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Resolving Interstate Conflicts Over Same-Sex Non-Marriage

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RESOLVING INTERSTATE CONFLICTS OVER SAME-SEX
NON-MARRIAGE

Hillel Y. Levin *

Abstract

States have adopted several different regimes of recognition for same-sex couples. A few states allow same-sex couples to marry; several others offer marriage-like partnerships (usually called civil unions), which provide all or nearly all of the substantive rights and responsibilities associated with marriage; still others offer marriage-lite partnerships (sometimes called reciprocal benefits arrangements), which provide a small subset of the rights and responsibilities associated with marriage; and, of course, others offer no recognition at all.

What happens when these regimes of recognition collide? For example, what happens when a couple marries in Massachusetts and then moves to a marriage-like state, like New Jersey? Will, and should, New Jersey recognize the Massachusetts marriage as a marriage under New Jersey law; or should it refuse to recognize it entirely; or should it automatically convert the relationship to New Jersey's marriage-like alternative?

Concerning these issues, which I call the marriage/marriage-like/marriage-lite conflicts, the law is deeply unsettled. Further, until now, scholars have focused nearly exclusively on conflicts that arise between states that recognize same-sex marriage and those that offer them no recognition at all, ignoring the marriage/marriage-like/marriage-lite conflicts; and the approaches they have offered do not translate to this new context. This Article fills this lacuna and offers a new framework for resolving the marriage/marriage-like/marriage-lite conflicts. It also explores some substantial implications of this new approach.

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I. INTRODUCTION

Only a few states currently permit same-sex couples to wed.¹ However, several states that balk at the idea of extending marriage to same-sex

1. The history in brief: In 2004, Massachusetts became the first state in the United States to allow same-sex couples to marry. *See Same Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated Sept. 2010). A decision by California's supreme court made it the second state to do so in 2008, but a ballot initiative (Proposition 8) overturned that court decision. *Id.* However, a federal district court recently overturned Proposition 8, holding that the federal Constitution provides a right to same-sex marriage. *Id.* Connecticut's and Iowa's supreme courts required those states to allow same-sex couples to marry. *Id.* Next, when Vermont's legislature overrode a gubernatorial veto, it became the first state to successfully enact a same-sex marriage bill legislatively. *Id.* In June 2009, New Hampshire also adopted same-sex marriage. *Id.* The District of Columbia also performs same-sex marriages. *Id.*

couples are willing to grant rights and responsibilities typically associated with marriage when they are packaged under other names. Thus, some states (the “marriage-like states”) offer alternatives functionally identical,² or at least nearly so,³ to marriage;⁴ and others (the “marriage-lite states”) provide same-sex couples with some but not all of the rights and

2. The marriage-like states are those that essentially provide state marriage rights to same-sex couples but give the rights different names. These relationships are often called civil unions, but they have sometimes been called (as in California) domestic partnerships. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008) (recognizing that California “affords substantive legal rights and benefits to a couple’s family relationship that are comparable to the rights and benefits afforded to other couples”), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009); *see also Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 416 (Conn. 2008) (affirming trial court determination that the Connecticut civil union statute “entitles same sex couples to all of the same rights as married couples” except the right to call the relationship a marriage).

3. *See, e.g.,* Opening Brief on the Merits at 40–42, *Clinton v. State (In re Marriage Cases)*, 183 P.3d 384 (Cal. 2008) (No. S147999) (acknowledging that California domestic partnership statute extends functionally equivalent rights to same-sex couples despite minor differences but arguing that a “separate but equal” approach violates the California constitution); Brief of the Plaintiffs-Appellants with Separate Appendix at 10–12, *Kerrigan*, 957 A.2d 407 (No. S.C. 17716) (conceding that Connecticut civil union statute “acknowledg[es] that committed lesbian and gay couples are identically situated to and deserving of the same legal rights as married couples” but asserting that the legislature fails to follow this acknowledgement to its logical end by extending the status of marriage to same-sex couples); *see also infra* Part II.B.

4. At one time or another, marriage-like states have included California, New Hampshire, New Jersey, Oregon, Vermont, and Washington. *See* CAL. FAM. CODE §§ 297–297.5 (West 2010) (establishing California domestic partnerships that provide “the same rights, protections, and benefits” as an opposite-sex marriage); N.H. REV. STAT. ANN. § 457-A:6 (2010) (“[T]he parties who enter into a civil union pursuant to this chapter shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to [the marriage statutes].”); N.J. STAT. ANN. § 37:1-32 (West 2010) (enumerating several rights for civil unioned same-sex partners); Oregon Family Fairness Act, 2007 Or. Laws ch. 99, § 9 (codified as OR. REV. STAT. ANN. § 106.340 (West 2010)) (establishing Oregon domestic partnerships granting rights to same-sex partners “on equivalent terms” with opposite-sex married couples); VT. STAT. ANN. tit. 15, §§ 1202, 1204 (2010) (granting “[p]arties to a civil union . . . the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage”); S.B. 5688, 61st Leg., 2009 Reg. Sess. (Wash. 2009) (“The provisions of this act shall be liberally construed to achieve equal treatment, to the extent not in conflict with federal law, of state registered domestic partners and married spouses.”). In addition to the marriage-like states in the United States, several European countries, New Zealand, and parts of Australia, Brazil, Mexico, Argentina, and Uruguay also offer marriage-like alternatives for same-sex couples. *See, e.g.,* Penny McLintock & Elizabeth Byrne, *Gay Couple Ties Knot in Ceremony*, ABC NEWS (Austl.), Nov. 25, 2009, <http://www.abc.net.au/news/stories/2009/11/25/2753087.htm>; *Same-Sex Marriage Legalized in Argentina*, CBC NEWS, July 15, 2010, <http://www.cbc.ca/world/story/2010/07/15/argentina-same-sex-marriage.html>; *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA EUROPE, http://ilga-europe.org/home/issues/families/recognition_of_relationships/legislation_and_case_law/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Oct. 15, 2010); *Civil Union*, N.Z. DEP’T OF INTERNAL AFFAIRS, http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?OpenDocument (last visited Oct. 15, 2010).

responsibilities associated with marriage.⁵ (The majority of states, of course, offer no recognition to same-sex couples.⁶) As the country continues to grapple with the debate over same-sex relationships, more states are likely to experiment with these alternative models.⁷ As a result, we can expect more and new kinds of conflicts of laws, at least until all states opt to, or are compelled by the Supreme Court to, perform and recognize same-sex marriage.⁸

5. Marriage-lite alternatives are sometimes called civil unions, domestic partnerships, or reciprocal benefit arrangements. Sometimes featuring such incidents of marriage as inheritance rights, workers' compensation, the right to sue for wrongful death, health insurance and/or pension benefits for state employees, hospital visitation, and healthcare decision-making, marriage-lite states include Hawaii, New York, Rhode Island, and Wisconsin. See HAW. REV. STAT. ANN. § 572C-6 (West 2010) (extending limited rights to same-sex reciprocal beneficiaries but explicitly providing that reciprocal beneficiaries enjoy fewer rights than married opposite-sex couples); FAIR WIS. EDUC. FUND, WISCONSIN DOMESTIC PARTNERSHIP PROTECTIONS REFERENCE GUIDE 3-4 (2010), available at http://assets0.percolatesite.us/w/005/images/0000/1406/fair_wi_domestic_partnership_guide_8.2.2010.pdf?1280805178 (detailing various benefits for same-sex partners in Wisconsin); *Domestic Partnership Registration*, OFFICE OF THE CITY CLERK, THE CITY OF N.Y., http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml (last visited Oct. 15, 2010) (providing a summary of New York domestic partnership benefits). In addition, although it is now a marriage-like state, New Jersey continues to recognize marriage-lite relationships in some cases. See N.J. STAT. ANN. § 26:8A-4.1 (West 2010) (permitting domestic partners to remain as such after passage of the New Jersey civil union statute but prohibiting new domestic partnerships for same-sex couples). Finally, several countries and jurisdictions around the world have analogous marriage-lite provisions. See Barbara J. Cox, *Using an "Incidents of Marriage" Analysis when Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 701 (2004) (listing Denmark, Finland, France, Germany, Greenland, Iceland, Norway, and Sweden as providing limited rights to same-sex couples).

6. Several states have adopted constitutional provisions prohibiting same-sex marriage or other alternatives while others have done so through legislative channels. See Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1858.

7. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE* 251-57 (2006) (describing the "emerging menu" of options available to same-sex couples in different states).

8. It is worth noting that there is rapid change in this area, with states moving from one category to another. See, e.g., *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html?scp=3&sq=same-sex%20marriage%20ban%20florida&st=cse (last updated Aug. 13, 2010) (showing the rapid progression of Proposition 8 in California). In particular, there has recently been a good deal of movement into the marriage category, especially (but not only) among marriage-like states, and we will likely see that trend continue. *Id.* However, we should not expect the marriage-like and marriage-lite categories to disappear anytime soon, leaving ours a marriage/no-recognition country. Many no-recognition states have adopted constitutional provisions prohibiting same-sex marriage, which, coupled with continued opposition to same-sex marriage in these states, makes it exceedingly unlikely that we will see a move towards marriage everywhere in the foreseeable future. *Id.* Furthermore, no-recognition states and marriage-lite states are not necessarily moving to become marriage states. In Washington, for example, the legislature passed a marriage-lite scheme and then subsequently passed a statute providing marriage-like benefits to same-sex couples. Press Release, Office of the Governor, Gov. Gregoire Signs Legislation to Expand Rights to Domestic Partners (May 18, 2009), available at <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1236&newsType=1>. In addition, it looks as though the federal government, if it were to move out of the

What happens when a same-sex couple married in a marriage state moves to a marriage-like state; or from a marriage-like to a marriage-lite state; or from a marriage-lite to a marriage state—and so on? Do they keep their rights and responsibilities? Do they lose them as they cross the border? Does it depend, and if so, on what? Consider these examples:

- A same-sex couple marries in Massachusetts (a marriage state) and moves to New Jersey (a marriage-like state). One spouse is incapacitated and hospitalized. Can the other spouse direct medical care and make end-of-life decisions? Can he even visit his husband in the hospital?⁹ What if the incapacitated spouse dies? Who inherits? Who assumes the decedent's debts?
- The same facts, except that the couple moves to Hawaii (a marriage-lite state) instead.
- A couple enters into a marriage-like relationship in New Jersey and moves to Massachusetts. Before officially getting married, they decide to split up. One member of the couple wishes to marry someone else. Can she? Must she dissolve her union in New Jersey first? If so, how and where?
- A couple enters into a marriage-lite relationship in Hawaii and then moves to New Jersey or Massachusetts. What rights, if any, do the members of the couple automatically enjoy in the new state?

These are what I refer to as the marriage/marriage-like/marriage-lite conflicts, and they will create substantial problems for same-sex couples,

no-recognition category at all, would more likely adopt a marriage-like or marriage-lite scheme than a marriage scheme, at least in the foreseeable future. Therefore, even as we see relatively rapid change in this area—and even as more states become marriage states—we can expect that the alternative categories will maintain their durability, and the marriage/marriage-like/marriage-lite conflicts will only become more common.

9. The issue of partners visiting each other in the hospital is one that has featured prominently over the years in the debates over same-sex relationships. For a recent example, see Tara Parker-Pope, *Kept from a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, http://www.nytimes.com/2009/05/19/health/19well.html?_r=1. Also, President Barack Obama issued an executive order requiring all hospitals receiving federal funds to allow visitation by same-sex couples. Michael D. Shear, *Obama Extends Hospital Visitation Rights to Same-Sex Partners of Gays*, WASH. POST, Apr. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041505502.html>.

as these examples show.¹⁰ Resolving these problems is enormously important.¹¹ As Justice Robert Jackson argued more than sixty years ago, “If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”¹²

Unfortunately, the law is a mess, and existing legal scholarship offers little by way of guidance. The relevant literature tends to focus on those conflicts that arise between marriage states and states that offer no recognition whatsoever for same-sex couples (the marriage/no-recognition conflict),¹³ and the extant approaches are contestable normatively and descriptively. Further, they ignore marriage-like and marriage-lite relationships almost entirely, thus offering little guidance for resolving conflicts that involve such relationships.¹⁴

10. Wardle, *supra* note 6, at 1858–59 & nn.9–10 (citing Hillel Y. Levin, *Marriages, Civil Unions Collide in CT, CA Court*, HARTFORD COURANT, Jan. 15, 2008, at A9, available at <http://www.jp.us.org/forum/index.php?showtopic=95&mode=threaded>).

11. Conflicts issues have arisen in litigation. *See, e.g.*, *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002) (declining to dissolve, in Connecticut, a civil union lawfully formed in Vermont); *Lane v. Albanese*, No. FA044002128S, 2005 WL 896129, at *2–4 (Conn. Super. Ct. Mar. 18, 2005) (following the reasoning of the *Rosengarten* court to decline to dissolve a Massachusetts same-sex marriage in Connecticut); *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 858, 862–63 (Iowa 2005) (reviewing procedural history of case in which the Iowa district court utilized its equity powers to dissolve a same-sex marriage entered into in Vermont); *Salucco v. Alldredge*, No. 02E0087GC1, 2004 WL 864459, at *1 (Mass. Super. Ct. Mar. 19, 2004) (permitting dissolution of Vermont civil union in Massachusetts upon consideration of the Full Faith and Credit Clause, the Defense of Marriage Act, state statutes and case law, and the court’s equity powers); *Langan v. St. Vincent’s Hosp. of N.Y.*, 765 N.Y.S.2d 411, 417–22 (Sup. Ct. 2003) (considering similarities in public policies of Vermont civil union statute and New York wrongful death statute and concluding that these policies permit wrongful death recovery in New York for a plaintiff whose partner—legally joined in a Vermont civil union—died in New York), *rev’d* 802 N.Y.S.2d 476, 477–80 (App. Div. 2005) (requiring strict adherence to wrongful death statute and therefore preventing plaintiff spouse from recovery); *In re Estate of Chase*, 515 N.Y.S.2d 348, 349–50 (App. Div. 1987) (denying adoptive child the right to inherit from a natural parent in accordance with New York law even when adoption took place in accordance with Rhode Island law, a state that permits such inheritance). For a more complete list and a discussion of various cases, see Wardle, *supra* note 6, at 1906–09, app. A. For a real world illustration of the problems unioned or married couples encounter, see Cox, *supra* note 5, at 703–11.

12. *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

13. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976–92 (1997) (asserting that the public policy doctrine of the traditional conflicts analysis violates the Full Faith and Credit Clause of the Constitution and therefore a forum state must recognize relationships lawfully entered into in other jurisdictions even if doing so violates the forum state’s public policy).

14. *See* Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 257–58 (2006) (structuring conflicts argument using framework of recognition and non-recognition of same-sex relationships); Kramer, *supra* note 13, at 1965–66 (focusing on recognition of same-sex marriage in no-recognition states); Wardle, *supra* note 6, at 1907 (framing debate in terms of states that recognize same-sex relationships and those that do not). Even the most careful scholars writing in this area address the marriage/marriage-like/marriage-lite conflicts only as an afterthought to their considerations of the marriage/no-recognition conflict. *See generally* ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES* (2006) (focusing on the marriage/no-recognition conflict). Professor Andrew Koppelman’s otherwise excellent book *Same Sex, Different*

This Article offers the first analytical framework for resolving marriage/marriage-like/marriage-lite conflicts. Rejecting the approaches offered by scholars as unsatisfactory and inapplicable, I develop an approach rooted in the horizontal federalist values embodied in conflicts law. By comparing the marriage/marriage-like/marriage-lite conflicts to other kinds of conflicts that present similar patterns, I argue that forum states should, to the degree possible, sever those elements of same-sex relationships entered into in foreign states that are contrary to local policy but accept the remainder. This approach allows us to articulate sensible, straightforward, and fairly comprehensive rules for addressing the marriage/marriage-like/marriage-lite conflicts.

Further, this analysis has substantial implications for other areas of the law, both practical and abstract. From a practical standpoint, the approach sheds new light on the oft-discussed marriage/no-recognition conflict. Additionally, it offers a solution to several complicated questions that may arise in the event that the federal government adopts a marriage-like or marriage-lite scheme, as seems likely. From a more abstract perspective, the underlying question and the approach that I offer suggest that the meaning of marriage itself is unstable and deeply contestable.

This Article proceeds as follows. Part II reviews the different options that states have for resolving marriage/marriage-like/marriage-lite conflicts and shows that the law is deeply unsettled. Part III reviews the extant literature concerning conflicts over same-sex relationships and shows why it is normatively and descriptively unsatisfactory and that it fails to sufficiently address the marriage/marriage-like/marriage-lite conflicts. Part IV develops my alternative approach. Part V expands the inquiry beyond the marriage/marriage-like/marriage-lite framework and considers how my approach sheds light on several other practical questions. Finally, I conclude by briefly exploring the important abstract implications of my approach to conflicts arising from same-sex relationships.¹⁵

States—the very best resource available on this topic—devotes nearly all of its attention to addressing the marriage/no-recognition conflict, but it offhandedly remarks that “[i]n [marriage-like] states, foreign same-sex marriages ought to be simply treated as if they were civil unions.” *Id.* at 108. He does little to explain why this should be so, even while noting that some marriage-like states seem to prohibit this approach. *See, e.g., infra* Part II.B (discussing the peculiar case of the marriage-like state of Connecticut). Moreover, Koppelman does not address other crucial conflict patterns, including the marriage-like/marriage conflict (the reverse of the marriage/marriage-like conflict), the marriage/marriage-lite conflict and its reverse, and the marriage-like/marriage-lite conflict and its reverse. This is not an indictment of Koppelman’s book, of course. It simply demonstrates why there is more work to be done.

15. Unfortunately, debates over conflicts in the context of same-sex relationships sometimes seem to have more to do with the positions of the scholars on the substantive question of same-sex marriage as they do with anything else. That is, those who favor same-sex marriage seem to interpret conflicts law in such a way that leads to expanded recognition of those relationships while those who oppose same-sex marriage seem to interpret the law in precisely the opposite direction. I therefore believe that some full disclosure on my part is appropriate.

I am strongly in favor of same-sex marriage, for both normative and legal reasons. However, for three reasons, I also believe that conflicts law is not the appropriate avenue through which same-sex

II. THE PROBLEM

In this Part, I present the backdrop of the marriage/marriage-like/marriage-lite set of conflicts. I first show that the states' approaches to these conflicts vary widely. I then argue that policymakers have failed to resolve the problem in a satisfactory way.

A. *The States' Current Approaches to the Marriage/Marriage-Like/Marriage-Lite Conflicts*

Although courts and legal scholars have not yet satisfactorily addressed the marriage/marriage-like/marriage-lite conflicts, states have begun to develop policies for dealing with them. The law in the marriage/marriage-like conflict context—what happens when a married same-sex couple moves from a marriage state to a marriage-like state?—is the most developed, and so I begin there. I then expand the scope to include the other new conflicts patterns.

1. Possible Resolutions of the Marriage/Marriage-Like Conflict

Conceptually, for couples relocating from a marriage state to a marriage-like state, the marriage-like state has three plausible options:

Option 1: Treat the couple as married. That is, although the forum state would not perform the marriage, it could recognize and adopt the status afforded by the marriage state as a matter of comity.

Option 2: Decline to recognize the relationship altogether. In other words, because the forum state does not permit same-sex couples to marry, it could simply reject the relationship entirely.

marriage should advance. First, proponents of same-sex marriage have claimed the mantle of states' rights; turning around and using conflicts law as a wedge to advance same-sex marriage across the country is thus problematic. Second, the debate over same-sex marriage should be conducted on its merits rather than through the use of technical legal devices. That is, while I do not oppose advances through the courts per se (though legislatures and grass-roots movements seem at least as viable right now if not more so), those advances should come in cases that argue on the basis of equal protection or the like rather than on the basis of peripheral arguments rooted in conflicts law. Advances of the first sort are more likely to be lasting and perceived as legitimate, and they are also more likely to fundamentally alter how same-sex couples are viewed by the American polity. Third, and perhaps most importantly, I believe that the most convincing conflicts analysis—mine, to be specific—is unlikely to satisfy partisans of either side.

In other words, what I offer here is not part of an agenda to advance or retard the recognition of same-sex marriage, and I do not believe that it particularly accomplishes either of those goals. Because I am a partisan of same-sex marriage, I must admit to some hope that my analysis will become obsolete or irrelevant in the near future because all states adopt same-sex marriage. Until then, this Article represents my best efforts to use a very complicated body of law to resolve a specific set of legal questions.

Option 3: Do not recognize the marriage, but, consistent with forum policy, automatically provide the maximum recognition for the couple afforded in the forum state. For example, a marriage-like state such as New Jersey could automatically treat a same-sex couple lawfully married in Massachusetts as though it had already entered into New Jersey's marriage alternative.

Each of these options is realistic. The third option—which I will argue later is the right result—has prevailed in a number of marriage-like states, including New Jersey and New Hampshire.¹⁶ But other states, including Connecticut (before it became a marriage state) and, until recently, California,¹⁷ have adopted the second option and chosen to accord no legal status to same-sex couples lawfully married in marriage states.¹⁸ Indeed,

16. For New Jersey, see N.J. Op. Att'y Gen. No. 3-2007 (2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>. For the rule in practice, see *N.J. Vital Statistics: Frequently Asked Questions: Civil Union Records*, N.J. DEP'T OF HEALTH & SENIOR SERVS., <http://www.state.nj.us/health/vital/faq.shtml#cur> (last visited Oct. 15, 2010), which reads:

Am I required to enter into a civil union in New Jersey if I am already in a civil union or same-sex marriage in another state or country?

No. You are not required to enter into a civil union in New Jersey. If your civil union or same-sex marriage meets the requirements of the state or country in which you registered, then it is recognized by the State of New Jersey as a civil union. However, if you wish, you may also elect to enter into a civil union in New Jersey. In that case, you would file for a Reaffirmation of Civil Union License in New Jersey.

New Hampshire is now a marriage state, but when it was a marriage-like state, it took the same approach as New Jersey. See N.H. REV. STAT. ANN. § 457-A:8 (West 2010) (repealed 2011) (“A civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter.”); see also *About Civil Unions*, N.H. FREEDOM TO MARRY COAL., <http://www.nhftm.org/Xtras/civilunions.html> (last visited Oct. 15, 2010) (explaining that a couple whose relationship is “already recognized elsewhere” does not need a New Hampshire civil union to access New Hampshire state-based legal rights).

Substantively, as my discussion will show, I believe that the New Jersey attorney general arrived at the correct conclusion, but the analysis leaves something to be desired. The opinion does not reflect a conflicts approach and is deeply confused. It provides little support for its assertions about legislative intent and, in any case, offers little guidance to other jurisdictions because it relies so heavily on what it takes to be one particular legislature's intent.

17. *California Bill to Recognize Some Same-Sex Marriages*, CNN.COM, Oct. 12, 2009, <http://www.cnn.com/2009/US/10/12/california.samesex.marriage/index.html>. But see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010) (holding Proposition 8 unconstitutional and enjoining its enforcement).

18. For Connecticut's decision, see Conn. Op. Att'y Gen. No. 2005-024 (2005), 2005 WL

this question is so contested that it is sometimes the focus of intense political lobbying.¹⁹

With respect to the remaining possibility—recognizing a same-sex marriage performed elsewhere as a marriage under forum law—it may seem farfetched. After all, why would a state that does not allow its own citizens to marry in same-sex unions treat similarly situated citizens from other states differently—better, in fact—by recognizing their marriages? However, it is not particularly farfetched at all, given that states often choose the law of other states based on interests like comity and uniformity. Further, while no marriage-like state has yet adopted this approach, there is reason to believe that some might do so. Some state officials contemplating same-sex marriage have found it impossible to enact a same-sex marriage law but easier to legalize recognition of same-sex marriages performed in other states, particularly where this can be achieved outside of legislative politics. For example, in New York, a marriage-lite state,²⁰ and one in which same-sex marriage bills have faced difficulties in the legislature,²¹ the governor controversially directed state agencies to treat same-sex couples lawfully married in other jurisdictions as married for the purposes of New York law.²² Rhode Island and the

2293060. For a discussion of the opinion, see *infra* notes 28–37 and accompanying text. For a summary of the law in California, see Nancy L. Ober & Paul R. Lynd, *The Wedding Cake Falls: An Update on Same-Sex Marriage and Domestic Partner Issues After the San Francisco Marriage Decision*, <http://library.findlaw.com/2004/Sep/27/172880.html> (last visited Oct. 4, 2010) (“Same-sex marriages from other jurisdictions . . . will not trigger any rights under California[’s] domestic partnership law. Individuals in lawful marriages—even those not recognized in California—are excluded from California’s domestic partnership law.”).

19. See Stephen Clark, *NH Anti-Recognition Bill Reintroduced*, SAME SEX CONFLICTS, <http://www.samesexconflicts.com/blog/2009/1/10/nh-anti-recognition-bill-reintroduced.html> (Jan. 10, 2009, 7:30 AM) (describing the repeated attempts of New Hampshire legislators to amend the code to decline recognition of same-sex relationships lawfully entered into in other states).

20. See *Domestic Partnership Registration*, *supra* note 5 (listing various city and state rights but emphasizing that a New York domestic partnership does not include numerous rights extended in a cross-sex marriage, including the right to obtain workers’ compensation death benefits, the right to petition a court for property partition under the framework of marriage, and the right to sue for wrongful death).

21. See Nate Silver, *Whip Count: Gay Marriage Faces Uphill Odds in New York Senate*, FIVE THIRTY EIGHT BLOG, <http://www.fivethirtyeight.com/2009/05/whip-count-gay-marriage-faces-uphill.html> (May 13, 2009, 8:43 PM) (speculating that a recent gay marriage bill, approved by the New York General Assembly, would likely fail in the state senate, where Democrats hold only a slight majority, not all of whom support the bill); see also Danny Hakim & Jeremy W. Peters, *Senate Democrats Try to Reverse G.O.P. Coup*, N.Y. TIMES, June 9, 2009, <http://www.nytimes.com/2009/06/10/nyregion/10switchsub.html> (describing the Republican coup in the New York Senate, spurred in part by the state’s new same-sex marriage bill, ending in virtual Republican control of the legislature and a likely end to same-sex marriage talks).

22. See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing a foreign same-sex marriage in New York); Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html>; see also Nicholas Confessore, *Court Backs Paterson Regarding Gay Unions*, N.Y. TIMES, Sept. 3, 2008, <http://www.nytimes.com/2008/09/03/nyregion/03marry.html>

District of Columbia followed suit.²³ Internationally, Israel, best viewed as a marriage-like jurisdiction, did the same and recognizes foreign marriages as marriage for the purposes of Israeli law.²⁴ Given these examples, it is entirely conceivable that more states, including some marriage-like states, will choose to recognize same-sex marriages lawfully performed elsewhere as marriage for local law purposes.

This is all to say that there is no consensus among the marriage-like states on how to resolve the marriage/marriage-like conflict.

2. The Remaining Conflict Patterns

Thus far, I have sketched only the possibilities that present themselves in the case of relocation from a marriage state to a marriage-like state. It is easy to see, though, that these same possibilities exist in the case of a move from a marriage state to a marriage-lite state (the marriage/marriage-lite conflict). That is, a marriage-lite state could, as New York has, recognize a same-sex marriage performed in another state as a marriage; it could automatically convert the relationship to the state's marriage-lite alternative; or it could, as most marriage-lite states have, refuse to recognize the relationship altogether.²⁵ And, of course, the same options

(“The decision [that Governor David Paterson acted within his power to require the New York government to recognize same-sex marriages performed out of state] is the latest in a string of rulings by state courts that have upheld the right of same-sex couples who were married in other jurisdictions to have their marital status recognized in New York . . .”).

23. For Rhode Island, see Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, <http://www.nytimes.com/2007/02/22/us/22rhode.html?ex=1329800400&en=60b8729465adf8c1&ei=5088&partner=rssnyt&emc=rss> (announcing the reversal of the Rhode Island attorney general's opposition to recognition of Massachusetts same-sex marriages in Rhode Island and his new opinion that these marriages should be recognized in the state); see also Katie Zezima, *Rhode Island Couple Wins Same-Sex Marriage Case*, N.Y. TIMES, Sept. 30, 2006, <http://travel2.nytimes.com/2006/09/30/us/30gay.html> (describing Rhode Island attorney general's original opinion).

While the District of Columbia is obviously not a state, it was a marriage-lite jurisdiction until it became a marriage jurisdiction. See *What are the Benefits of Participation?*, D.C. DEP'T OF HEALTH, http://dchealth.dc.gov/doh/cwp/view,a,3,q,573324,dohNav_GID,1787,dohNav_/33110/33120/33139/.asp#6 (last visited Oct. 15, 2010) (enumerating the limited rights afforded to same-sex couples, including the right to hospital visitation, the right to control over a partner's remains, and the right to add one partner to the insurance policy of the other partner as a family member).

24. Because marriage and many other family status issues in Israel are controlled by religious authorities opposed to same-sex marriage, no law requiring recognition of same-sex marriage could currently be adopted in Israel. However, the Israeli courts have held that Israel must treat same-sex couples lawfully married in other jurisdictions as married under Israeli law. Yuval Yoaz, *High Court: Interior Ministry Must Register Same-Sex Couples Legally Married Abroad*, HAARETZ, Nov. 22, 2006, <http://www.haaretz.com/print-edition/news/high-court-interior-ministry-must-register-same-sex-couples-legally-married-abroad-1.202009>. To be sure, the Israeli court's decision was not based on American conflicts principles but rather on unique principles of Israeli law. It demonstrates, however, that some jurisdictions have adopted this rule.

25. Other than those I have already discussed, no states, including the marriage-lite states, attach any status to same-sex marriages performed elsewhere.

are available for the final way in which couples could move “down” the scale in status by moving from a marriage-like state to a marriage-lite state (the marriage-like/marriage-lite conflict).

For couples moving “up” the scale—from a marriage-lite to a marriage-like or marriage state (the marriage-lite/marriage-like or marriage conflict), or from a marriage-like to a marriage state (the marriage-like/marriage conflict)—only two options realistically exist: either the forum state (the state offering a greater level of recognition) converts the relationship to the higher status or it refuses to accord it any status. The third option—that the forum state will recognize the marriage alternative from another state on its own terms—is, though theoretically viable, practically unrealistic. After all, it would be improbable and strange, both as a conflicts law matter and commonsensically, to require Massachusetts (a marriage state) to recognize a New Jersey civil union as a civil union under Massachusetts law, given that civil unions do not exist under Massachusetts law. To do so, Massachusetts would have to create a new category for foreigners relocating within its borders, and it is difficult (perhaps impossible) to identify a case in which courts or local law have required states to do something comparable. Thus, the realistic choices for Massachusetts are to treat the New Hampshire civil union either as a marriage or as nothing.

B. *The Failure of Policy-Makers to Undertake a Proper Conflicts Analysis*

Some states have already begun to grapple with these conflicts. State policymakers have devoted the most attention to the marriage/marriage-like conflict.

In some states, legislatures have provided the answers to this question. For example, New Hampshire’s statutory scheme governing its marriage-like alternative (before it became a marriage state) explicitly provided that the state would automatically treat a same-sex couple lawfully married in Massachusetts as having entered into a civil union under New Hampshire law.²⁶ In such cases—where the legislature has explicitly resolved the legal question—we benefit from the clarity of the rules. That is, a couple interested in learning about its family status upon relocation could, with relative ease, obtain a straightforward answer. But while clarity is welcome, these statutes provide little by way of explanation. We do not know *why* these marriage-like states have adopted these rules. Further, statutes like this provide no guidance for policymakers in other jurisdictions grappling with the marriage/marriage-like/marriage-lite conflicts.

Other states that have addressed the problem have done so outside of

26. “A civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter.” N.H. REV. STAT. ANN. § 457-A:8 (2010) (repealed 2011).

the legislative process. For instance, when Connecticut legislatively adopted a marriage-like scheme²⁷ (a court ruling has since required it to perform and recognize same-sex marriages²⁸), its statutory provisions were not clear on this question. Connecticut's marriage-like statute contained a provision defining marriage as "the union of one man and one woman," effectively a Defense of Marriage Act formulation.²⁹ Moreover, the legislature left untouched the statutes that referred to marriages in gendered terms, raising the possibility that Connecticut would entirely refuse to recognize same-sex marriages entered into in other states. However, also untouched was Connecticut's longstanding presumption that "except in certain extreme cases, a marriage valid where the ceremony is performed is valid everywhere," raising the possibility that Connecticut would recognize a same-sex marriage lawfully performed in Massachusetts as a marriage under Connecticut's laws.³⁰ And, of course, the fact that Connecticut defined marriage as between a man and a woman is not dispositive on whether it should accord any status at all to a same-sex couple lawfully married in another state. After all, it could have taken the middle approach and converted the marriage to Connecticut's marriage-like alternative. As a result of this confusion, the state's attorney general was tasked with issuing a formal opinion on the matter. The attorney general opined that Connecticut would not accord any status to same-sex marriages lawfully entered into in other states.³¹

The Connecticut attorney general's opinion—which was the first and (to my knowledge) still the most thoroughly argued consideration of these issues by a policymaker—is useful in several respects. First, like New Hampshire's statutes that explicitly provided for automatic civil union status for a lawfully wed same-sex couple, the attorney general's opinion provided clarity. Second, unlike those statutes, the opinion explained the attorney general's reasoning.³² Third, the reasoning is based on principles from conflicts law, recognizing that the question presented is a conflicts question.³³ Fourth, because the attorney general provided his reasoning, the opinion could be persuasive to policymakers in other states and could thus lead to some measure of uniformity. Unfortunately, though, the opinion is unhelpful in one crucial respect: it is deeply confused.

The attorney general centers his analysis, properly enough, on the principle that Connecticut must recognize a marriage lawfully performed in

27. CONN. GEN. STAT. ANN. §§ 46b-38aa to -38oo (West Supp. 2006) (repealed 2009).

28. *Kerrigan v. Comm'r. of Pub. Health*, 957 A.2d 407, 476–78 (Conn. 2008).

29. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2006) (repealed 2009).

30. *Davis v. Davis*, 175 A. 574, 575 (Conn. 1934).

31. Conn. Op. Att'y Gen. No. 2005-024 (2005), 2005 WL 2293060, at *3.

32. *See id.* at *1–5.

33. *Id.* at *2–5.

another state unless such a union violates Connecticut's public policy.³⁴ However, the extent of the attorney general's analysis of Connecticut's public policy is that Connecticut defines marriage as between one man and one woman.³⁵ Therefore, the attorney general concludes, the state could not automatically extend any rights at all to a same-sex marriage from another state.³⁶ Q.E.D.³⁷

As I will explain in greater detail, this is not remotely what a conflicts analysis requires.³⁸ This reasoning might suffice if the opinion were addressed to a marriage/no-recognition conflict, but the proper question to begin with for a marriage/marriage-like conflict is *why* Connecticut chooses to limit marriage to cross-sex couples but to give same-sex couples the very same rights and responsibilities under a different title—a question that the attorney general's opinion never addresses. Only by confronting this question directly—that is, only by engaging in a proper conflicts analysis—could the attorney general arrive at a plausible and compelling approach for dealing with these conflicts. Alas, it appears that no policymaker has undertaken such an analysis.

III. THE LIMITS OF CURRENT SCHOLARLY APPROACHES

As I have indicated, I am not the first to consider the conflicts that arise as a result of legal recognition of same-sex relationships. On the contrary, there is quite a large body of scholarly literature focusing on these issues. Scholarly interest in the issue began to emerge in the wake of the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*,³⁹ the first decision that seemed to open the door for state recognition of same-sex marriage.⁴⁰ Ultimately, Hawaii amended its constitution to allow the legislature to restrict marriage to cross-sex couples and thus to forestall any conflicts questions from arising in courts;⁴¹ but before it did so, the media and legal scholars began to consider whether and how other states would recognize

34. See *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. App. Ct. 2002).

35. Conn. Op. Att'y Gen. No. 2005-024 (2005), 2005 WL 2293060, at *3-4.

36. *Id.* at *5.

37. Seriously. That's all there is to the opinion.

38. See *infra* Part IV.

39. 852 P.2d 44 (Haw. 1993).

40. See, e.g., Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married when We Return Home?*, 1994 WIS. L. REV. 1033, 1038-41 (1994); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 552-53 (1994); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 499-500 (1995); Kramer, *supra* note 13, at 1965-67.

41. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

same-sex marriages performed in Hawaii (or any other state that adopted same-sex marriage).⁴² In the years that followed, a robust body of scholarship developed concerning this conflicts question.

However, as I will argue in this Part, the two general approaches to these conflicts offered by scholars—what I refer to as the vertical federalist approach⁴³ and the narrow horizontal federalist approach⁴⁴—are theoretically and practically unsatisfying. More importantly, because they focus almost exclusively on the marriage/no-recognition conflict and draw from sources that speak only to that specific context, they offer little guidance for resolving the marriage/marriage-like/marriage-lite conflicts that will likely predominate in the coming years. Indeed, on these questions, the scholarly literature is virtually silent.

A. *The Vertical Federalist Approach and Its Limits*

In the wake of *Baehr*, the first question that arose was whether the U.S. Constitution would compel states to recognize same-sex marriages that everyone anticipated (mistakenly, as it turns out) would soon be performed in Hawaii. Some reports suggested that the Full Faith and Credit Clause⁴⁵ would require other states to extend such recognition, regardless of any objections those states would have to doing so.⁴⁶ According to this view, any conflict is easily resolved through a vertical federalist approach: the federal Constitution would dictate to states what they must do.

42. With respect to media interest in the issue, see, for example, Tom Campbell, *Perspective on Same-Sex Marriages; Each State Should Be Able to Make Its Own Decision; California Public Policy Should Be Decided by California Voters and Legislators, Not by a Judge in Hawaii*, L.A. TIMES, July 12, 1996, at B9; Chris Casteel, *Gay Nuptials Bill Sparks Stormy Capitol Debate*, DAILY OKLAHOMAN, July 12, 1996, at A1; David Foster, *Gay Couples Seek Benefit of Legal Wedlock*, CHI. TRIB., June 6, 1996, at C8; *Gays Win Hawaii Marriage Ruling; Decision May Set Off Legal Battles on Mainland*, CHI. TRIB., Dec. 4, 1996, at N1; Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES, Apr. 25, 1994, at A1; Patricia G. Miller, Editorial, *No Faith or Credit?: Refusal to Recognize Same-Sex Marriages in Another State Could Mean Problems*, PITT. POST-GAZETTE, Dec. 21, 1996, at A11.

43. As I explain below, vertical federalism posits that the federal government—in this case, through the Constitution's Full Faith and Credit Clause—resolves these conflicts among states. See *infra* Part III.A.

44. As I explain below, the horizontal federalist approach assumes that the states are on an equal playing field and that they must resolve disputes individually, without resort to the federal government. I refer to the horizontal federalist approach in this context as narrow because, as I detail below, it looks at a very small subset of cases to develop a framework for resolving conflicts relating to same-sex relationships. Although I agree that the solution to these conflicts lies in a horizontal approach, I offer a much more broadly based theoretical basis that leads to some different conclusions. See *infra* Part III.B.

45. "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." U.S. CONST. art. IV, § 1.

46. See *supra* note 42.

But this approach was too simplistic, and quite clearly wrong, both as a descriptive matter and as a normative matter. Descriptively, it has never been held that states must recognize other states' marriages in all circumstances under the Full Faith and Credit Clause. Although states do generally recognize marriages from sister states, they have always reserved for themselves the right to reject those marriages that violate their own public policies.⁴⁷ Moreover, given the intense opposition to same-sex marriage at the time (and today), it is nearly inconceivable that many federal or state courts would interpret and apply the Full Faith and Credit Clause in this manner. Thus, simply as a statement of the present state of the law and the courts, this version of the vertical federalist approach is readily rejected.

This approach is also normatively and theoretically unsound. Consider its implications. It would mean that a state must *always* give preference to another jurisdiction's policies over its own.⁴⁸ That is, anything that qualifies as a "public Act[], Record[], [or] judicial Proceeding[]"⁴⁹ of another state would trump a forum state's own interests. In determining whether to recognize a marriage, the forum state's own policies would not matter, whereas every other state's would. The courts have expressly rejected this argument, and no legal scholar has seriously argued for it in this or any other context.⁵⁰

However, while this simplistic approach is easily rejected, there are more nuanced vertical federalist approaches to the issue. For example, some scholars have sought to narrow the public policy exception to the Full Faith and Credit Clause such that same-sex marriage does not come within the exception.⁵¹ The trouble is that courts are not likely to adopt this sort of approach, and in any case, many states have defeated it by enacting laws that expressly state that same-sex marriage is against the public policy of the state.⁵²

The most refined and creditable vertical federalist approach to conflicts arising from same-sex relationships is that of Professor Larry Kramer.⁵³ According to Kramer, although a forum state may reject some foreign marriages, it may not do so simply as a result of substantive disagreement as to the desirability of the particular marriage in question.⁵⁴ To put it more starkly, Kramer argues that the public policy exception that allows states to decline to recognize or apply other states' laws (including marriage status

47. Kramer, *supra* note 13, at 1971.

48. *Id.* at 1977.

49. U.S. CONST. art. IV, § 1.

50. *See* Kramer, *supra* note 13, at 1977–78.

51. *See, e.g.,* Henson, *supra* note 40, at 555.

52. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2149 (2005).

53. *See generally* Kramer, *supra* note 13.

54. *Id.* at 1966–67, 1986.

conferred by other states) is unconstitutional.⁵⁵ According to this view, a forum state may not reject same-sex marriages from marriage states if the forum state otherwise recognizes similarly situated opposite-sex marriages; but states may adopt choice of law rules that equally affect all foreign marriages.⁵⁶

For example, under the choice of law rules governing marriage currently accepted by most states, a forum state will generally recognize a foreign marriage if the marriage was lawful where it was celebrated.⁵⁷ Under this choice of law regime, if an opposite-sex couple travels from state *A* to state *B* solely for the purpose of getting married, state *A* will recognize the marriage. In Kramer's view, pursuant to the Full Faith and Credit Clause, there can be no public policy exception to this rule.⁵⁸ Thus, if a same-sex couple travels from state *A* to state *B* solely for the purpose of getting married—and specifically because state *A* does not perform same-sex marriages performed within its borders—then state *A* must still recognize the marriage.⁵⁹ However, state *A* could adopt a different generally-applicable choice of law rule that refuses to recognize *any* marriages in which a couple seeks to evade local laws by temporarily traveling to another state for the purpose of marriage.⁶⁰

It is worth noting that although I categorize this approach as an example of vertical federalism, it is actually a sort of hybrid approach that also includes an element of horizontal federalism. After all, this approach does not require that all states behave identically under the Constitution. Instead, the approach allows a state to select its own choice of law rules (a type of horizontal federalism) and only prohibits the state from declining to apply its own choice of law rules in a particular case as a result of a substantive rejection of another state's policies.⁶¹ Nevertheless, I categorize this approach as vertically federalist because it centers on a particular reading of the Constitution's Full Faith and Credit Clause, and also because, as a practical matter, it would render many states' approaches to marriage conflicts unconstitutional.

This version of the vertical federalist approach to same-sex marriage conflicts is undoubtedly more formidable than the simplistic argument offered by some commentators. Still, while its implications appear somewhat more limited than those of the simplistic version—states determined not to recognize same-sex marriages could rework their choice of law rules to avoid doing so in some cases—it nevertheless has far-

55. *Id.*

56. *Id.* at 1998–99.

57. *Id.* at 1969.

58. *Id.* at 1999.

59. *See id.*

60. *See id.*

61. *See id.* at 1998.

reaching consequences. For one thing, a state staunchly opposed to same-sex marriages would inevitably find itself compelled to recognize some of them. Specifically, while a state could rework its choice of law rules such that it could reject evasive same-sex marriages, there is probably no choice of law regime that would allow it to reject the same-sex marriages of couples who actually lived in marriage states, married there, and then, at some later time, moved to the forum state. Thus, many states opposed to same-sex marriage would nevertheless be compelled to recognize them in some instances. Furthermore, as Kramer acknowledges, entirely apart from the marriage context, his argument would undo a breathtakingly broad and robust body of doctrine and jurisprudence that arises from the public policy exception.⁶²

Of course, the mere fact that an argument has far-reaching implications does not discredit it. However, Kramer's vertical federalist approach is ultimately unsatisfying. Normatively, it relies on a contestable claim about the nature and reach of the Full Faith and Credit Clause. Many would argue that this constitutional provision includes within it a public policy exception and always has.⁶³ More importantly, purely as a descriptive matter, it is almost certainly an argument that will not survive judicial review. That is, even if it is theoretically sound and persuasive, we can predict with relative confidence that the current U.S. Supreme Court will reject it. I say this for two reasons. First—and here is where the far-reaching implications of the argument come into play—I think it is fair to speculate that the Court will not likely wish to so severely destabilize the law by undermining and undoing all of the applications of the public policy exception, particularly given that the public policy exception has been upheld for decades by every court to confront it, including the Supreme Court itself.⁶⁴ Second, from a crassly legal realist perspective, if we believe that a majority of the current Court is opposed to same-sex marriage and would not require states to perform same-sex marriage on equal protection, due process, or fundamental rights grounds,⁶⁵ then it seems likewise unlikely that those same Justices would be prepared to require recognition of foreign same-sex marriages on full faith and credit grounds. If, on the other hand, we believe that the Supreme Court is prepared to require states to perform same-sex marriages, then it will likely make that decision before it considers the conflicts question and thus renders the entire issue moot. If there remains any doubt as to whether Kramer's vertical federalist argument would fail in court, I can only add that same-sex marriage

62. *See id.* at 1973.

63. *Id.* at 1980.

64. *See id.* at 1977–78.

65. *See* William N. Eskridge, Jr. & Darren Spedale, *Sit Down, Ted Olson and David Boies*, SLATE, May 29, 2009, <http://www.slate.com/id/2219252/> (arguing that the Court, as currently composed, is unlikely to find a right to same-sex marriage).

advocates have declined to use it in their litigation arsenal as a basis for challenging states' refusals to recognize same-sex marriage. Perhaps they too view it as sure to fail, whatever its theoretical merits.

Further, even if the vertical federalist argument might have some purchase in courts as a way of resolving conflicts arising from same-sex marriage, as a strategic matter, it is not one that same-sex marriage advocates should pursue. Although this view is likely controversial, I believe that same-sex marriage advocates have more to lose in pursuing this argument—even if it were to prevail—than they stand to gain. Forcing a state with a population overwhelmingly and adamantly opposed to same-sex marriage to recognize same-sex marriages performed in other states with different political and social cultures is likely to spark a massive backlash against the same-sex marriage project so as to retard its steady, albeit slow, progress.⁶⁶ (I argued in the previous paragraph that the absence of lawsuits built around Kramer's arguments indicates something about same-sex marriage advocates' calculations about its likelihood of success. It is also possible, of course, that the absence of such lawsuits can be explained by same-sex marriage advocates' calculation that the potential *success* of such lawsuits could threaten the same-sex marriage project as a result of the backlash that it would spark.) In addition, advocates for same-sex marriage have built their case, in part, on the back of states' rights rhetoric. Indeed, they assured opponents and fence-straddlers that the adoption of same-sex marriage by one state would not force the hand of other states. Having successfully introduced same-sex marriage in a small number of states, it would now be unseemly, even dishonest, to use that as a wedge to force same-sex marriage on other states.⁶⁷

Finally, there is one dispositive reason for reaching beyond Kramer's vertical federalist approach: it does not resolve all of the conflicts. At best, the vertical federalist approach extends to conflicts that involve recognition of same-sex *marriage*; this approach offers no guidance when it comes to

66. The recent history in California and Maine may be instructive. In both states, the courts held that the state constitution required recognition of same-sex marriage. Almost immediately, however, ballot initiatives reversed these holdings. Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html>; Michael Falcone, *Maine Vote Repeals Gay Marriage Law*, POLITICO, Nov. 4, 2009, available at <http://www.politico.com/news/stories/1109/29119.html>. Recall that both California and Maine are relatively progressive states in relatively progressive regions. If the public outcry against same-sex marriage was powerful enough there, consider what the outcry might look like if a federal court in a politically conservative state were to require the state to recognize another state's same-sex marriages. In the worst-case scenario, it might be enough to generate support for a Federal Marriage Amendment prohibiting same-sex marriage everywhere, thereby erasing whatever gains the movement has made thus far and severely retarding future development. Short of that, it would at least become a wedge issue yet again in national political elections.

67. I have fleshed out these arguments in a recent symposium contribution. See Hillel Y. Levin, *Conflicts and the Shifting Landscape Around Same-Sex Relationships*, 41 CAL. W. INT'L L.J. (forthcoming 2011).

recognition of foreign marriage-like and marriage-lite relationships that are at the heart of this Article. This is because no one would argue that the Full Faith and Credit Clause requires one state to recognize marriage-like and marriage-lite relationships created in other states. If this seems less than intuitive, consider the following hypothetical. State *A* decides to give certain state tax benefits to computer owners. Sam, a resident of State *A*, acquires a computer and enjoys the tax benefits. Subsequently, Sam and her computer move to State *B*, a state that does not extend tax benefits to computer owners. Can Sam claim that the Full Faith and Credit Clause requires State *B* to offer her the same tax benefits that she enjoyed in State *A*? Obviously not. State *B* is free to reject the special status offered by State *A*. Similarly, a state is permitted to decline to recognize a special status conferred by marriage-like and marriage-lite schemes from other states.

Thus, many of the conflicts that this Article seeks to resolve would remain unresolved under Kramer's analysis. For instance, should a marriage state treat a marriage-like relationship from another state as a marriage, as nothing, or as something else? Should a marriage-lite state treat a marriage-like relationship from another state as anything? And so on. Thus, whatever the substantive, normative, descriptive, and strategic merits or demerits of the vertical federalist approach, it does not suffice.

B. *The Narrow Horizontal Federalist Approach and Its Limits*

Recognizing that the solution to the problem initially posed in the wake of *Baehr*—must another state recognize a same-sex marriage performed in Hawaii?—may not lie in the Constitution, some legal scholars have developed a different approach. They did not have to search very far to locate precedent to guide them. After all, the challenge of recognition of same-sex relationships is not the first time that states have been confronted with the question of whether to recognize foreign marriages that could not be performed in the forum states.

Indeed, there is a long history of states having different rules for marriage in this country. States have different age of consent laws, for example. Similarly, states differ in their consanguinity laws: some permit first cousins to marry while others do not. Likewise, some American territories and foreign countries have permitted polygamous marriages. And finally, of course, until *Loving v. Virginia*,⁶⁸ some states prohibited interracial marriages (or at least *some* interracial marriages—those that included whites and members of any other race) while others permitted them. In each of these contexts, the fundamental question has been: What to do when a couple lawfully married in one jurisdiction and then returned, traveled, or moved to a state in which that marriage could not have been

68. 388 U.S. 1 (1967).

performed?⁶⁹

It is easy to see why scholars would turn to the doctrine that emerged from those contexts to resolve the conflicts arising from recognition of same-sex relationships: they seem to present similar questions. Based on cases from these contexts, scholars have developed a horizontal federalist model for resolving conflicts arising from same-sex relationships. In developing this model, scholars have begun with the principles that emerged from the previous marriage conflicts contexts that I have identified. The basic rule has been that states that prohibited a particular marriage also declined to recognize such marriages that had been lawfully created in other jurisdictions.⁷⁰ This is because, generally speaking, a state may reject a marriage that violates its own public policy interests.⁷¹

If this were the sum total of the cases arising from those earlier conflicts contexts, the application to the same-sex marriage context would be clear: a state with a public policy against same-sex marriage would not recognize a same-sex marriage lawfully performed elsewhere. But the cases, and therefore the scholarship, are quite a bit more complicated than that. Although states may reject marriages that offend their public policies, in some circumstances, the forum state would extend some of the “incidents” of marriage to these “objectionable” unions. That is, the forum state would recognize the couple as married for some purposes but not for others. These “incidents of marriage” cases are what scholars parse to develop a horizontal federalist approach to the conflicts arising from same-sex relationships.

This approach is superior to the vertical federalist approach discussed above. However, it is not without its flaws. Chief among them, the

69. See, e.g., Cox, *supra* note 40, at 1040; Henson, *supra* note 40, at 553. With respect to interracial marriages, see Wardle, *supra* note 6, at 1893 & n.168. To be sure, there were cases on both sides of this question. See Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 104 (2004) (explaining that while truly evasive marriages often received no recognition, courts sometimes recognized interracial marriages lawfully entered into in a state other than the forum if the couple was legitimately domiciled in that state); Koppelman, *supra* note 52, at 2154 n.49 (comparing *State v. Ross*, 76 N.C. 242 (1877), with *State v. Bell*, 66 Tenn. 9 (1872)). Compare *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948) (recognizing an interracial marriage for purposes of intestate succession when Mississippi prohibited interracial marriage), and *State v. Ross*, 76 N.C. 242, 243, 247 (1877) (recognizing an interracial marriage lawfully entered into in South Carolina when a couple was domiciled in South Carolina and subsequently relocated to North Carolina), with *State v. Kennedy*, 76 N.C. 251, 251–53 (1877) (declining to recognize an interracial marriage lawfully entered into in South Carolina when the couple was never domiciled in South Carolina but merely married there). With respect to polygamous and consanguineous relationships, see Wardle, *supra* note 6, at 1896–1900.

70. See Henson, *supra* note 40, at 553; Wardle, *supra* note 6, at 1896.

71. See KOPPELMAN, *supra* note 14, at 117; Kramer, *supra* note 13, at 1968–76 (describing that the basic doctrine is that a marriage is valid everywhere if it is valid where it is celebrated, with some exceptions; the primary exception being when it violates public policy).

incidents of marriage cases are notoriously fragmentary. As such, they do not readily offer a cohesive and coherent approach for determining which “incidents” of marriage should be recognized by the forum state and which should not. Scholars have struggled to make sense of these cases and to develop rules.⁷² Doing so is something like recreating a complex statutory scheme by referencing a small number of cases in which the statute was applied. Further, scholars inevitably make contestable claims about how to categorize cases and what to learn from them.⁷³ Which incidents of marriage should a state extend to a couple and which should it not? Under what circumstances? Given these difficulties, few scholars have even attempted to offer a comprehensive scheme from these fragments.

To be sure, there is some excellent scholarship in this area. In his book, *Same Sex, Different States*, Professor Andrew Koppelman makes a heroic effort to deduce rules from the incidents of marriage cases and create a workable framework for resolving conflicts arising from the recognition of same-sex marriage.⁷⁴ The analysis he develops is compelling in many ways, but it falls prey to the problems that often beset those engaged with this enterprise. First, he relies on a very small set of incidents of marriage cases to develop his thesis. (This is no fault of his own; there are simply not very many cases to begin with.) Second, the cases he analyzes offer little by way of explanation for why they come out as they do. In this sense, they are paragons of formalist reasoning, announcing a rule without explaining the values and principles that undergird it. As a result, Koppelman expends a great deal of effort categorizing these cases in such a way as to provide a coherent framework, but the categories and lessons he draws are suspect because the source material is so sparse.

Third, the framework that Koppelman offers is awfully complex. He concludes that “evasive marriages” (as when a couple domiciled in a no-recognition state travels to a marriage state to get married and then returns to the domicile) should generally not be recognized in the domicile state.⁷⁵ In contrast, “migratory marriages” (as when a couple domiciled and married in a marriage state subsequently relocates to a no-recognition state) should not be recognized, with several exceptions and exceptions to exceptions.⁷⁶ Next, “visitor marriages” (as when a couple domiciled in a marriage state travels to a no-recognition state) should always be recognized.⁷⁷ Finally, “extraterritorial marriages” (as when a couple domiciled and married in a marriage state has never been to the no-recognition forum state, but the marriage is “relevant to litigation

72. *See supra* note 5.

73. *Id.*

74. KOPPELMAN, *supra* note 14, at 91–96.

75. *Id.* at 102–06.

76. *Id.* at 106–10.

77. *Id.* at 110–12.

conducted there”) should also always be recognized.⁷⁸ The existence of so many categories, with different rules applying to each, is daunting enough. But beyond that, the framework, with its exceptions and exceptions to exceptions, is particularly difficult to administer. For example, it would require a court to determine whether a couple relocates for evasive purposes or for migratory purposes—a determination that Koppelman agrees is sometimes difficult and contestable.⁷⁹ To be sure, difficulty of administration and inherent uncertainty are not alone sufficient reason to reject a proposal that is otherwise compelling, but they are surely worthy of consideration in determining whether a proposal is optimal.

Moreover, although Koppelman’s approach represents the best of the scholarship that focuses on the incidents of marriage framework, its application to the marriage/marriage-like/marriage-lite conflicts at the heart of this Article is, at best, unclear. Beyond remarking offhandedly that “[i]n [marriage-like] states, foreign same-sex marriages ought to be simply treated as if they were [the local marriage-like alternative],” Koppelman has little to say on the matter.⁸⁰ He offers no explanation for why this rule should apply with respect to the marriage/marriage-like conflict, even while noting that several marriage-like states reject this approach;⁸¹ and he does not even broach the marriage-like/marriage conflict or any conflict patterns involving marriage-lite states. Thus, it is not clear how this horizontal federalist approach would translate to the marriage/marriage-like/marriage-lite conflicts context.

The lack of focus on these conflicts in the horizontal federalist literature is likely a direct result of the literature’s near-exclusive focus on the incidents of marriage cases. The incidents of marriage cases, after all, arose from marriage/no-recognition conflicts. That is, the conflicting laws that triggered those lawsuits either permitted or prohibited the marriages in question; they provided no intermediate marriage alternatives for the couples in question. As a result, the doctrinal framework for resolving those cases was fairly straightforward: first, determine whether the forum state’s prohibition of such marriages constituted a public policy objection, and second, if so, consider whether the right sought by the couple was, nevertheless, an incident of marriage that could be separated from the marriage itself. As Koppelman and others argue, this may transfer easily to marriage/no-recognition conflict in the context of same-sex relationships. But the danger in adopting such a narrow approach is that it leaves all of the newer conflicts questions unresolved.

One natural response to these observations might be, “Fine, I get it. The current scholarship does not adequately or neatly translate the incidents of

78. *Id.* at 112.

79. *Id.* at 106.

80. *Id.* at 108.

81. *Id.*

marriage doctrines to the marriage/marriage-like/marriage-lite conflicts context. So do it. Go back and interrogate the incidents of marriage cases and report back what they have to say about these newer conflicts patterns.” The trouble is that the incidents of marriage cases are too limited to withstand that type of interrogation. I mean this in two senses. First, my comment above about the inherent contestability of the principles that emerge from these cases for resolving marriage/no-recognition conflicts in the context of same-sex relationships applies doubly (at least) if we try to stretch these principles to resolve other conflicts patterns. That is, the cases are too few, too inconsistent, and too thinly reasoned to offer much guidance.

Second, and most importantly, the marriage/marriage-like/marriage-lite conflicts questions are fundamentally different from the marriage/no-recognition conflicts question. With respect to the latter, it is not difficult to appreciate that a state’s utter rejection of marriage (be it an interracial, consanguineous, polygamous, or same-sex marriage) is a strong indication of an objection on the part of that state to the relationship underlying the marriage. Thus, the predominant rule that forum states that do not permit these marriages will generally reject them makes some intuitive sense. But a marriage-like or marriage-lite state that allows same-sex couples all or some of the rights and responsibilities traditionally associated with marriage, even as it withholds the title marriage and perhaps many of the other rights and responsibilities that typically come with marriage, is a different thing. The incidents of marriage cases, narrowly focused as they are on marriage/no-recognition conflicts, shine little light on these cases.

For all of these reasons, the resolution of the marriage/marriage-like/marriage-lite conflicts lies not in a narrow horizontal federalist approach that focuses nearly exclusively on the incidents of marriages cases but rather in a broader horizontal federalist approach that looks to basic conflicts principles to confront these questions.

IV. A NEW APPROACH

In this Part, I develop a new approach for resolving the marriage/marriage-like/marriage-lite conflicts. My approach views conflicts through a horizontal federalist lens but provides a broader theoretical framework that is more sensitive and responsive to conflicts doctrine and theory, as well as to the various marriage alternatives now offered by states, than are the current models.

Conflicts doctrine deals with the sort of conflicts pattern presented by the marriage/marriage-like/marriage-lite conflicts in several areas across the law. I do not refer here to the parallel marriage/no-recognition conflicts arising from different laws regarding interracial marriage, consanguinity, and so forth. As we have seen, those cases are too limited to serve as the template for resolving the newer conflicts. Rather, I refer to a different sort

of conflict pattern entirely—namely, the case in which a forum state refuses to recognize *some* aspects of a legal status recognized and conferred by a foreign state but chooses to recognize others. In such cases, the question arises as to whether the forum state will recognize the status conferred by the foreign state, reject it altogether, or alter the foreign status such that it would conform to the forum state's law. This, of course, is the marriage/marriage-like/marriage-lite pattern, and by expanding the scope of the inquiry beyond the marriage/no-recognition conflicts of the past, we find that states routinely (but not always) adopt the third option, of altering the foreign status in order to conform it to local law.

I begin this Part by offering three examples of how conflicts law resolves this conflicts pattern: one from contracts law and two from family law. After doing so, I show that this general approach, although it has no formal name in American conflicts law, mirrors a French conflicts doctrine called Equivalence. I then argue that the Equivalence concept fits comfortably within American family law conflicts doctrine, and I show how it would resolve the marriage/marriage-like/marriage-lite conflicts. Finally, I show how this approach fits with contemporary conflicts doctrine.

A. *Three Examples of the Pattern*

1. Severability of Unenforceable Contracts Clauses

Parties sometimes enter into a contract in a foreign state that contains a clause that a forum state adjudicating the contract deems unenforceable. In such a case, the question arises as to how the forum state should treat the rest of the contract. Should the state (1) put aside its objections to the problematic clause on the grounds that it should give full force to a sister state's law; (2) reject the contract entirely; or (3) sever the unenforceable clause and give full force to what is left of the contract? For example, consider the following case. *X* and *Y* enter into a contract in state *A*. The contract contains a clause in which *Y* waives certain statutory rights. The clause is lawful in state *A*. However, suppose that litigation ensues in state *B*, where the waiver clause is void as against public policy. What should state *B* do?

Indeed, this pattern arises with some frequency in contracts cases. And, truth be told, it is not limited to foreign versus forum law conflicts. For example, suppose that two parties enter into an employment contract in state *A*, where *X* agrees to work for *Y*. Suppose further that the employment contract includes a non-compete provision in the event that the employment relationship is terminated. But suppose that the non-compete provision contains work restrictions that are too broad and would render the provision unenforceable under state *A*'s law. In the event of litigation concerning the employment relationship, how should state *A* view the

contract as a whole?

In such cases, the court will often sever the unenforceable provision such that the remainder of the contract will be valid and enforceable.⁸² Thus, a contract provision void in the forum state does not always void an entire contract.⁸³ Similarly, an employment contract that contains an unenforceable non-compete clause is generally valid, except with respect to the non-compete clause itself.⁸⁴ In other words, the court will conform the contract, where possible, to local law and policy. In so doing, it can uphold its interest in enforcing agreements between parties while simultaneously affirming its opposition to the particular provision in question.⁸⁵

2. Different Contents of the Marriage Relationship

This conflicts pattern—and resolution—is also found within family law itself. The states vary somewhat with regard to precisely which rights travel along with marriage. Some states are community property states⁸⁶ while others are common law states.⁸⁷ If a couple were to move from the

82. See 17A AM. JUR. 2D *Contracts* § 318 (2004) (“If any part of such an agreement is valid, it will avail pro tanto, though another part may be prohibited by statute, provided: (1) the statute does not, either expressly or by necessary implication, render the whole void; and (2) the sound part can be separated from the unsound and enforced without injustice to the defendant. Under some holdings, a court may modify a contract to comport with the requirements of a statute applicable to the agreement or may reform a contract to eliminate any unconscionable provisions or terms that violate public policy.”); see also 17A C.J.S. *Contracts* § 297 (1999) (“A lawful promise based on a good consideration is not invalid because an unlawful promise is made for the same consideration, and where the illegal portions of an agreement are severable, they will be upheld. . . . If the illegal part can be eliminated without destroying the symmetry of the contract as a whole, this will be done, and the remainder enforced. . . . Thus, the fact that one part of an agreement may be void or unenforceable does not render the entire agreement void, if the prohibited and valid provisions are severable, and if the parties would have entered the bargain absent the illegal portion of the original agreement. In order to avoid inequities, courts will sever the illegal and unenforceable provisions of a contract from the remainder rather than declare the entire contract void.”).

83. See 17A C.J.S. *Contracts* § 297 (1999) (“Except in cases of fundamental interdependency, a contract is not rendered unenforceable because it contains an invalid clause relating to arbitration.”).

84. See, e.g., *Ex parte Crisona*, 743 So. 2d 452, 455 (Ala. 1999); *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So. 2d 765, 767 (Ala. 1996).

85. I do not mean to imply, of course, that conflicts law governing contracts and conflicts law governing family status are identical. Further, as a general matter, family status is more consequential than contractual provisions. I offer this example only as a useful analogy to show that conflicts doctrine allows for flexibility in order to serve the interests of the relevant parties and the relevant states.

86. A community property state is one in which property acquired during a marriage is considered to be owned by both spouses. Community property states in the United States include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and several others. Lee Ann Sontheimer Murphy & Tiffany Knight, *The Ins and Outs of Community Property Law*, LEGALZOOM.COM (June 2006), <http://www.legalzoom.com/marriage-divorce-family-law/divorce/ins-and-outs>.

87. *Community Property States Versus Common Law Property States*, WIGGIN & DANA LLP

first state to the second, the second would generally apply its own law were a dispute about the property to arise (though some states would recognize the status of the property bestowed by the other state)—but it would still recognize the couple as married.⁸⁸

In other words, the mere fact that the forum state might not recognize one aspect of the relationship is not enough for the state to refuse recognition of the relationship altogether. Once again, we find the forum state rejecting that which conflicts with its policies and embracing that which it can.

3. The Incidents of Marriage Cases

As I have argued, the specific case holdings in earlier marriage/no-recognition conflicts shed little light on the marriage/marriage-like/marriage-lite problems. However, one can see that the conflicts principles I have described are implicitly at play in some of those very cases.⁸⁹ Sometimes, when courts have been confronted with conflicts arising from polygamous, consanguineous, and interracial marriages, they have held that, although the no-recognition state has an interest in rejecting the marriage, it might nevertheless have an interest in recognizing aspects of the marriage, the “incidents” of marriage.⁹⁰ For instance, although a no-recognition state might find a polygamous marriage abhorrent, it might nevertheless prefer to enforce an alimony decree from a foreign state that assumes a marriage relationship—because the forum state has no interest in becoming a haven for foreign debtors fleeing court decrees—rather than to refuse to accord any status whatsoever to the relationship.⁹¹ In this way, the forum state adjusts its laws so as to minimize conflicts where possible; but when true conflicts are unavoidable, they reject the foreign state’s law.

Consider also the famous *In re Dalip Singh Bir’s Estate* case.⁹² There, an Indian national with a California bank account and two wives in India

(Nov. 1, 2000), <http://www.wiggin.com/showadvisory.aspx?show=5622>.

88. *Id.* Either of these approaches is consistent with the Equivalence approach. If a forum community property state chooses to treat property acquired in a common law regime as separate property, then it is choosing to modify its own laws slightly so as to conform to the couple’s expectations and mirror what the couple had previously undertaken in the other forum. If it chooses to treat it as quasi-community property, then the forum is choosing to apply its own laws to the couple’s property, modifying them only slightly, without entirely rejecting the relationship. In any event, the key point is that in all cases, the forum state recognizes the couple as married, even though the marriage they had entered into may have included slightly different rights and responsibilities.

89. See KOPPELMAN, *supra* note 14, at 15–20, 82–96; Henson, *supra* note 40, at 564–66, 581–83 (comparing the public policies behind the same-sex “incidents” of marriage debate to those of the polygamous “incidents” cases).

90. See KOPPELMAN, *supra* note 14, at 91–95.

91. See *id.*

92. 188 P.2d 499 (Cal. Dist. Ct. App. 1948).

died intestate in California.⁹³ The court held that a polygamous marriage could be valid in California for the purposes of succession even though California would reject the marriage for other purposes (for instance, cohabitation).⁹⁴ In other words, the court unbundled the term “marriage” and applied those elements of the marriage that were compatible with local law and not those that were abhorrent to it. Similarly, in *Estin v. Estin*, the Supreme Court held that a forum state should recognize those aspects of a divorce judgment obtained in another state that are compatible with the forum state’s own law, even as it rejects the incompatible aspects.⁹⁵ Again, the forum state would look beyond the title (“divorced”) conferred by the other state and would instead focus on the substance of the divorce decree. Further, the state would modify its own laws to the extent possible in order to avoid or minimize conflicts.

In none of these so-called incidents of marriage (or divorce) cases does a court articulate much by way of reasoning; and, to be sure, there are other incidents cases that cannot be squared with this approach (indeed, the incidents cases as a whole defy synthesis and are in some ways incoherent).⁹⁶ However, in an inchoate way, American courts view legal relationships, including marriage, flexibly enough that they can reject those aspects of the relationships that offend their own policies without rejecting the whole.

B. *The French Doctrine of Equivalence*

American conflicts law is filled with many debates and much jargon. As a result, some straightforward concepts, like the fact that American courts sometimes modify legal relationships in order to conform to local law, are not well-articulated or clearly developed. However, a parallel French conflicts law doctrine called Equivalence sheds light on the approach that I have described. Under French law, as in American law, a local court will not apply foreign laws that grant rights to a holder that are incompatible with French policy.⁹⁷ However, under the doctrine of

93. *Id.* at 499.

94. *Id.* at 501–02.

95. *Estin v. Estin*, 334 U.S. 541, 549 (1948). Here, the forum state was required to treat a couple as divorced in the sense that they were no longer husband and wife, but it could continue to require the husband to comply with an alimony order that presupposed that they were still married. *Id.* at 546–49.

96. For a discussion of the many different approaches to these kinds of cases, see generally Wardle, *supra* note 6 (reviewing “incidents” cases involving interracial, polygamous, and same-sex marriages).

97. See BERNARD AUDIT, *DROIT INTERNATIONAL PRIVÉ* paras. 465, 802 (5th ed. 2008); see also Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 283 (2008) (“[W]ith regard to the French plaintiffs, the court concluded that the judgment would be recognized in France because a French court would likely find that . . . U.S. law would likely produce the same outcome as the law that would be applicable

Equivalence, France will do its best to approximate the protections and rights of an incompatible foreign law by applying the nearest equivalents under French law.⁹⁸ That is, even where France would be unable to recognize a right or status afforded by foreign law as such, it will look to the underlying elements of the foreign right or status and find and apply the closest match available under French law.⁹⁹

An example may help to clarify this concept. In the past, France, like other civil law countries, did not recognize trusts.¹⁰⁰ Theoretically, then, a beneficiary of a foreign trust could not claim any benefits from the trust in French courts. However, French courts developed the doctrine of Equivalence and identified and applied the French laws that best approximated the concept and contours of the trust. Consequently, France was able to apply those aspects of the foreign law that France itself did offer.¹⁰¹

This approach has clear benefits. French interests are vindicated in two ways: first, by maintaining the superiority of French law in France; and second, by aligning its own laws, to the extent they permit, with those of other countries and thereby creating a relatively unified and predictable approach to the legal question. In other words, where the interests of two states align, the forum state minimizes conflicts and advances its own interests by finding the nearest equivalent under its own law to apply to the lawfully created foreign relationship or entity. It should be immediately obvious that this is what I have described as the basic American approach to conflicts.

To be sure, American conflicts law does not necessarily take its cues from French law, nor should it.¹⁰² However, on this particular question, as we have seen, the doctrine of Equivalence is simply a more clearly-stated and expansive version of what American courts sometimes do with conflicts questions presenting this pattern, and American courts would do

under French choice-of-law rules (doctrine of 'equivalence') . . . [and] the American class action procedures would not contravene French public policy . . .").

98. See YVON LOUSSOUARN & PIERRE BOUREL, *DROIT INTERNATIONAL PRIVÉ* para. 505 (6th ed. 1999); AUDIT, *supra* note 97, para. 737; see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 670 (1995) ("The Hague Convention report discusses leading cases from . . . France . . . in which conflict-of-laws issues about trust validity were resolved by characterizing the Anglo-American trust in terms of the forum state's law of contractual obligations.").

99. See AUDIT, *supra* note 97, para. 737; Langbein, *supra* note 98, at 670.

100. See 4 ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 465–66 (1958). See generally Langbein, *supra* note 98 (discussing how the trust is distinctly an Anglo-American institution).

101. See AUDIT, *supra* note 97, para. 737; LOUSSOUARN & BOUREL, *supra* note 98, para. 505; 4 RABEL, *supra* note 100, at 465–66.

102. See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006) (comparing the American choice of law approach to European approaches).

well to make this explicit.¹⁰³ In other words, I am not arguing that American courts should abandon American conflicts doctrine in favor of French conflicts doctrine. Rather, I am suggesting that in this particular case, there is substantial overlap and similarity—the French are just explicit about the principle at work.

C. Applying This Approach to the Marriage/Marriage-Like/Marriage-Lite Conflicts Context

By applying this approach—what the French call Equivalence and what we call severability in the contracts context—to the marriage/marriage-like/marriage-lite conflicts, we can provide a straightforward framework for courts and states to use.

In the marriage/marriage-like case, as I have noted, there are three possible approaches to the question of recognition of foreign same-sex marriages, and choosing among them can be translated into a conflicts question: should a marriage-like forum apply (1) the foreign law that declares the couple married, (2) the forum law that declares that a same-sex couple cannot be married, or (3) the forum law that declares that a same-sex couple can enter into a relationship that gives them all of the legal rights of marriage? And, once again, similar possibilities apply with respect to the remaining conflicts patterns.¹⁰⁴

The basic rule, as stated previously, is that states should reject that which offends their public policy and accept that which conforms to it. Thus, for the marriage/marriage-like conflict, the forum state should refuse to apply the marriage label to the couple, but it should extend all of the benefits that it would offer to similarly situated same-sex couples under local law. In other words, contrary to the approaches originally taken by Connecticut and California,¹⁰⁵ it should treat the couple as having automatically entered into its marriage-like alternative.

The same rule should apply in the marriage/marriage-lite and marriage-like/marriage-lite conflicts cases. That is, the marriage-lite forum state should not recognize the marriage or marriage-like label, or even the full array of rights and responsibilities that the couple attained under the foreign state's marriage or marriage-like scheme. It should, however,

103. Indeed, Equivalence is not entirely foreign to American courts. Narrowly speaking, Louisiana has adopted the doctrine of Equivalence for conflicts cases in its civil code. Article 3536 of the Louisiana Civil Code provides that “a real right acquired while the movable was situated in another state is subject to the law of this state if . . . the right is incompatible with the law of this state” LA. CIV. CODE ANN. art. 3536 (2009). Comment (h) to this Louisiana code provision essentially incorporates the doctrine of Equivalence and states that “this principle should not prevent Louisiana courts from giving the holder of the right protection that approximates as much as possible the protection accorded by the law of the other state.” LA. CIV. CODE ANN. art. 3536 cmt. h (2009).

104. *See supra* Part I–II.B.

105. *See supra* Part II.

extend all of the benefits that it offers to same-sex couples within its own marriage-lite alternative and that are subsumed within the marriage or marriage-like relationship into which the couple already entered.¹⁰⁶

Similarly, with respect to the marriage-like/marriage conflict (where a couple enters into a marriage-like relationship and then finds themselves in a marriage state), the marriage state should automatically treat the couple as though they were married. Once again, the marriage state would simply be conforming the relationship to local law.

However, with respect to the marriage-lite/marriage-like and marriage-lite/marriage conflicts, the marriage and marriage-like forum states should refuse to extend any recognition to the couple that has entered elsewhere into a marriage-lite relationship. This is because (1) marriage-lite relationships offend the policies of marriage and marriage-like states, such that the state should not recognize the marriage-lite status itself, and (2) the couple has not shown any interest in undertaking the much more robust marriage-like or marriage relationship. That is, the marriage-like or

106. To be sure, the case for automatic recognition in marriage-lite states is less clear than the case for automatic recognition in marriage-like states. Here's why: in the case of severability of contractual provisions, courts often consider whether the parties to the contract would have entered into the contractual relationship in the absence of the unenforceable provision. If the unenforceable provision is integral to the contract relationship, then courts will *not* sever it, and instead will declare the entire contract void. See 17A AM. JUR. 2D *Contracts* § 318 (2004); 17A C.J.S. *Contracts* § 297 (1999). One could argue that a marriage-lite relationship is so different in kind from a marriage or marriage-like relationship that one cannot assume that the couple that married in Massachusetts, for example, or entered into a domestic partnership in California, would have *wanted* the marriage-lite relationship; and, as such, the marriage-lite state should treat the relationship as void under forum law. This argument is not without force. Indeed, anecdotally, I have met several same-sex couples who have told me that they traveled to a marriage state and tied the knot for the purpose of making a political statement but had no interest in bringing that relationship back with them to their marriage-lite or no-recognition home states. To put it simply, the fact that a couple enters into a bigger-bundle relationship does not necessarily indicate that they would have chosen to also enter into a smaller-bundle relationship, and perhaps the smaller-bundle state should not foist the relationship upon them.

In the end, this is an opt-out versus opt-in question: should couples who have married or entered into marriage-like relationships in foreign states be required to opt-in separately to a relationship in a marriage-lite state, or should they be required to explicitly opt-out if they do not wish to maintain such a relationship? This question can only truly be resolved with empirical data, but in the absence of such data, we have no choice but to rely on our intuitions. My own intuition is that the rights and responsibilities that come along with marriage-lite relationships, such as hospital visitation rights, are so basic that they should be assumed along with entry into a marriage or marriage-like relationship. Put otherwise, we may reasonably assume that couples who get married or enter into marriage-like alternatives are doing more than making a political statement that has no tangible consequences.

Finally, totally apart from the framework that I am proposing, as we have seen in the incidents of marriage cases, same-sex couples contemplating marriage should already be aware that non-marriage states may well recognize their relationship for some purposes, and they may do so unpredictably. The framework that I have proposed would make it predictable and provide an opt-out option for such couples.

marriage forum cannot sever some piece of the marriage-lite relationship that it objects to and thus leave some larger piece that it can recognize; there is simply no equivalence in the relationships.¹⁰⁷ However, there is one critical exception to this rule: if the marriage or marriage-like forum state would allow individuals to enter into a contractual relationship governing the specific right at issue independently of a marriage or marriage alternative relationship, then it should recognize the foreign marriage-lite relationship's granting of that right. For instance, if the forum state permits individuals to appoint someone to make end-of-life decisions independently of marriage (as all states do), and if the foreign marriage-lite relationship provides for end-of-life decision-making, then the forum state should affirm that aspect of the relationship as a contractual matter.

In my view, this approach is fairly intuitive and offers a more comprehensive and straightforward approach than those offered by others. But that is not to say that it will make everyone happy. Indeed, it will likely make very few—at least, very few partisans in the same-sex marriage debates—happy. Some who wish to see same-sex marriage spread throughout the country would no doubt prefer an argument that every state is required to recognize a same-sex marriage lawfully performed in another state, such as that offered by Professor Kramer, who argues that the Full Faith and Credit Clause of the Constitution may require such recognition.¹⁰⁸ For doctrinal, practical, and strategic reasons that I have already discussed, I do not believe that conflicts law should be the wedge for expanding same-sex marriage.

On the other side, some who oppose same-sex marriage and other forms of recognition may protest that my approach allows a sort of “creep” in the recognition of same-sex relationships, requiring states that have expressly rejected same-sex marriage to recognize such relationships in some cases. To these I argue that the approach I have offered *recognizes and operationalizes* the interests that states have expressed by refusing to recognize same-sex relationships. That is, such a forum state must offer same-sex couples from other jurisdictions no more than the forum state itself offers same-sex couples living within its own jurisdiction. But such a state ought not penalize couples from foreign states by withholding rights and responsibilities that it offers to same-sex couples within its borders simply on the grounds of form or to express nothing more than rejection of the word marriage. Doing so violates both comity and the forum state's own interests.

107. One final point is worth clarifying. What I have offered is simply a default rule. States may reject this approach entirely if they do so explicitly. However, they should be very careful in making such a choice. For example, a marriage-like state may choose to treat a same-sex married couple as having no status whatsoever under local law, but if it does so, it would be undermining its own policies that seem to favor the creation of strong marriage-like bonds for same-sex couples.

108. Kramer, *supra* note 13, at 1976–92.

In any case, making people happy is not my goal, and, for reasons I have explained,¹⁰⁹ I suggest that the approach I offer is the most sensible way to solve the problem.

D. *The Doctrinal Lens*

Some may object to my approach on the grounds that I seem to have sidestepped conflicts doctrine and terminology almost entirely. However, I believe that the framework I have offered is fully consistent with, and perhaps compelled by, conflicts doctrine. In this section, I show how.

Conflicts doctrine is notoriously jargon-filled, and the debates over the correct approach to conflicts problems—modern, traditional, or the *Second Restatement*—are endless. As it relates to the questions this Article is concerned with, however, there is little practical difference among the various approaches. *All* of them require forum states to balance their own interests against the interests of the other state and the interests in comity. They express this approach through different terminology, but the approach is the same. For example, both the traditional approach to conflicts, captured in the *First Restatement of Conflict of Laws*, and the approach captured in the *Second Restatement* announce that any marriage that is “valid where performed or celebrated [is] valid everywhere unless violative of the public policy of the forum.”¹¹⁰ Thus, under this approach, the question becomes what the “public policy” of the forum is with respect to the same-sex relationship recognized in the foreign state. The modern approach, by contrast, counsels something called an “interest analysis.” Under the interest analysis, the forum state must once again consider its “interests” in the relationship, as compared with those of the foreign state. As a practical matter, for the purposes of this question at least, a public policy analysis and an interest analysis are fundamentally the same. In this section, I refer to the interest analysis because I believe that it provides clearer direction for how to conduct this analysis, but a public policy analysis would lead to the same conclusion.

Under the modern approach, courts use a two-step analysis for addressing conflicts questions. First, the forum court must analyze the substance of both laws and determine whether there is a true conflict between them.¹¹¹ In its most basic formulation, a true conflict exists when the two laws actually lead to different results.¹¹² If, on the other hand, both states’ laws would lead to the same conclusion, there is no true conflict,

109. *See supra* Part IV.C.

110. L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”*: *How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 31 (1998) (explaining the *First* and *Second Restatements*).

111. *See, e.g.*, *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (comparing New Jersey and Pennsylvania law).

112. ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 93, at 187–88 (3d ed. 1977).

only a false one.¹¹³ Although the rule for determining whether a true conflict exists is easily stated, applying this rule sometimes requires additional work. In difficult cases, one must undertake an interest analysis to determine whether there is a true conflict. This means that one must analyze the purposes of the apparently competing laws and the interests that each state has in having its own laws apply.¹¹⁴ Even where there appears to be a conflict between the outcomes of the two states' laws, it is possible that the court will find that one state has no real interest in having its own law apply to the case.¹¹⁵ Because "[e]ach state restricts its laws to cases it really cares about and thereby minimizes conflicts,"¹¹⁶ if a state's real interests are not implicated, then there is no true conflict.¹¹⁷ Finally, states sometimes adjust their own laws in ways that minimize conflicts.¹¹⁸

Second, once the court identifies the conflict as true or false, it moves on to the next stage of the analysis. In the case of a false conflict, the forum state court can resolve the case without choosing one state's interests and policies at the expense of the other's.¹¹⁹ If there is a true conflict, the court must choose one state's approach over the other's.¹²⁰ There is a great deal

113. "[F]alse conflict' really means 'no conflict of laws.' If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them" LEFLAR, *supra* note 112, § 93, at 188; *see also* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.6 (1982) ("A 'false conflict' exists when the potentially applicable laws do not differ . . ."). *But see* *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229 (3d Cir. 2007) ("Our review of the case law indicates there is some inconsistency in the way . . . courts have defined a false conflict. One line of cases provides that a false conflict exists if there are no relevant differences between the laws of the two states, or the laws would produce the same result. If there is a false conflict under this definition, the court does not have to engage in a choice of law analysis, and may refer to the states' laws interchangeably. . . . A different line of cases holds that a 'false conflict' exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's laws." (citations omitted)). To be sure, there is some inconsistency between these two approaches, and I do not mean to suggest that they necessarily lead to the same conclusions in most cases. However, as we will see, in our context, the distinctions between these two approaches are without a practical difference.

114. KOPPELMAN, *supra* note 14, at 15–16, 51–52.

115. *See, e.g.*, Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2199 & n.18 (2005) (noting that Massachusetts's interest in attracting in-state marriages to bolster the state's hotel and catering industries does not constitute a legitimate interest).

116. DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 63 (7th ed. 2006).

117. *See* Silberman, *supra* note 115, at 2198–99, 2199 n.18 (concluding that since Massachusetts's interest in having its own laws apply is insufficient and since the married same-sex couple at issue resided in Pennsylvania before and after the wedding, Pennsylvania laws should apply).

118. KOPPELMAN, *supra* note 14, at 51–52 (explaining that courts "try to discern the legitimate interest each state has in applying its own law, and then they try to decide the dispute before them in a way that accommodates all of those interests to the greatest extent feasible").

119. *Id.* at 15–20, 51–52.

120. *See* CURRIE ET AL., *supra* note 116, at 174–204.

of disagreement among scholars and courts as to precisely how to do so, but there is general agreement that in many true conflicts cases, the forum court must refuse to apply the other state's laws in order to advance the forum state's interests.¹²¹

And so, in applying the modern approach to marriage conflicts, we begin with the first step and ask if there is a true conflict between marriage, marriage-like, and marriage-lite states. This depends, in part, on precisely how we define our terms. There *is* a conflict, for example, between the terms “married” and “not married”; they obviously cannot be reconciled. Further, if we look beyond the formal titles that states give to these relationships to the underlying rights and responsibilities states bestow, there may still be a conflict in the sense that it is not immediately clear what triggers the attachment of those rights and responsibilities. Take, for example, the marriage/marriage-like conflict. The forum state, which rejects same-sex marriage but offers an alternative with similar rights and responsibilities, has two different laws that might apply to the couple married elsewhere. One law would be the “no recognition” law that would effectively treat them as strangers to each other. Applying this law would obviously create a true conflict. The second law, though, would be the marriage-like law that would bestow the rights and responsibilities of marriage, albeit without the name. Applying this law would render the conflict false, because, titles aside, the couple would have the same substantive rights and responsibilities in both jurisdictions. Therefore, in order to determine whether there is or is not a true conflict, we must undertake an interest analysis.

This, too, is not an uncomplicated undertaking. On the one hand, these marriage-like and marriage-lite states have a policy against same-sex marriage. On the other hand, the adoption of a marriage alternative suggests that, whatever its reason for rejecting same-sex marriage, the state has a policy in favor of providing same-sex couples with some or all of the rights and responsibilities typically associated with marriage. Accordingly, to determine the state's real policy interests, we must address the much more basic and loaded questions of (a) what state interests are furthered by marriage and (b) what interests are furthered by extending some or all of the rights of marriage to same-sex couples but not calling it a marriage? Or, to put it more simply, why—and why not—marriage?

This “why marriage” question is undeniably subject to intense debate. Suggested answers include: to establish bonds of kinship among potential rivals;¹²² to enforce and make use of a gendered division of labor;¹²³ to

121. *See id.*

122. By this, I mean marriage between scions of different dynasties, with the marriage serving the function of unifying kingdoms and/or decreasing tension among potential rivals.

123. *See SAME-SEX MARRIAGE: PRO AND CON: A READER* 36–37 (Andrew Sullivan ed., 1997) (comparing opposite-sex marriage to same-sex marriage).

comply with God's law or to otherwise make God happy;¹²⁴ to rein in male sexuality;¹²⁵ to control female sexuality;¹²⁶ to create a family unit capable of naturally bearing children;¹²⁷ or to create units in which one spouse is responsible to and for the other, thereby reducing the responsibility of society at large.¹²⁸ Choosing among these deeply contested visions of marriage is complex to say the least, and this "why marriage" question is what the litigation surrounding intrastate recognition of same-sex marriage reduces to, and courts are sharply divided.¹²⁹

As a brief aside, this may be among the most surprising and interesting aspects of the conflicts issue: even as the context changes, the analysis reduces, in fundamental ways, to the very same question that dominates the debate over the substantive issue, internal to each state, of whether to allow same-sex couples to marry. There is, however, one difference that strikes me as significant. The public may understand these debates relatively easily when they are wrapped in the fairly accessible and well-known legal and constitutional concepts of equality and fundamental rights, but they are more difficult to locate within the technical jargon that constitutes conflicts law. That is, terms like "the Full Faith and Credit Clause," "public policy exceptions," "true" and "false" conflicts, "comity," and "interest analysis" may well obscure the underlying questions. This may mean that the public

124. I do not think it is controversial to say that some view marriage as primarily a religious institution. See Peter Sprigg, "One Flesh": A Sample Sermon Outline, FAM. RES. COUNCIL, <http://www.frc.org/get.cfm?i=WX06E13&f=WX06E07> (last visited Oct. 16, 2010) (asserting that marriage is "created by God" and symbolizes the relationship between God and the people of Israel and between Christ and the Church).

125. JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 140 (2004).

126. Sam Schulman, *The Worst Thing About Gay Marriage: It Isn't Going to Work*, WEEKLY STANDARD, June 1, 2009, <http://weeklystandard.com/Content/Public/Articles/000/000/016/533narty.asp?pg=2> ("It is that marriage is concerned above all with female sexuality. The very existence of kinship depends on the protection of females from rape, degradation, and concubinage. This is why marriage between men and women has been necessary in virtually every society ever known. Marriage, whatever its particular manifestation in a particular culture or epoch, is essentially about who may and who may not have sexual access to a woman when she becomes an adult, and is also about how her adulthood—and sexual accessibility—is defined.").

127. See Sprigg, *supra* note 124 ("That reproduction of the human race is one of the central purposes of marriage is clear from God's mandate to Adam and Eve in Genesis 1: 'So God created man in his own image, in the image of God he created him; male and female he created them. God blessed them and said to them, 'Be fruitful and increase in number; fill the earth and subdue it.'" For the human race to 'be fruitful and increase in number,' it was clearly necessary that man and woman come together in a procreative act.").

128. RAUCH, *supra* note 125, at 33.

129. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (holding that civil marriage is not a religious institution but rather one that encourages stable relationships and private individual care rather than societal care of individuals); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (concluding that the purpose of marriage is procreation and stable childrearing).

will be less caught up in conflicts cases than it has been in the intrastate-recognition cases and will cede these debates to lawyers and judges, an intuition supported by the relative paucity of public interest that has greeted the few conflicts cases that have arisen thus far. Whether to view this as a good thing or not, of course, depends on whether one believes that public engagement on these kinds of issues is desirable or a distraction. In either case, we will continue to rehash the same debates even as the legal terrain shifts.¹³⁰

Happily, in the context of the marriage/marriage-like conflicts, this fundamental “why marriage” question is answered, to the extent necessary, fairly readily. Whatever state interests are served by marriage, the marriage-like alternatives serve the same interests. If marriage establishes

130. Perhaps we should not be particularly surprised that this question persists. Long before same-sex marriage was ever up for debate, we were having quite similar debates in other contexts. Most obviously, battles over gender equality revolved around related questions. For instance, litigation and legislative action concerning gender equality in the workplace, divorce law, and marital property were all fundamentally about what we mean by equality, what the purpose of marriage is, how women are similar to, and different from, men, and so forth. In fact, in important ways, same-sex marriage and other gay rights issues are simply the apex of the gender equality debates. To put it starkly, if we are committed to eradicating legally enforced gender roles, then why would we not do so in the context of marriage? Given the long history of intense debate over these issues, it should come as no shock that these questions persist, albeit with different points of emphasis, as we continue to hash out our approach to same-sex relationships.

One might go so far as to predict that these very same issues will continue to arise in yet other contexts in the future. Consider the issue of polyamorous marriage. Obviously, advocates of recognition of polyamorous relationships will argue that the same-sex rights cases provide support for, or even mandate, such recognition. In fact, not only will they do so, they have already begun to lay the groundwork for it, and we can expect to see cases featuring such claims in coming years. *See Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships: Executive Summary*, BEYONDMARRIAGE.ORG, <http://www.beyondmarriage.org> (last visited Oct. 16, 2010) (calling for a reformation same-sex marriage debate into a debate about “household diversity,” a term that encompasses polyamorous relationships). To be sure, Justice Antonin Scalia’s claim, echoed by many religious and cultural conservatives (and perhaps some liberals as well), that recognition of same-sex relationships will inevitably, and legally must, lead to recognition of polyamorous relationships is absurd. *See Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting). The claim is absurd as a legal matter because surely we can distinguish between a law that discriminates on the basis of gender (a protected class under clearly established case law) and a law that discriminates on the basis of the number of people a person wishes to marry. It is equally absurd as a predictive matter because the coalition that has coalesced around marriage equality for same-sex couples will surely fragment over the question of polyamorous marriage. Still, these inevitable cases will continue to focus on familiar questions: “what do we mean by equality?”; “what is the purpose of marriage?”; “in what ways are polyamorous groups similar to, and/or different from, married couples?”; and so forth.

For those interested in considering the relationship between gay rights and gender equality further, Professor Koppelman has written extensively on the subject. *See generally* Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

bonds of kinship among potentially rival clans, then marriage-like alternatives do the same. If marriage reins in sexuality, then marriage-like alternatives would likely serve the same interest. If marriage creates stable family units within which to raise children, then marriage-like alternatives serve the same interests. If marriage creates units in which one spouse is responsible to and for the other, thereby reducing the responsibility of society at large, then marriage-like alternatives serve the same interest.¹³¹

Of course, to the extent that marriage serves to enforce and makes use of gendered division of labor, then marriage-like alternatives not only do not serve this interest, they actually undermine it. Nevertheless, if this were the state's interest in marriage, marriage would surely be unconstitutional,¹³² and the same would be true if the state articulated some religious interest in marriage.¹³³

The next question, then, is this: If marriage and the marriage-like alternative serve the same interest, then what interest is served in offering one to cross-sex couples and one to same-sex couples? Professor Koppelman argues that marriage has both an administrative component and a normative component.¹³⁴ The administrative, or utilitarian, component, relates to the couple's internal relationship and its lawful relationship to the state and everyone else.¹³⁵ This component includes each and every aspect of marriage other than the label itself. The normative component relates to the social value associated with being in a relationship called marriage.¹³⁶ A marriage-like state has apparently chosen to offer the administrative/utilitarian aspects of marriage to same-sex

131. It is not my concern in this context which of these interests is actually advanced by marriage and marriage-like alternatives. It is sufficient to recognize that whatever interests are advanced by one are also advanced by the other. For my own part, however, I find the "mutual responsibility" interest, described by journalist Jonathan Rauch, the most descriptively and normatively compelling. RAUCH, *supra* note 125, at 25–27.

132. Laws that apply and enforce gender roles fail the intermediate scrutiny test and are therefore unconstitutional under the Equal Protection Clause. *See United States v. Virginia*, 518 U.S. 515, 533–34 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." (citations omitted)).

133. A law that is designed to serve and advance religious interests, particularly where those interests are sectarian in nature, is unconstitutional under the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citations omitted)).

134. KOPPELMAN, *supra* note 14, at 53–58.

135. *Id.* at 55–56.

136. *Id.* at 53–54.

couples but not the normative aspects. I think that this is accurate enough, but it is a very lawyerly way of saying that marriage-like alternatives are the products of messy political bargains wherein the state recognizes the practical benefits of providing the rights and responsibilities of marriage to same-sex couples without deeming it as good as cross-sex marriage. Or, to be more generous, the differences between marriage and marriage-like are cultural rather than strictly legal. In other words, a state's interest in offering a marriage-like alternative is functionally identical to the state's interest in offering marriage to cross-sex couples while preserving the message that same-sex coupling is not as good as cross-sex coupling. Therefore, excepting the normative element associated with the term marriage, there is no true conflict between marriage and marriage-like relationships.

Identifying the relationship between marriage-lite and marriage or marriage-like states is a somewhat more complex task. On the one hand, a marriage-lite state plainly does not take the position that same-sex relationships serve the same utilitarian function as cross-sex couples do. (After all, it offers far fewer incentives—and rights and responsibilities—to same-sex couples.) On the other hand, marriage-lite benefits plainly serve some state interests. Given that the “incidents” offered in marriage-lite bundles may include inheritance rights, workers' compensation, the right to sue for wrongful death, health insurance and pension benefits for state employees, hospital visitation, and healthcare decision-making,¹³⁷ it is safe to say that God, children, and gender roles are out of the picture as providing the basis for recognizing these relationships. After all, no one seriously asserts that God cares much about these incidents of marriage, and many of the rights and responsibilities that come along with marriage have little or nothing to do with children or gender stereotypes and roles. Instead, the interests served by these relationships must be to encourage mutual responsibility, to create stable, monogamous relationships, and/or to make it easier for committed couples to enter into private contractual relationships. Thus, when it comes to these specific incidents, the same interests are advanced for marriage, marriage-like, and marriage-lite states, and there is no true conflict.

At the same time, we must also acknowledge that marriage and marriage-like states have an interest in *rejecting* these marriage-lite relationships. After all, when a marriage or marriage-like state wishes to grant rights and responsibilities typically associated with marriage, it does so only when the couple is willing to take on a complete marriage or marriage-like package. The state apparently has no interest in making it easy for couples to enter and exit these marriage-lite relationships, but rather seeks to create even stronger bonds.¹³⁸ Moreover, there is no reason

137. See *supra* note 5.

138. See RAUCH, *supra* note 125, at 41–43.

to assume that the couple that entered into the marriage-lite relationship would have chosen to marry or to enter into a marriage-like relationship even if those choices were available to them. It would be problematic for the forum state to foist that relationship upon them. Thus, when a couple moves from a marriage or marriage-like state to a marriage-lite state, the latter state's interest does not conflict with the former's with respect to those incidents of marriage that they both offer. But when a couple moves from a marriage-lite state to a marriage or marriage-like state, there is a true conflict because the marriage or marriage-like relationship creates and imposes rights and responsibilities that the couple has not accepted. Moreover, a conflict exists because the marriage or marriage-like state declines to recognize relationships that do not include all of the rights and responsibilities typically associated with marriage. However, it is critical to note that with respect to those elements of a marriage-lite relationship that the marriage or marriage-like state would allow individuals to adopt independently of marriage or the marriage alternative, there is no conflict.

Given that many of the apparent conflicts (marriage/marriage-like and its reverse, and marriage or marriage-like/marriage-lite, at least with respect to those incidents that they both offer) are actually false conflicts (because the states' interests and practical treatment of the couple are not really at odds), the next step is to determine how best to bring these interests in line with one another. With respect to the remaining true conflicts (marriage-lite/marriage or marriage-lite/marriage-like), we must also consider how best to resolve them.

Based on this interest analysis, resolving the false conflicts becomes relatively easy, while resolving the remaining true conflicts is only somewhat more difficult. A forum state should recognize a same-sex relationship lawfully created in another state to the extent that doing so advances the forum state's own policy interests. Where the policy interests are at odds, the forum state should apply its own policies in order to advance its own interests.

1. The False Conflicts

The false conflicts, again, are those in which the forum state and foreign state have fundamentally compatible policy interests.¹³⁹ These false conflicts include the marriage/marriage-like conflict (a couple married in a marriage state moves to a marriage-like state); the marriage-like/marriage conflict (the reverse); and the marriage or marriage-like/marriage-lite conflict (a married or unioned couple moves from a marriage or marriage-like state to a marriage-lite state). In these cases, the way forward is clear.

Take first the marriage/marriage-like conflict. On the one hand, it makes no sense to adopt the Connecticut attorney general's approach to marriage/marriage-like conflicts. Doing so advances no state's interests—

139. See Kramer, *supra* note 13, at 1976–78.

and in fact considerably undermines the forum state's interests. Consider the practical implications of the attorney general's approach. A same-sex couple marries in Massachusetts and then relocates to Connecticut. Under the attorney general's view, the state would not allow one to make end-of-life decisions for, or inherit from, the other—even though Connecticut adopted a marriage-like alternative for precisely this purpose. Even more bizarrely, one spouse would apparently be permitted to lawfully enter into a civil union with another member of the same sex or marry another individual of the opposite sex without first dissolving the Massachusetts marriage.¹⁴⁰ This greatly undermines Connecticut's interests in creating stable, mutually-responsible, monogamous same-sex couples that it expressed by adopting its marriage-like alternative.

On the other hand, it makes little sense for marriage-like states to recognize same-sex marriages from marriage states as marriages under local law. This would undermine the marriage-like state's clearly-expressed interest in withholding the normative aspect of marriage—or, as I put it more crassly, its interest in preserving the message that same-sex coupling is not as good as cross-sex coupling—from same-sex couples. It would also either give citizens living in other states advantages over local citizens or incentivize local couples to travel for the sake of getting married (or both), neither of which advances the forum state's interests.

Instead, a marriage-like state should simply treat a same-sex couple lawfully married in a marriage state as having entered into the local marriage equivalent. This way, the marriage-like state vindicates its own policy interests, both in the sense of recognizing and encouraging mutual commitment for same-sex couples and in the sense of preserving its opposition to same-sex marriage. This should be the default position applicable unless a state statute or constitutional provision explicitly prohibits the state from adopting it—an unlikely result, since this would harm the state's own interests.

Next, consider the reverse situation: a couple unioned in a marriage-like state moves to a marriage state. Again, there is no true conflict in the sense that both the marriage and marriage-like state offer essentially identical utilitarian aspects of marriage. Thus, it makes little sense for the marriage state to reject any recognition whatsoever, for in doing so, it would leave the couple unprotected and allow the spouses to go off and marry other people—undermining its own values. Instead, the marriage state should automatically treat the couple as married under forum law. It would be saying, in effect, that the couple has made all of the commitment necessary to be recognized as married both for utilitarian and normative purposes.

Finally, consider the situation in which a lawfully married or unioned

140. *See* Conn. Op. Att'y Gen. No. 2005-024 (2005), 2005 WL 2293060, at *1.

same-sex couple moves to a marriage-lite state. The state should not reject the relationship altogether because it would undermine the state's interest in encouraging couples to enter into committed (albeit limited) relationships; and, once again, doing so would have the perverse effect of allowing them to enter into relationships with yet other people, undermining whatever interest the state has in creating stable and monogamous same-sex relationships. Again, though, the state should not treat the couple as married because doing so would undermine the state's utilitarian and normative interests in withholding marriage from same-sex couples. Instead, the state should treat the couple as though it had entered into the local marriage-lite alternative.¹⁴¹

In each of these situations, by focusing on the content of the relationships and the states' interests in offering them rather than the formal titles that each of these states give to same-sex relationships, states can minimize conflicts and tailor the laws in such a way as to advance rather than undermine each state's interests.

2. The True Conflict

The true conflict is the remaining potential pattern in which a couple that entered into a marriage alternative in a marriage-lite state then moves to a marriage or marriage-like state. Here, there is a very real conflict. The forum state's policy of recognizing only robust relationships does not allow it to recognize the marriage-lite relationship as such. It also does not make any sense for the state to automatically elevate the marriage-lite relationship to a marriage or marriage-like relationship because the couple has not undertaken that commitment (and indeed may not want it). In this

141. The question of dissolution presents a wrinkle here. In the case of the marriage/marriage-like conflicts, or vice versa, a dissolution under the forum state's laws should be operative anywhere because both state's interests are fundamentally compatible in nearly every way. However, a married or unioned couple that moves to a marriage-lite state and then seeks a dissolution faces a different situation. The marriage-lite state only recognizes a marriage-lite relationship, and it can therefore only dissolve that relationship. This would not necessarily have the effect of dissolving the marriage or marriage-like relationship for the purposes of states that would recognize that relationship. This problem is a difficult one to solve, but the easiest way of doing so is probably to create a mechanism whereby the marriage or marriage-like state that initially created the relationship retain power to dissolve it in the event that no other relevant state can do so. For an alternative view, see L. Lynn Hogue, *Constitutional Issues in Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Fathoming DOMA's Role*, 41 CAL. W. INT'L L.J. (forthcoming 2010) (manuscript at 19–20). One might argue that a no-recognition state should have no role dissolving foreign same-sex relationships (marriage or otherwise) performed elsewhere because the forum state does not wish for the couple to be in such a relationship in the first place. I believe that this argument is facile, and no-recognition states may legitimately refuse to perform such dissolutions (assuming, of course, the baseline proposition that the federal Constitution does not compel recognition of same-sex marriage). After all, these states' refusal to recognize same-sex relationships is not simply that they prefer that gay people not enter into legal relationships; it is that they refuse to recognize such relationships for all purposes. To dissolve a union, the state would first have to recognize that one exists, and to the no-recognition state, the foreign same-sex union is a non-entity.

case, then, following conflicts doctrine, the forum state should generally advance its own clearly articulated interests at the expense of the foreign state's interests and refuse to recognize the relationship.

Of course, with respect to those aspects of a marriage-lite relationship that are compatible with the interests and policies of the marriage or marriage-like forum state (for instance, if the forum state allows individuals to attain or adopt a particular right or responsibility through a contractual process independent of marriage), there is no true conflict, and the forum state should recognize that aspect of the marriage-lite relationship. In other words, the forum state should treat the couple as though it had entered into the contractual relationship permitted under forum law by entering the marriage-lite relationship in the foreign jurisdiction.

V. BEYOND THE MARRIAGE/MARRIAGE-LIKE/MARRIAGE-LITE CONFLICTS

Beyond helping us resolve the marriage/marriage-like/marriage-lite conflicts, this analysis sheds light on two other important questions. First, it helps formulate a new approach to the marriage/no-recognition conflict. Second, it allows us to resolve any conflicts that arise in the event the federal government adopts a marriage-like or marriage-lite scheme.

A. *The Marriage/No-Recognition Conflict*

Thus far, I have argued that the marriage/marriage-like/marriage-lite conflicts ought to be treated differently from the marriage/no-recognition conflict. And indeed, a state that has explicitly rejected *any* form of recognition for same-sex couples may be on fairly safe and well-trodden ground when it declines to extend recognition to same-sex couples married in other jurisdictions. This conclusion flows both from precedent¹⁴² and from the very interest analysis I have offered. All the same, the approach I have offered has significant implications for resolving some marriage/no-recognition conflicts.

The truth is that even no-recognition states have laws that recognize, or at least protect, same-sex relationships. Same-sex couples can provide for each other in their wills, and these wills are respected in no-recognition states. Also recognized, at least theoretically, are legal agreements directing decision-making in the event of incapacity, contracts governing property division, and other private agreements into which same-sex couples may enter.¹⁴³ I do not mean to suggest that this is *much* or *enough*

142. Melissa Murray, Remark, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1396 & n.5 (2008) (collecting cases).

143. It is worth noting that same-sex couples nevertheless sometimes face hurdles when it comes to enforcing these lawful agreements. *See, e.g.*, Parker-Pope, *supra* note 9 (illustrating the frequent ineffectiveness of living wills, advanced directives, and power of attorney documents when one partner is hospitalized and the other partner wishes to exercise visitation rights).

protection—these are only a small subset of the rights that automatically come with marriage, marriage-like, or marriage-lite relationships—but they are still very real rights that same-sex couples enjoy.

If we undertake a conflicts analysis and ask ourselves why even no-recognition states permit same-sex couples to enter into these kinds of agreements, we can see why and how it makes sense to apply my approach to marriage/no-recognition conflicts.¹⁴⁴ Recognizing and protecting these agreements advance many of the same interests for no-recognition states that recognizing marriage and marriage alternatives advances for marriage, marriage-like, and marriage-lite states: it is in the state's interest to allow individuals to freely contract and to allow and encourage individuals to take responsibility for themselves and for one another and to provide notice to everyone else as to their wishes. For this limited set of rights and agreements, then, there really is no conflict between no-recognition states and the marriage, marriage-like, and marriage-lite states. In each case, the couple has entered into, in effect, a set of agreements in one state that the other state would independently recognize, uphold, and protect. Therefore, no-recognition states should apply the same approach and automatically treat couples who have lawfully entered into marriage, marriage-like, and marriage-lite relationships in other states as though they had entered into whatever private contracts would be embraced by those relationships and by forum law.

The most obvious objection to this approach is that it ignores the formal requirements that no-recognition states attach to the contracts that same-sex couples can enter into. For example, states require that a will be drawn in a particular kind of way. Obviously, the process of entering into a lawful relationship in a marriage, marriage-like, or marriage-lite state does nothing to comply with such formal requirements. It may be thus argued that no-recognition states should not recognize the relationships entered into in foreign states even to the extent that they would recognize a subset of agreements had they been entered into separately.

However, putting this issue in doctrinal conflicts language, the question to ask is whether the forum state's interest in upholding its formalities outweighs its interests in recognizing and encouraging mutual responsibility and upholding private agreements. Common sense suggests that it should not, and so does the law. First, formalities do not generally implicate a state's public policy interests.¹⁴⁵ Second, there is precedent for

144. Of course, one reason that states might allow such private agreements is that it would likely be unconstitutional for them not to. *See Romer v. Evans*, 517 U.S. 620, 633–35 (1996) (holding that laws that discriminate on the basis of animosity, including those that make “a general announcement that gays and lesbians shall not have any particular protections from the law,” violate even rational basis review under the Equal Protection Clause). But I doubt that states would want to prevent same-sex couples from entering into these contracts even if they could do so because it would be counter to their interests and policies.

145. *See* EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES,

the approach I have offered. The incidents of marriage cases I referenced earlier arose in the marriage/no-recognition context and, in some cases, recognized elements of marriage relationships despite the fact that the forum state would not recognize the marriage if performed locally.¹⁴⁶ For instance, as we have seen, states that deemed interracial and consanguineous relationships to be against their public policy nevertheless recognized some aspects of the marriage for forum law purposes.¹⁴⁷ Third, states routinely put aside forms requirements when it makes sense to do so. For example, a will executed in California may routinely be upheld in Georgia even if it does not conform to Georgia's forms requirements.¹⁴⁸ There is little reason, I think, to exclude same-sex couples from this kind of flexibility.

Applying my approach may appear somewhat radical at first glance. After all, states that have adopted constitutional amendments against recognizing same-sex couples emphatically disapprove of homosexuality. However, undertaking the interest analysis suggests that these states should extend at least those benefits to same-sex couples that have achieved government recognition in other states that such couples could independently and lawfully obtain under forum law.

B. *The Federal Government and Same-Sex Relationships*

My approach will also help resolve conflicts that may arise if the federal government eventually adopts some kind of marriage alternative scheme. A federal marriage-like or marriage-lite bill is of critical importance to same-sex rights advocates because many of the benefits traditionally associated with marriage are available only from the federal government. These include partners' access to social security, Medicare, Medicaid, disability and veteran benefits, health insurance, tax protection, and so forth. In total, the United States General Accounting Office reports that there are 1,138 such federal benefits associated with marriage, all of which are currently unavailable to same-sex couples regardless of whether they have entered into a marriage, marriage-like, or marriage-lite relationship authorized by the states.¹⁴⁹ For this reason, a federal marriage alternative bill is very much on the agenda for same-sex rights advocates. So the push is certainly there.

At the same time, the federal government may be receptive to such a bill in the foreseeable future. President Barack Obama announced support

CONFLICT OF LAWS 974 (4th ed. 2004) (noting that variations among contract requirements do not implicate public policy concerns).

146. See *supra* notes 90–95 and accompanying text.

147. Wardle, *supra* note 6, at 1893–97.

148. THE AMERICAN BAR ASSOCIATION GUIDE TO WILLS & ESTATES: EVERYTHING YOU NEED TO KNOW ABOUT WILLS, ESTATES, TRUSTS, AND TAXES § H, at 1–7 (2d ed. 2004).

149. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf>.

for federal civil unions, as has Vice President Joe Biden.¹⁵⁰ Indeed, both went so far as to promise full legal equality—apart from the word “marriage”—for same-sex unions under federal law.¹⁵¹ Even leading Republicans, like former President George W. Bush,¹⁵² former Vice President Dick Cheney,¹⁵³ and former Utah Governor (and speculative presidential aspirant)¹⁵⁴ Jon Huntsman,¹⁵⁵ have spoken out in favor of civil unions. Not all of these politicians have advocated a federal marriage-like or marriage-lite scheme, of course. But there is fairly broad support among the political class for the general proposition that same-sex couples should be entitled to at least some recognition and protection from the government. Similarly, according to recent polling data, American public opinion is moving in the direction of greater acceptance for same-sex relationships and growing support for legal recognition,¹⁵⁶ suggesting that opposition to a federal bill, while inevitable, will be something less than absolute. For these reasons, it is possible that a federal marriage alternative

150. Michael Blood, *Obama Argues for Civil Unions for Gays*, FORBES, Aug. 9, 2007, http://www.barackobama.com/2007/08/09/obama_argues_for_civil_unions.php; *Joe Biden on Civil Rights*, ONTHEISSUES.ORG, http://www.ontheissues.org/2008/Joe_Biden_Civil_Rights.htm (last visited Oct. 16, 2010).

151. See Blood, *supra* note 150 (“As I’ve proposed [civil unions], it wouldn’t be a lesser thing, from my perspective.” (quoting Sen. Barack Obama)); *Joe Biden on Civil Rights*, *supra* note 150 (describing Joe Biden’s opinion that there should be “no distinction from a legal standpoint between a same-sex and a heterosexual couple” but that neither he nor Obama “support redefining from a civil side what constitutes marriage”).

152. See *Good Morning America: ABC America Exclusive* (ABC television broadcast 2004), available at <http://www.youtube.com/watch?v=qL5qSiW3LUQ> (last visited Oct. 16, 2010) (“I don’t think we should deny people rights to a civil union—a legal arrangement—if that’s what a state chooses to do . . .”). It is not altogether clear whether President Bush supports civil unions or merely does not oppose them if states choose to adopt them.

153. Sam Stein, *Cheney Offers Support For Gay Marriage*, HUFFINGTON POST, June 1, 2009, http://www.huffingtonpost.com/2009/06/01/cheney-offers-his-support_n_209869.html. Cheney supports not only civil unions but also same-sex marriage. See *id.*

154. See Chris Cillizza, *The Rising: John Huntsman Jr.*, WASH. POST: THE FIX, <http://voices.washingtonpost.com/thefix/the-rising/the-rising-jon-huntsman-jr.html> (Dec. 9, 2008, 6:07 AM) (speculating that Huntsman may make a bid for the 2012 presidential election); *Cheney Says GOP Presidential Bench Still Strong*, CNN POLITICAL TICKER BLOGS, <http://politicalticker.blogs.cnn.com/2009/06/29/cheney-says-gop-presidential-bench-still-strong/> (June 29, 2009, 9:15 PM) (indicating that former Vice President Cheney mentioned Huntsman in his list of potential GOP presidential candidates).

155. Brock Vergakis, *GOP Utah Gov Says He Supports Civil Unions*, DAILY HERALD, Feb. 9, 2009, http://www.heraldextra.com/news/state-and-regional/article_8738c4fc-dbca-5fb2-ba35-3e0f9056121b.html.

156. Nate Silver, *Two National Polls, for First Time, Show Plurality Support for Gay Marriage*, FIVE THIRTY EIGHT BLOG, <http://www.fivethirtyeight.com/2009/04/two-national-polls-for-first-time-show.html> (Apr. 30, 2009, 6:00 PM); cf. Grossman, *supra* note 69, at 112 (“As we saw with interracial marriage, a deeply held belief against a practice can undergo a complete reversal with the passage of enough time.”). To be sure, such polls may be unreliable or outliers. But the point is that attitudes concerning same-sex relationships have shifted over time.

bill will be one of the next dominoes to fall in the steady progress towards marriage equality. If so, then this will raise the same conflicts question we have been analyzing here.

Broadly speaking, a federal scheme could take one of two forms, each of which would raise conflicts. One approach might be for it to limit the availability of federal marriage-like or marriage-lite relationships to those couples that have entered into the state law equivalents. Such an approach would parallel the federal government's traditional approach to marriage for cross-sex couples. That is, for cross-sex couples, the federal government leaves the question of whether a couple is lawfully married to the states. If the state performs a marriage, the federal government will recognize it as well; if the state refuses to perform the marriage, the federal government does not offer an alternative avenue for the couple. Applying this approach in the context of same-sex couples thus has the benefit of consistency with how the federal government treats cross-sex couples by continuing to defer to states on questions of family status. On the other hand, this first approach suffers from the consequence that same-sex couples residing in states that do not offer civil unions as an option—which is currently the majority of states by far—would have no access to the federal rights being offered to others. Thus, the alternative (and perhaps more likely) approach would be for the federal government to create its own marriage-like or marriage-lite registry for same-sex couples everywhere.¹⁵⁷

Either approach would create marriage/marriage-like/marriage-lite conflicts. Suppose for the sake of argument that the federal government adopts a marriage-like scheme. Under the first approach, in which the federal government simply applies state law, would a same-sex couple that entered into its state's marriage-lite relationship qualify for federal benefits? Would the federal marriage-like law exclude couples that lived in marriage states? With respect to the second approach, in which the federal government creates its own civil unions registry open to same-sex couples anywhere, would couples that entered into a marriage, marriage-like, or marriage-lite union under state law automatically qualify for the federal benefits, or would they be required to apply to the registry separately? What if one partner or spouse becomes incapacitated prior to becoming registered?

My approach answers these questions. For the same reasons that it makes little sense for states to focus on form over substance, it also makes little sense for the federal government to do so. Thus, regardless of which of the two general approaches to civil unions the government takes, it ought to automatically extend benefits to those couples that have entered into relationships that are substantially similar to whatever type of union the federal government recognizes. In other words, if the federal

157. There are, of course, possible variations on each of these models, but these are the prototypical possibilities.

government adopts a marriage-like scheme, it should automatically apply that scheme to same-sex couples that have attained state recognition in marriage and marriage-like states. However, just as marriage and marriage-like states should not automatically extend recognition to same-sex couples that have entered into marriage-lite relationships, the federal government should decline to do so as well.

VI. CONCLUSION: THE CHANGING MEANING OF MARRIAGE

The fact that states have developed these just-like-marriage-but-not-exactly and sort-of-like-marriage-but-not-really alternatives reflects something about our evolving cultural and legal view of the nature of marriage. Traditionally, marriage has been about status. You either had marital status—social, cultural, historical, and religious in nature—or you did not; and people got married in order to attain that status. Traditionally, marriage demanded a lot of people and was difficult to exit.

When same-sex marriage advocates began to demand marriage rights, they were, perhaps, seeking that same kind of status. But, of course, at that time, the idea that a same-sex couple deserved that status, that social cache, was quite radical. As a result, the argument for same-sex marriage became a utilitarian one: what does the state give the married couple, what does the couple give the state in return, and should same-sex couples be able to make that trade? Marriage was thus reconfigured into a series of contracts. Some of these contracts, which reflect mutually agreed-upon rights and responsibilities, are between the two spouses while others, also reflecting mutually agreed-upon rights and responsibilities, are between the couple and the state.

The changes in the general conception of marriage relating to same-sex relationships have been consequential. First, these developments have made the equality-based argument in favor of marriage far more attractive and viable than the fundamental-rights-based argument.¹⁵⁸ Under the

158. For a fascinating debate as to whether equal protection or the fundamental rights/due process argument for same-sex marriage should or will make more inroads in courts, I recommend the online debate between Professors Kenji Yoshino and Heather Gerken. See Kenji Yoshino, *Gerken-Yoshino Discussion of Liberty and Equality*, CONVICTIONS: SLATE'S BLOG ON LEGAL ISSUES (May 21, 2008, 9:48 AM), <http://www.slate.com/blogs/blogs/convictions/archive/2008/05/21/gerken-yoshino-discussion-of-liberty-and-equality.aspx> (asserting that courts must protect the rights of same-sex couples via a liberty analysis); Heather K. Gerken, *Yoshino-Gerken on the Liberty/Equality Debate*, BALKINIZATION BLOG (May 21, 2008, 11:36 AM), <http://balkin.blogspot.com/2008/05/yoshino-gerken-on-libertyequality.html> (positing that Yoshino's liberty approach is problematic and that an equality approach better suits courtroom debate); Heather K. Gerken, *Gerken-Yoshino on the Liberty/Equality Debate: Round 2*, BALKINIZATION BLOG (May 22, 2008, 9:27 AM), <http://balkin.blogspot.com/2008/05/gerken-yoshino-on-libertyequality.html> (favoring, from a normative perspective, an equality approach); Kenji Yoshino, *Gerken-Yoshino Debate on Liberty and Equality, Round 2*, CONVICTIONS: SLATE'S BLOG ON LEGAL ISSUES (May 22, 2008, 10:17 AM), <http://www.slate.com/blogs/blogs/convictions/>

earlier view, under which marriage was about personal status, it made sense to think about it as a fundamental right. But under today's prevailing conception, in which marriage is really a utilitarian institution and just a bunch of contracts, why exclude same-sex couples who can make the same beneficial tradeoffs? Second, this shift opened the door for marriage-like and marriage-lite alternatives. Once the argument for marriage focused on the utilitarian benefits to the state and to the couple, then if those benefits could be achieved without the term "marriage" attached, thus avoiding some of the public backlash, then why not? The embrace of these marriage alternatives, in turn, reinforces the newer, contract-based conception of marriage.

In some ways, this shift is a repeat of what we have seen in the context of property. There, as others have shown, we have seen a move away from an older conception of property rights as the status-based dominion over a physical object or space to a set of utilitarian and economically-beneficial rules about the rights to possess, dispose, and exclude.¹⁵⁹ This suggests that our laws and cultural understandings are constantly in flux, so we should not be especially surprised or bothered that we are witnessing these changes with respect to marriage as well.

I do not mean to suggest that there is a straight line running from the developments concerning same-sex relationships to a new understanding of marriage. Nor am I myopic enough to imply that the debate over same-sex marriage is the only, or even the primary, driver of changing attitudes towards marriage. Indeed, there are much larger and more longstanding trends associated with these changes. The sexual revolution and the push towards gender equality are obviously at work, and the changes are reflected in legal and cultural developments having nothing to do with same-sex relationships. These changes include laws that promote gender equality within marriage and that make it far easier to exit a marriage. They also include the rising number of committed cross-sex couples that choose not to marry.¹⁶⁰ All of these cultural and legal developments are

archive/2008/05/22/gerken-yoshino-debate-on-liberty-and-equality-round-2.aspx (presenting a normative argument in favor of a liberty approach).

For my own part, I am more persuaded by the equal protection argument, though I do think that advocates will continue to make both arguments, and different judges are likely to find different arguments persuasive (or unpersuasive, as the case may be). For a fuller explanation of my views, see Hillel Levin, *Gay Rights: Equality or Due Process?*, PRAWFSBLAWG (Oct. 2, 2008, 3:11 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/10/gay-rights-equa.html>.

159. See Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372–76 (2003) (providing the framework for a new "integrated theory" of property disposition that "serve[s] to give full meaning to the concept of property"); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 818–20 (1996) (criticizing the "bundle of rights" conception of property and advocating a formulation of property rights "as comprising rights to any kind of value, to the extent of that value . . .").

160. Jocelyn Voo, *Why Do Unmarried Couples Opt out of Wedlock?*, CNN.COM, Sept. 19, 2007, <http://www.cnn.com/2007/LIVING/personal/09/19/unmarried.couples/index.html>.

intertwined with changing attitudes towards the nature, meaning, and value of marriage, and the battle over recognition of same-sex relationships is simply one aspect—cause and/or effect—of it.

At the same time, we can see from the debates over same-sex marriage that the institution of marriage continues to retain its status-based character. If it did not, would there be so much opposition to marriage equality but relatively less to marriage-like and marriage-lite alternatives? And if it did not, why would same-sex rights advocates demand marriage rather than its functional marriage-like equivalent? We can see, then, that the status-based model of marriage is deeply entrenched in our culture, even as we move away from it.

The approach I have offered takes as a given that different states will have different approaches—a menu of possible resolutions, in the formulation of Professor William Eskridge, Jr. and attorney Darren Spedale¹⁶¹—to the same-sex marriage question, but it navigates among the contested meanings of marriage in a way that makes the most sense for the states themselves and for the couples whose lives are deeply affected by states' choices.

161. ESKRIDGE & SPEDALE, *supra* note 7, at 251–57.