Supp. 2002).
96. A.B. 1661, Gen. Assem., Reg. Sess. (Cal. 2002).
97. CAL. FAM. CODE §297 historical and statutory notes (West 2001).
98. CAL. GOV. CODE § 12940 (West 2001).

housing,[99] health contracts,[100] hate crimes,[101] judicial ethics,[102] criminal law,[103] juror excuse and disqualification,[104] and court appointments.[105]

However, this inquiry into California policy as expressed in California statutes would not be complete without noting the recent California Assembly Bill 1338.[106] Assembly Bill 1338 proposed to create a system of civil unions in California almost identical in spirit to the Vermont system,[107] but, pursuant to article IV, section 10(c) of the California Constitution,[108] was extinguished when it had not been passed by January 31 of the second calendar year after its proposal. The bill provided:

> Existing law provides for the issuance of a marriage license and specifies the rights and obligations of married persons. Existing law provides that only marriage between a man and a woman is valid or recognized. This bill would provide for the issuance of a civil union license, and provide that the rights and obligations of a civil union,

99. CAL. GOV. CODE § 12955 (West Supp. 2002).

100. CAL. HEALTH & SAFETY CODE §1365.5 (West 2001).

101. CAL. CIV. CODE §51.7 (West 2001); CAL. PENAL CODE §422.6 (West 2001).

102. *See* Curran v. Mt. Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 227 n.10 (Cal. 1998).

103. CAL. PENAL CODE §422.6 (West 2001).

104. *See* CAL. CIV. PROC. CODE §§ 204, 231.5 (West Supp. 2002).

105. *See* CAL. CIV. PROC. CODE § 231.5 (West Supp. 2002).

106. *See* A.B. 1338, Gen. Assem., Reg. Sess. (Cal. 2001-02).

107. California's proposed civil union bill not only embodied the spirit of Vermont's civil union, but anticipated the future struggle of Californians to have their civil unions recognized elsewhere. The proposed bill provided:

> It is the further intent of the Legislature that this act shall be construed broadly to equalize civil union and civil marriage under all applicable laws of any jurisdiction that may affect or govern the rights of married persons in every other state, the District of Columbia, the United States, and any foreign country, to the fullest extent of applicable law, including the Constitution of the United States and the California Constitution, to the end that no party to a civil union shall be treated any differently than a married person as to his or her rights, benefits, and responsibilities under the laws of every jurisdiction that recognizes and accords rights, benefits, and responsibilities to a person who has been married or whose marriage had been recognized under California law.

Id. Had Vermont included similar language in its civil union statute the discussion of this Note would obviously be altered significantly. Or would it? Is a state obligated to give full faith and credit to a statute of a sister state simply because the sister state statute itself says so? What, then, of states like Nebraska whose marriage-evasion statutes clearly provide that they will not give any effect to sister state civil unions?

108. *See* http://www.leginfo.ca.gov/pub/bill/asm/ab_1301-1350/ab_1338_bill_20020207_history.html. Article IV section 10(c) of the California Constitution provides: "Any bill introduced during the first year of the biennium of the legislative session that has not been passed by the house of origin by January 31 of the second calendar year of the biennium may no longer be acted on by the house."

which could be entered into by any two persons, are the same as those of a marriage.[109]

Although the bill died without a vote, the legislature's reluctance to address the bill should at least be noted. This should serve as a reminder that, in so much as the California Legislature is an indication of California policy, this part of the discussion is not a "slam dunk." It remains the opinion of this author, however, that while the death of Assembly Bill 1338 marks some resistance to extending full rights to same-sex relationships, it does not meet the California standards of a "strong policy" against extending those rights.

D. California Case Law as an Indicator of California Policy

Gay Law Students[110] is not the only California opinion that serves to identify a state-wide policy of favoring the protection of homosexual rights. *People v. Garcia,* for example, held that homosexuals cannot be excluded from jury selection on that basis.[111] In *Leibert v. Transworld Systems, Inc.*, the California Court of Appeal held that there was a fundamental public policy against discrimination on the basis of sexual orientation which was evident from California Labor Code sections 1101, 1102 and 1102.1 (now incorporated in California Government Code section 12900).[112] In *Holmes v. California National Guard*, the Court of Appeal held that the federal "don't ask don't tell" policy of excluding homosexuals who affirm their homosexuality in the armed services violates the California Constitution and cannot be applied to discriminate against employing homosexuals in the California National Guard.[113] In *Nadler v. Superior Court*, the California Supreme Court held that a party's homosexuality was only a factor in determining a child custody case and could no longer, on its own, be determinative of the child's best interests.[114] Finally, the California Court of Appeal in *In re Joshua H.* also held that California's "hate crime" statutes[115] do not violate freedom of speech since they do not proscribe expression; rather, they proscribe "an especially egregious type of *conduct*, that is, of selecting

109. *See* A.B. 1338, Gen. Assem., Reg. Sess. (Cal. 2002).
110. Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979).
111. 92 Cal. Rptr. 2d 339, 348 (Ct. App. 2000).
112. 39 Cal. Rptr. 2d 65, 72 (Ct. App. 1995).
113. 109 Cal. Rptr. 2d 154, 172 (Ct. App. 2001).
114. *See* 63 Cal. Rptr. 352, 354 (Ct. App. 1967).
115. *See* CAL. PENAL CODE §§ 422.6–422.95(West 2001).

crime victims on the basis of race, color, religion, ancestry, national origin, or sexual orientation."[116]

While California case law does not expressly prescribe that California mandate a system of civil unions for same-sex marriage, it does illustrate a trend in the judiciary of protecting the civil rights of homosexuals. By contrast, California case law also illustrates the very real roadblock that same-sex couples face in receiving their constitutionally guaranteed right of equal protection of the laws. In 1985, the Third District Court of Appeal in *Hinman v. Department of Personnel Administration* considered whether the denial of dental benefit coverage to unmarried partners of homosexual state employees unlawfully discriminates and violates the equal protection clause of the California Constitution.[117] The intermediate court held that rather than discriminating on the basis of sexual orientation, the dental plans distinguish eligibility on the basis of marriage, which is a distinction rationally related to a legitimate state purpose: the state's interest in promoting marriage.[118] The court then commented that the plaintiffs' only true recourse would be in convincing the legislature to redefine marriage so as not to exist only as a union between a man and a woman.[119]

While this appellate opinion was written more than fifteen years before the enactment of the current domestic partnership statute, it does serve to show the California judiciary's reluctance to call a system that bestows rights only on married persons a violation of equal protection. While the Court of Appeal in *Hinman* saw the plaintiffs' only recourse in redefining the definition of marriage,[120] the Vermont high court in *Baker* saw the potential of an alternative remedy—the one ultimately chosen by the Vermont Legislature—of creating a mirror system of rights under the civil union.[121] What is essential to note, however, is that while the California Court of Appeal found no equal protection violation on the basis of marital status, its dicta did at least recognize that marriage was not equally accessible to all plaintiffs.

116. 17 Cal. Rptr. 2d 291, 293 (Ct. App. 1993) (emphasis in original).

117. 213 Cal. Rptr. 410, 411 (Ct. App. 1985).

118. *Id.* at 419.

119. *Id.* at 419–20.

120. *Id.*

121. *See* Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

E. California Marriage Policy—Apples and Oranges

This Note holds tightly to the premise that a civil marriage and a civil union are not the same legal entity and should not be treated as such. Some recent scholarship suggests that it is possible to determine a state's policy on a foreign civil union by looking at that state's policy on foreign marriages.[122] It is not clear, however, that such an inquiry is appropriate or useful.

California has a policy that favors marriage in general.[123] Thus, for marriages, California follows the general rule that the law of the place of the contraction of the marriage controls the question of its validity.[124] In addition, California has other pro-validation rules concerning foreign marriages. For example, an intent on the part of the parties to evade California marriage law by going to another state only to contract a marriage that could not lawfully be entered into in California, has no effect on the validity of the marriage.[125] In other words, California does not penalize couples who have specifically gone out of state to marry in such a way that evades California law (such as age or health requirements) only to immediately return to California and seek to have their new status enforced.[126] An exception to this policy arises where the marriage is deemed "odious by common consent of nations", such as, incestuous or polygamous marriages,[127] but even in such cases, California courts have deemed those marriages valid for some purposes such as succession rights to property.[128]

It would therefore be tempting to discuss whether a civil union is more akin to an underage marriage or more akin to a polygamous marriage. However attractive such a comparison may be, it is nonetheless analogous to the proverbial apples-and-oranges comparison. Proponents of same-sex rights might urge a California court not to inquire into the intent of a same-sex couple who evades California law by entering into a foreign civil union. Meanwhile,

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122. *See* De Franco, *supra* note 33, at 258.

123. *See* Hendricks v. Hendricks, 270 P.2d 80, 82 (Cal. Ct. App. 1954) ("It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation.").

124. *See* McDonald v. McDonald, 58 P.2d 163, 164 (Cal. 1936).

125. *See id.*

126. *See id.*

127. *See id.*

128. *See In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (holding that where a decedent legally entered into polygamous marriages in a foreign jurisdiction, California will not deem such marriages invalid as contrary to California policy when the purpose of recognizing such a marriage is to divide the decedent's estate).

opponents of the civil union might seek to define same-sex relationships as marriages that are "odious by common consent of nations." However, each of those arguments is intrinsically flawed to the extent that it assumes state policy on marriage could be compared to state policy on civil unions. An argument that offers California's liberal policy of validating evasive marriages as evidence of a liberal policy towards validating foreign same-sex unions is crippled by the fact that California's definite interest in preserving marriage does not necessarily extend to civil unions.[129] By the same token, an argument that proposes that California policy sees the civil union as a marriage that is "odious by common consent of nations" is belied by the fact that California statutorily excludes same-sex relationships from ever being considered as a "marriage" in the first place. It is therefore tempting, but impossible, to properly compare general marriage policy with the policy of extending marital benefits to same-sex couples.

Conclusion

This Note set out to determine the extent of California's obligation to recognize the rights afforded to a civilly unionized same-sex couple under Vermont state law. The federal DOMA neither mandates nor precludes California's recognition of non-marital rights created by other states' statutes. The language of California's own defense of marriage statute applies strictly to marriages and leaves little room for an apples-and-oranges analogy between marriage and the civil union. California doctrine is clear: California policy alone dictates whether a sister state statute is afforded full faith and credit in California. Such policy is specifically evidenced by California's constitution, statutes, and case law—pro-equal protection policy towards same-sex citizens is exhibited clearly in the California Constitution, the domestic partnership scheme, various state statutes, and California case law.

It is therefore without hesitation that this author suggests that California practice what it preaches: a California court must afford full faith and credit to the Vermont civil union statute in the event

129. One could argue that the equal protection guarantees provided for in Article 7 of the California Constitution extend California's policy of promoting marriage to include a policy that promotes civil unions or domestic partnerships. It is evident that such an argument fails based on the premise of this section, that a civil marriage and a civil union are not analogous. Furthermore, the overwhelming approval of Proposition 22 in California is clear evidence of a public sentiment that keeps the institutions of marriage and domestic partnerships separate from a policy standpoint.

such a question is properly before it. Stepping beyond the premise of this Note, it appears that both the language and spirit of the California Constitution create a duty in the legislature to enact a statute that provides same-sex Californians with the rights guaranteed to them by California's equal protection provision. By the same token, a responsible California legislature should also enact a statute that clearly defines California's policy towards recognition of state civil unions, reciprocal beneficiaries, and domestic partnerships. And, in drafting such a provision, the legislature should look deep into the rights guaranteed by the state's constitution, the policies exhibited by its existing codes, the case law as handed down by its able judiciary, and the words of its current governor.

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