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MISSION IMPOSSIBLE: ON *BAKER*, EQUAL BENEFITS, AND THE IMPOSITION OF STIGMA

Mark Strasser*

In Baker v. State, the Vermont Supreme Court held that the state constitution required same-sex couples be afforded the same benefits and protections that married couples receive. While the state did not need to recognize same-sex marriage, at the very least, it needed to create a parallel system providing equal benefits. Professor Mark Strasser argues that a civil union alternative ultimately would not meet the court's requirements because it cannot possibly provide this requisite equality. His central concern is the differing treatment that same-sex marriage and domestic partnerships receive from other states. Additionally, Professor Strasser notes that such a system would fail to meet the requirement of equality due to the stigma attaching to civil union status. He concludes that such a parallel system would have all the legitimacy of "separate but equal."

* * *

INTRODUCTION

In *Baker v. State*,¹ the Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution requires same-sex couples to be afforded the opportunity to receive the same benefits and protections that married couples receive. The court suggested that it was not necessary for the state to recognize same-sex marriages if those benefits and protections could be accorded some other way, although the court cautioned that the benefits would, in fact, have to be equal if the parallel system was to pass constitutional muster.²

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¹ 744 A.2d 864 (Vt. 1999).

² See *id.* at 886.

There is good reason to believe that the civil union status created by the Vermont legislature does not meet the state constitution's requirements. A civil union alternative for same-sex couples, while better than what any other state has offered thus far, nonetheless cannot offer equal benefits, protections, and security, precisely because civil unions are less likely than marriages to be recognized in other jurisdictions. If that is so, however, and if there are particular benefits and protections that different-sex married couples would be able to enjoy in other jurisdictions that same-sex civil union partners would not, then the Vermont legislature has failed to meet the state constitutional mandate by failing to permit same-sex couples to marry.

That same-sex marriages would likely offer greater benefits and protections in *some* of the other states is not dependent on whether the constitutionality of the Defense of Marriage Act (DOMA)³ will be upheld, since DOMA does not preclude states from according recognition to same-sex marriages but merely gives them the choice of whether to do so. Yet, it should not be assumed that DOMA will pass constitutional muster when it is finally challenged, and its constitutional vulnerability itself has implications.

Suppose that DOMA is struck down as an unconstitutional exercise of congressional power or even that only the DOMA section reserving federal benefits for different-sex couples is struck down. Civil union partners would presumably be treated like domestic partners who, whether or not they are of the same sex,⁴ are not entitled to the federal benefits that married partners receive.⁵ If that is so, then the civil union system set up by Vermont would not entitle Vermont same-sex couples to the federal benefits to which they would have been entitled had they been

³ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

⁴ See Todd Foreman, Comment, *Nondiscrimination Ordinance 101 San Francisco's Nondiscrimination in City Contracts and Benefits Ordinance: A New Approach to Winning Domestic Partnership Benefits*, 2 U. PA. J. LAB. & EMPLOYMENT L. 319, 323-24 (1999) ("Some jurisdictions also allow heterosexual couples to register as domestic partners."). Of course, some jurisdictions do not. See, e.g., *Crawford v. City of Chicago*, 710 N.E.2d 91, 93 (Ill. App. 1 Dist. 1999) ("[T]he Chicago City Council adopted the DPO [domestic partnership ordinance] . . . which makes available employee benefits to unmarried, same-sex partners of City employees."); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 439 (Or. App. 1998) (discussing judgment that "defines 'domestic partners' as homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older").

⁵ See Foreman, *supra* note 4, at 342 (noting that the federal government denies marital benefits to domestic partners).

allowed to marry.⁶ Thus, the invalidation of the federal benefits provision of DOMA would even more clearly establish that the civil union system in Vermont does not meet the state's constitutional requirements.

Even if one sets aside the fact that same-sex civil union partners will not receive the benefits that they might have received had they been married, the stigmatization that occurs by setting up a separate civil union system for same-sex couples alone suffices to establish that the separate system does not pass constitutional muster. Indeed, it is hard to imagine a parallel system according identical benefits that would not have overtones of stigma. Thus, if the Vermont Constitution requires that all Vermonters receive equal benefits, it is difficult to imagine how that could be interpreted to require anything less than the state's recognition of same-sex marriages.

Part I of this Article discusses why the strong tendency and possible constitutional obligation of states to recognize a marriage that is currently valid in another domiciliary state suggests that the Vermont legislature has not set up a parallel status for same-sex couples that in fact accords them equal benefits. Part I also explains why the likely invalidation of the DOMA section reserving federal benefits for different-sex couples makes it even clearer that Vermont's establishment of a civil union system offends state constitutional guarantees.

Part II discusses the stigmatization that necessarily results from the establishment of a separate status system for same-sex couples. This imposition of stigma alone suffices to establish the unconstitutionality of a "separate but equal" system for same-sex couples. This Article concludes that the Vermont legislature has not met the state constitution's requirements by setting up a civil union system both because that system does not accord equal benefits, and because, even if it had, the stigmatization that will inevitably occur cannot help but offend constitutional guarantees.

I. BENEFITS AND PROTECTIONS

In *Baker v. State*,⁷ the Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution requires that all Vermonters be afforded "the common benefit, protection, and security of the law."⁸ The court explicitly refused to address whether "notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-

⁶ But see David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 488 (1996) ("[S]ome states might extend all state laws bearing on marriage to same-sex couples while the federal government withheld the incidents of federal law."). Yet, the question then would be whether Congress' doing that would itself offend constitutional guarantees.

⁷ 744 A.2d 864 (Vt. 1999).

⁸ *Id.* at 867.

protected rights,”⁹ deferring that issue for another day.¹⁰ The court did make clear that if the Vermont legislature fails to pass the appropriate legislation in a timely manner,¹¹ the appellants can then petition the court to require that marriage licenses be issued.¹² The court thus recognized that, in the future, it might be asked to decide cases involving two different kinds of allegations: (1) the state had failed to fulfill its obligations to accord Vermonters equal benefits, and (2) while the state had accorded equal benefits to all similarly situated Vermonters,¹³ nonetheless, it had effected an invidious classification that could not withstand constitutional scrutiny.¹⁴

A. *Which Benefits Must Be Included?*

The Vermont Supreme Court listed a whole host of benefits and protections incident to marriage in Vermont, including:

[T]he right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a spouse; the right to bring an action for loss of consortium; the right to workers' compensation survivor benefits; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member; and the right to

⁹ *Id.* at 886.

¹⁰ *See id.* (holding that “some future case may attempt to establish that [claim]”).

¹¹ *See id.* at 887 (“[W]e hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to consider and enact implementing legislation in an orderly and expeditious fashion.”).

¹² *See id.* (“In the event that the benefits and protections in question are not statutorily granted, plaintiffs may petition this Court to order the remedy they originally sought.”).

¹³ The issue for the court was whether “the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*.” *Id.* at 882.

¹⁴ For an analysis of this second prong, see *infra* notes 76-113 and accompanying text.

receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.¹⁵

Further, the court made clear that it had only offered a partial list.¹⁶ Indeed, civil union partners are entitled to a comprehensive list of benefits.¹⁷ A separate question, which will not be addressed here, is whether the package includes all the enumerated benefits within the state to which other couples are entitled.¹⁸

When Congress passed DOMA, it thereby illustrated and emphasized that some of the benefits usually accorded to married couples are conferred by other states or by the federal government. At least one issue that the Supreme Court of Vermont will have to address is whether the Vermont legislature has met the requirement to afford all Vermonters "the common benefit, protection, and security of the law"¹⁹ when, by recognizing civil unions instead of same-sex marriages, it offered Vermont same-sex couples fewer benefits and protections vis-a-vis other states, and perhaps the federal government, than it might have given.

B. *Interstate Recognition*

When it seemed that Hawaii might recognize same-sex marriages, some commentators suggested that other states would be required to recognize those same-sex marriages validly established in Hawaii.²⁰ Anticipating that Hawaii might

¹⁵ *Baker*, 744 A.2d at 883-84 (citations omitted).

¹⁶ *See id.* at 884 (stating that "other statutes could be added to this list").

¹⁷ The law entitles same-sex couples in civil unions to all of the benefits that married couples have. *See* 1999 Vt. Acts & Resolves 91 § 1204(a) ("Parties to a civil union shall have all the same benefit, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."). However, the state may be precluded by federal law from according certain benefits. *See infra* note 18 and accompanying text.

¹⁸ Further, there will be no discussion of how ERISA affects issues here. *See, e.g.*, Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267 (1998) (arguing that ERISA should not be interpreted to preclude legislation requiring employers to provide domestic partner benefits).

¹⁹ *Baker*, 744 A.2d at 867.

²⁰ *See, e.g.*, 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, 556 (1993-94) (suggesting that full faith and credit guarantees would not allow states to refuse to recognize same-sex marriages validly established in other states); Habib Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 400 (1995) (suggesting that full faith and credit requirements when properly understood would require such recognition).

recognize same-sex marriages, Congress passed DOMA,²¹ one part²² of which dealt with the conditions under which states would have to recognize marriages validly established in other states. The Act read in relevant part:

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

There is some confusion about how this section of the Act should be interpreted. When it was discussed in Congress, proponents suggested that this section was necessary to prevent a same-sex couple domiciled in one state from going to another state where such marriages were recognized, marrying, and then returning to their home state demanding that the marriage be recognized.²⁴ Yet, if that was the purpose,²⁵ then this section of the Act was unnecessary, because domiciles already had the power not to recognize marriages validly established in other jurisdictions.²⁶ Indeed, a brief examination of either *Restatement (First)* or *Restatement (Second) of the Conflict of Laws* reveals that domiciles have long had

²¹ See Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality under the Full Faith and Credit Clause*, 47 DEPAULL. REV. 943, 944 (1998) ("In anticipation of the imminent legalization of same-sex marriages in Hawaii, Congress passed the Defense of Marriage Act . . .").

²² For discussion of the Act's other part, see *infra* notes 76-113 and accompanying text.

²³ 28 U.S.C. § 1738C.

²⁴ See *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Sen. Hatch) available at 1996 WL 10829443 ("Thus, it would not be surprising that persons who want to invoke the legitimacy of 'marriage' for same-sex unions will travel to Hawaii to become 'married.' Then, they will return to their home states where it would be expected that the state recognize, as valid, a Hawaii marriage certificate."); *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Rep. Largent) available at 1996 WL 10829445 ("If the state court in Hawaii legalizes same-sex marriage, homosexual couples from other states around the country will fly to Hawaii to 'marry.' These same couples will then go back to their respective states and argue that the Full Faith and Credit Clause of the U.S. Constitution requires their home state to recognize their union as a 'marriage.'").

²⁵ See 142 CONG. REC. S4870 (daily ed. May 8, 1996) (statement of Sen. Nickles) ("This bill does not change State law, but allows each State to decide for itself with respect to same-sex marriage This effort . . . reaffirms current practice and policy . . .").

²⁶ See *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Prof. Cass Sunstein) available at 1996 WL 10829449 (suggesting that DOMA "gives states no authority that they lack").

the power to refuse to recognize marriages that are legally void in the domicile even if validly established elsewhere.²⁷

Some commentators suggest that this DOMA section was merely intended to reaffirm that the domicile at the time of the marriage has the right to refuse to recognize a marriage validly established elsewhere and that the courts should not hold otherwise.²⁸ Yet, the language of the section is much broader than that and, in fact, does not even include the term “domicile.” A literal reading of the section allows *any* state to refuse to recognize a same-sex marriage, regardless of when or where it was contracted.

This broad, literal interpretation would permit a significant change in the interstate recognition practices that had existed up to the time of the Act’s passage. While both *Restatements* suggest that the domicile *at the time a marriage is established* need not recognize a marital union if it violates an important public policy of the state,²⁹ they both also suggest that a marriage valid in the domicile at the time of the marriage would be recognized as valid by all of the states.³⁰

Two different points may be made about the emphasis in each of the *Restatements* on the law of the domicile at the time of the marriage. First, insofar

²⁷ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934) [hereinafter FIRST RESTATEMENT]. This provision states:

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

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

Id.; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1969) [hereinafter SECOND RESTATEMENT] (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).

²⁸ See Leonard G. Brown III, Comment, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 170-71 (1996) (suggesting that DOMA is meant to provide a check on the federal courts).

²⁹ See *supra* note 27.

³⁰ See FIRST RESTATEMENT, *supra* note 27, §§ 121, 132 (suggesting that a validly celebrated marriage not void in the domicile is valid). There is one exception regarding remarriage after divorce that is not relevant for purposes here. See *id.* at § 131; see also SECOND RESTATEMENT, *supra* note 27, § 283 (suggesting that a validly celebrated marriage that does not violate the strong public policy of the state with the most significant contacts at the time of the marriage is valid).

as either *Restatement* is persuasive in a particular jurisdiction,³¹ a court in that jurisdiction would tend to follow it and hold that the domicile at the time of the marriage could refuse to recognize a marriage validly established elsewhere, but a state that was neither the domicile nor the state where the marriage was established, *should* recognize the marriage as long as it was valid in the domicile at the time it was established. Congress' having passed DOMA and having (allegedly) accorded each state the power to refuse to recognize a same-sex marriage validly established elsewhere does not speak to whether such a marriage should be recognized. Thus, absent local legislation to the contrary,³² courts should recognize same-sex marriages validly established in another domiciliary state because the state has important interests in protecting the predictability of marriage,³³ strengthening and preserving the integrity of marriage,³⁴ and safeguarding family relationships.³⁵

Second, a separate point is that the interpretation of DOMA should itself be affected by the positions offered in the *Restatements*, because the Act was, allegedly, merely intended to affirm existing practices³⁶ and the *Restatements* offer influential characterizations of what those existing practices were and are. Thus, because both *Restatements* suggest that the law of the domicile at the time of the marriage will determine the validity of the union, congressional intent in passing DOMA should be interpreted as permitting domiciles, at the time of the marriage, to refuse to recognize a same-sex marriage validly established elsewhere, but not permitting a state having no connection to the marriage at the time of its establishment in a sister domicile to refuse to recognize that union.

Suppose that the DOMA section under examination here is given a broad interpretation, notwithstanding its proponents' claimed goal to reflect current law. A separate question is just what that broad interpretation would permit. Perhaps it would "merely" entitle future *domiciles* to refuse to recognize same-sex unions. On the other hand, a broad interpretation might do much more than that, for example,

³¹ See *State v. Graves*, 307 S.W.2d 545, 547 (Ark. 1957) (upholding validity of marriage void in the domicile after appealing to *First Restatement* position); *Hesington v. Estate of Hesington*, 640 S.W.2d 824, 826 (Mo. App. 1982) (supporting Missouri position with respect to the validity of marriage by appealing to the *Second Restatement* position); *In re Estate of Murnion*, 686 P.2d 893, 898-99 (Mont. 1984) (upholding marriage after analyzing and applying *Second Restatement* position); *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex. App. 1985) (suggesting that Texas has adopted the *Second Restatement*'s position with respect to the validity of marriage).

³² Various states have enacted "mini-DOMAs." See, e.g., ARK. CODE ANN. § 9-11-107 (Michie 1998); DEL. CODE ANN. tit. 13, § 101 (a), (d) (Supp. 1996); GA. CODE ANN. § 19-3-3.1(b) (1996 & Supp. 1998); MISS. CODE ANN. § 93-1-1(2) (1997 & Supp. 1998); N.C. GEN. STAT. § 51-1.2 (Supp. 1997).

³³ See *Vandever v. Indus. Comm'n of Arizona*, 714 P.2d 866, 869 (Ariz. App. 1986).

³⁴ See *Murnion*, 686 P.2d at 899.

³⁵ See *id.*

³⁶ See *supra* note 25.

permitting *any* state to refuse to recognize a same-sex marriage, notwithstanding the *current* recognition of the union by the couple's domicile.

A very broad interpretation of this section would be of doubtful constitutional validity, however, as the alleged reason for its passage was quite narrow: preventing the domicile at the time of the marriage from being forced to recognize a marriage validly celebrated elsewhere.³⁷ The Supreme Court struck down Colorado's Amendment II in *Romer v. Evans*³⁸ because "its sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class that it affect[ed]"³⁹ The Court would have reason to make a similar finding with respect to DOMA, especially since members of Congress have already suggested that DOMA was prompted by animus.⁴⁰

The resolution of how broadly this DOMA section should be read is especially important in the context discussed here. The *Baker* holding suggests that Vermont same-sex couples must be afforded equal benefits;⁴¹ it does not suggest that domiciliaries of *other* states are entitled to such benefits. Indeed, individuals seeking to avoid their own state's law by marrying in Vermont might find an unwelcome surprise. For example, even were it possible for a Vermont same-sex couple to marry in that state, a same-sex couple domiciled in a state declaring such marriages void would find that their marriage "celebrated" in Vermont would not even be recognized by Vermont.⁴² Thus, if this section of DOMA merely was meant to assure that domiciliaries would be unable to go back to their domicile and demand recognition of their same-sex union validly established elsewhere, the

³⁷ Even if the purpose for its passage was thought to be broader, the Act is constitutionally vulnerable for a number of reasons. Arguably, DOMA is an invalid exercise of congressional power that violates a number of constitutional guarantees. See generally Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997) (arguing that DOMA is unconstitutional because it is the antithesis of a full faith and credit measure, encroaches on state rights, unreasonably restricts interstate travel, and unduly burdens a disfavored group).

³⁸ 517 U.S. 620 (1996).

³⁹ *Id.* at 632.

⁴⁰ See *The Defense of Marriage Act: Hearings on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Sen. Kennedy) available at 1996 WL 10829444 (calling the bill the "Defense of Intolerance Act"); 142 CONG. REC. E1320-02 (daily ed. July 18, 1996) (statement of Rep. Collins) (DOMA "is nothing more than blatant homophobic gay-bashing").

⁴¹ See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) ("Whatever system is chosen . . . must conform with the constitutional imperative to afford all *Vermonters* the common benefit, protection, and security of the law.") (emphasis added).

⁴² See VT. STAT. ANN. tit. 15, § 6 (1989) ("A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.").

section would be doubly unnecessary in the context under discussion here, because: (1) states already had that power anyway, and (2) according to Vermont law, such marriages would not be valid.

Consider a different scenario. Suppose that Vermont were to recognize same-sex marriages and that a Vermonter were to marry her female partner. Suppose further that this same-sex couple travelled to another state to honeymoon. If that second state subscribed to the recognition position articulated in either the *First* or *Second Restatements*, that second state would recognize the marriage, because the couple's domicile (Vermont) recognizes the union.⁴³ If there was an accident in that latter state during the honeymoon, then the privileges enjoyed by a spouse (e.g., those associated with visiting a patient in the hospital or, perhaps, having a say in the patient's medical treatment if she were unable to express her own preferences) would presumably be accorded to the patient's partner.⁴⁴ Further, even if the right to sue for wrongful death or loss of consortium were limited to family members, the marital partner might nonetheless be able to bring such a cause of action.⁴⁵

Suppose the above scenario is modified slightly and the Vermont couple had instead contracted a civil union. The second state where they were celebrating Vermont's legal recognition of their relationship would be much less likely to recognize their civil union status⁴⁶ and, instead, probably would view the civil union

⁴³ A separate issue would be raised if the couple married in Vermont with the intention of moving to a second state, because that second state might then be viewed as having the most significant contacts with the couple at the time of the marriage. Here, it is imagined that the couple plans to live in Vermont.

⁴⁴ See *Baker*, 744 A.2d at 884 (including within the benefits "hospital visitation and other rights incident to the medical treatment of a family member"). The *First Restatement* treats the validity of a marriage and the incidents of marriage in separate sections; therefore, a state could recognize one without recognizing the other. See Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 363-64 (1997) (discussing difference between validity and incidents of marriage).

⁴⁵ See, e.g., DEL. CODE ANN. tit. 10, § 3724(b) (1999) (wrongful death action can only be for the benefit of someone related through blood or marriage); GA. CODE ANN. 51-4-2(a), (b) (1982) (action can only be brought by decedent's spouse or child); IDAHO CODE § 5-311 (1998) (wrongful death action can only be brought by heirs under the statutes of intestate succession, see IDAHO CODE § 15-1-201(21) (1998), or other family members through marriage, blood or adoption); KY. REV. STAT. ANN. § 411.130 (Michie 1992) (wrongful death benefits to go to spouse, child, or others related by blood); see also CONN. GEN. STAT. § 52-555a (1991) (loss of consortium action can be brought by spouse); ME. REV. STAT. ANN. tit. 14, § 302 (Supp. 1999) (married person can bring action for loss of consortium of spouse); N.H. REV. STAT. ANN. § 507:8-a (1997) (loss of consortium claim can be brought by spouse); R.I. GEN. LAWS § 9-1-41 (1997) (married person entitled to recover damages for loss of consortium caused by tortious injury to spouse); W.V. CODE § 48-3-19a (1999) (a married woman may sue and recover for loss of consortium to same extent and in all cases as a married man).

⁴⁶ See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex*

benefits accorded by Vermont as purely local and not requiring recognition.⁴⁷ Were there an accident, the domestic partner might be treated as a legal stranger to the patient.

There are at least two different reasons that a state might be unwilling to recognize another state's civil union benefits. First, the state might have its own domestic partnership system that accorded less robust benefits than Vermont; for example, not recognizing the right to sue for wrongful death or loss of consortium.⁴⁸ The state might well be unwilling to accord a benefit to Vermont civil union partners that it did not accord to local domestic partners. Second, the state might consciously have decided not to recognize domestic partnership or civil unions and, thus, might refuse to recognize Vermont's "novel" system. Therefore, the claim would not be merely that the states differed with respect to which individuals would be entitled to become domestic partners⁴⁹ but, rather, that the states differed with respect to whether to recognize such an institution at all.⁵⁰

It might be claimed that the analysis above ignores the argument that by passing DOMA Congress has authorized the states to refuse to recognize same-sex marriages. Yet, this is beside the point for two different reasons. First, DOMA is vulnerable on a number of constitutional grounds.⁵¹ If the only reason that states can refuse to recognize same-sex marriages validly celebrated in other domiciliary states is that Congress has authorized them to do so, and if this authorization is void and of no legal effect because Congress did not have such power, then all states would have to recognize a marriage validly celebrated in another domiciliary state. Second, even if DOMA is constitutional, it authorized, rather than required, the non-recognition of same-sex marriages. As long as *some* states would choose to recognize the Vermont same-sex marriage if only because of the "strong public policy . . . for upholding the validity of a marriage wherever possible,"⁵² there

Marriage, 1996 B.Y.U. L. REV. 1, 55 (suggesting that very few jurisdictions recognize domestic partnerships).

⁴⁷ See Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 L. & SEX. 541, 551 (1996) (suggesting that a virtue of the partnership proposal therein described was that it "would have few intergovernmental ramifications, since the benefits conferred would remain within the state").

⁴⁸ The *Baker* court explicitly included these rights as among those that must be accorded. See *Baker*, 744 A.2d at 883.

⁴⁹ See *supra* note 4 (suggesting that some jurisdictions only allow same-sex couples to register for partnership benefits and others allow both same—and different-sex couples to register for those benefits).

⁵⁰ Such a state could not say that it had refused to recognize *any* marriages, even if it did refuse to permit its domiciliaries to contract a particular marriage, for example, same-sex unions.

⁵¹ See *supra* note 37.

⁵² See EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 13.8 (2d ed. 1992).

would be important implications for the Vermont legislation.

One of the reasons that theorists were tempted to think that states might recognize same-sex marriages established in Hawaii was the growing trend for states to recognize marriages validly established elsewhere, even if these marriages could not be validly established in the domicile. The *Uniform Marriage and Divorce Act (Uniform Act)* "codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil."⁵³

The emerging conflicts principle is important to consider because it indicates the unique status of marriage and the very strong tendency of states to recognize marriages that have been validly established. Indeed, the *Uniform Act* describes the principle that the domicile *at the time of the marriage* should recognize a marriage validly established elsewhere, notwithstanding the established jurisprudence recognizing that the law of the domicile at the time of the marriage's celebration determines the marriage's validity. Here, what is being discussed is something far less "radical" than the recommendation offered in the *Uniform Act* and, further, was even something recognized in the *First Restatement*, namely, that states should recognize the validity of a marriage that is considered valid in a sister domiciliary state. If the "emerging conflicts principle" suggests that domiciles at the time of the marriage should recognize marriages validly established elsewhere, it certainly suggests that marriages valid in the domicile at the time of the marriage should be recognized throughout the country and a fortiori that a marriage valid in the domicile at the time of the marriage *and* in the couple's current domicile should be recognized by all of the states.

Given the strong presumption regarding the validity of marriages validly celebrated in sister domiciles⁵⁴ and the perceived "enormous differences between marriage and domestic partnership[s]"⁵⁵ likely causing such partnerships to be viewed as purely domestic creations,⁵⁶ it would seem extremely likely that some

⁵³ UNIF. MARRIAGE & DIVORCE ACT, § 210 cmt., 9A U.L.A. 176 (1987).

⁵⁴ See Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 185-86 (1997) ("marriages carry a very strong presumption of validity"); Beth A. Allen, Comment, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 647 (1996) (discussing the "strong presumption of validity" of marriages).

⁵⁵ See *Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (App. Div. 1999); see also *Crawford v. City of Chicago*, 710 N.E.2d (Ill. App. 1 Dist. 1999) 91, 98 ("Nothing in the DPO [domestic partnership ordinance] purports to create a marital status or marriage as those terms are commonly defined.").

⁵⁶ See Coleman, *supra* note 47, at 551 (touting the lack of interstate recognition as a benefit).

jurisdiction (let us call it State X) would recognize a same-sex marriage but not a civil union.⁵⁷ That the former would be recognized and some benefits accorded while the latter would not, suggests that civil unions are an inferior alternative to marriage that cannot offer equal protections and security.

The point here should not be misunderstood. Assuming that Vermont recognized same-sex marriages, it would not matter for purposes here that State X: (a) would not allow its own domiciliaries to marry a same-sex partner, or even (b) would not recognize a same-sex marriage of current domiciliaries who had validly contracted the marriage while living in Vermont. As long as State X would recognize a same-sex marriage of individuals *traveling through* the state (e.g., who were still domiciled in Vermont and were vacationing in the state), but would not recognize the civil union status of such a couple, and as long as affording the former recognition would, in fact, translate into some benefits and protections, then the Vermont constitutional requirement that same-sex couples be afforded equal benefits could not be met by adopting a civil union system instead.⁵⁸

The claim here is *not* that Vermont is required by its own constitution to regulate how other states treat the marriages of Vermonters, but merely that “the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law,”⁵⁹ and that setting up a separate civil union system does not meet this mandate. To see why this is so, it will be helpful to consider first-cousin marriages.

First-cousin marriages are permitted in Vermont,⁶⁰ although numerous states prohibit such marriages.⁶¹ A different state *might* have a law declaring that first-

⁵⁷ Cf. *Crawford*, 710 N.E.2d at 99 (“Here DPO [domestic partnership ordinance] affects only Chicago’s personnel policies; no state policy involving any other locality is either involved or undermined . . .”). Just as other localities within the state would not be affected by one city’s passing a domestic partnership ordinance, other states would seem not to be affected by one state’s passing a domestic partnership ordinance; *see also* Coleman, *supra* note 47, at 551 (suggesting that a virtue of the partnership proposal was that other states would not have to recognize the conferred benefits).

⁵⁸ It might well be that Oregon, for example, would be willing to recognize a same-sex marriage of visiting Vermonters, compare *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 447 (Or. App. 1998) (holding that lesbians and gays are members of a suspect class), even if that state is unwilling to allow Oregonians to marry a same-sex partner. *See id.* at 443 n.3 (pointing out that marriage is reserved for different-sex couples, although not addressing the constitutionality of that restriction).

⁵⁹ *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

⁶⁰ *See* 15 VT. STAT. ANN. § 1, 2 (1989).

⁶¹ *See* ARIZ. REV. STAT. ANN. § 25-101(A),(B) (West 2000) (first-cousin marriages void unless both are sixty-five or one is unable to reproduce); ARK. CODE ANN. § 9-11-106(a) (Michie 1998) (marriage between first cousins is “incestuous and absolutely void”); IDAHO CODE § 32-206 (1996) (first-cousin marriages prohibited); 750 ILL. COMP. STAT. 5/212 (West 1993) (first-cousin marriage prohibited unless both are fifty or older or one is permanently and irreversibly sterile); IND. CODE ANN. § 31-11-8-3 (Michie 1999) (first-

cousin marriages will not be recognized no matter where or when celebrated, for example, barring recognition of such marriages even if validly celebrated in Vermont by Vermont domiciliaries.⁶² Assuming that the latter state has the power to enforce such a law,⁶³ there would be nothing that Vermont could do to assure that a Vermonter's first-cousin marriage would be recognized in the other state. By the same token, were DOMA amended to permit every state to refuse to recognize the marriage of first cousins and were that amendment held constitutional, there would be nothing that Vermont could do to *assure* that Vermonters who marry their first cousins would have those marriages recognized in other states.

The fact that Vermont could not assure that other states would recognize the marriages of Vermont domiciliaries who had married their first cousins would not justify setting up a separate classification of first-cousin civil unions so that the relationship would be recognized in even *fewer* other states.⁶⁴ Those who wished

cousin marriages void unless both are sixty-five when marriage solemnized); IOWA CODE ANN. § 595.19 (West 1996) (first-cousin marriages void); KAN. STAT. ANN. § 23-102 (1995) (first-cousin marriages void); KY. REV. STAT. ANN. § 402.010 (Michie 1999) (first-cousin marriages void); MICH. COMP. LAWS ANN. §§ 551.3, 551.4 (West 1988) (individuals cannot marry their first cousins); MINN. STAT. ANN. § 517.03 (West 1990) (first-cousin marriages prohibited); MO. ANN. STAT. § 451.020 (West 1997) (first-cousin marriages prohibited); MONT. CODE ANN. § 40-1-401(1)(b) (2000) (marriage between first cousins prohibited); NEB. REV. STAT. § 42-103 (1998) (first-cousin marriages void if of the whole blood); N.H. REV. STAT. ANN. §§ 457:1, 457:2 (1992) (first-cousin marriages prohibited); N.D. CENT. CODE § 14-03-03 (1997) (first-cousin marriages void); OR. REV. STAT. § 106.020 (first-cousin marriages void unless cousins by adoption only); UTAH CODE ANN. § 30-1-1 (1998) (first-cousin marriages void unless both are over sixty-five or both are at least fifty-five and one is unable to reproduce); W.VA. CODE §§ 48-1-2, 48-1-3 (1999) (first cousins shall not marry unless relationship created solely through adoption); WIS. STAT. ANN. § 765.03 (West 1993) (first cousins may not marry unless female is fifty-five or either is permanently sterile).

⁶² See DEL. CODE ANN. tit 13 § 101(a), (d) (1999); see also ARIZ. REV. STAT. ANN. §§ 25-101(A), 25-112(A) (West 2000). It is unclear whether these statutes would be interpreted to preclude recognition of a first-cousin marriage validly established in another domicile. In both *Mortenson v. Mortenson* (*In re Estate of Mortenson*), 316 P.2d 1106, 1108 (Ariz. 1957) (first-cousin marriage validly established in New Mexico by Arizona domiciliaries) and *Godt v. Godt*, 1990 WL 123047 at *4 (Del. Super. Aug. 7, 1990) (first-cousin marriage validly established in Maryland by Delaware domiciliaries), first cousins who had evaded local law by marrying elsewhere were held not to have valid marriages. If these statutes would be interpreted not to authorize the refusal to recognize a first-cousin marriage validly established in another *domicile*, however, they should also be interpreted not to authorize the refusal to recognize a same-sex marriage validly established in another domicile, as the statutes imply that the two kinds of marriages should be treated similarly.

⁶³ But see Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000) (suggesting that this would violate the right to travel).

⁶⁴ The *Baker* court recognized that some states do not recognize first cousin marriages.

to marry rather than establish civil unions with their first cousins would rightly complain if Vermont claimed to be treating them equally but merely gave them the latter option, even if in fact the benefits *within* the state were equal in all respects, because the state would thereby have diminished the partners' protections and security when they traveled in other states.⁶⁵

The issue that interested many commentators who discussed whether other domiciles would be forced to recognize a same-sex marriage validly established in Hawaii⁶⁶ is *not* the issue of interest here. The Vermont Constitution offers protections to Vermonters, not to Georgians who wish to evade the marriage laws of that state.⁶⁷ Precisely because the issue of interest involves *Vermonters'* benefits, the benefits and protections accorded *current* Vermont domiciliaries (for instance, those who are merely traveling elsewhere) must be examined. The very reason that protecting Vermonters is important to Vermont is the reason that other states would be most likely to defer to Vermont and recognize the same-sex marriage of Vermont domiciliaries,⁶⁸ namely, that the ties to Vermont would be substantial and long-lasting whereas the ties to another state would be slight and temporary. Indeed, in the nineteenth century when states were thought to have even more power with respect to whether they would recognize a marriage within the state,⁶⁹ a Virginia court in *Ex parte Kinney*⁷⁰ pointed out that the state would have to recognize an interracial marriage if the couple were merely traveling through the state, even if

See *Baker*, 744 A.2d at 885 (discussing "Vermont's recognition of unions, such as first-cousin marriages, not uniformly sanctioned in other states").

⁶⁵ For example, although Oklahoma expressly refuses to permit first-cousin marriages, it also expressly provides that "any marriage of first cousins performed in another state authorizing such marriages, which is otherwise legal, is hereby recognized as valid and binding in this state as of the date of such marriage." OKLA. STAT. ANN. tit. 43, § 2 (1990).

⁶⁶ See, e.g., Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 47 (1998) (focusing on the "most common case" where the domiciliaries of one state go to Hawaii, marry, and then return to the domicile seeking recognition of the marriage).

⁶⁷ See GA. CODE ANN. § 19-3-3.1 (1999). For reasons to think that it might be especially unavailing for same-sex couples from Georgia to marry in Vermont even were Vermont to recognize same-sex marriages, see *supra* notes 41-42 and accompanying text.

⁶⁸ Further, this would seem to be the kind of case in which it would be the most likely that other states would be constitutionally required to recognize the marriage. See MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 192 (1999) (suggesting that due process guarantees would be implicated in such a case).

⁶⁹ See *Ex parte Kinney*, 14 F. Cas. 602, 605 (E.D. Va. 1879) ("If Virginia were in the midocean or on the antipodal continent, her control over the rights and privileges of her citizens as members of society, including marriage, would be, no more certainly than now, unrestrained by any provision of the national constitution.").

⁷⁰ *Id.*

Virginia could refuse to allow its own domiciliaries to enter into such a marriage.⁷¹

It should not be thought that when the *Kinney* opinion was written, interracial marriages were basically accepted, notwithstanding their legal prohibition. On the contrary, such marriages were considered strongly offensive to local policy. In fact, in the year preceding the *Kinney* opinion, the Virginia Supreme Court explained its view of the importance of prohibiting interracial marriage:

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, . . . all require that . . . [the races] should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law.⁷²

Earlier in the decade, the Supreme Court of Tennessee had offered its own view of how offensive such marriages were, suggesting that if interracial marriages were recognized, polygamous and incestuous marriages would also have to be recognized.⁷³

Yet, if states were constitutionally required to recognize the interracial marriages of individuals traveling through the state even though: (1) interracial marriages were thought at least as offensive to local policy as any other kind of marriage, and (2) states were viewed as having the same power to establish marital restrictions for their own domiciliaries as they would have had were they separate countries,⁷⁴ then states are *currently* constitutionally required to recognize the same-sex marriages of Vermont domiciliaries who are merely traveling outside the state, since states are now understood to have less sovereignty than they once were thought to have.⁷⁵ Thus, because other states, out of comity or constitutional obligation, would likely recognize the same-sex marriages of vacationing Vermonters and (temporarily) afford them increased protections accompanying that recognition, the Vermont legislature must recognize same-sex marriage if it is to accord Vermonters equal protection.

⁷¹ See *id.* at 606 ("That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded . . .").

⁷² *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878).

⁷³ See *State v. Bell*, 66 Tenn. (7 Heisk.) 9, 11 (1872).

⁷⁴ See *supra* note 69.

⁷⁵ For example, the *Kinney* court claimed that Virginia had the power to preclude any of its citizens from marrying someone of another race, see *Kinney*, 14 F. Cas. at 604, although the United States Supreme Court later made clear that the United States Constitution prevented states from enforcing such marital restrictions. See *Loving v. Virginia*, 388 U.S. 1 (1967).

C. *Marriage for Federal Purposes*

The DOMA section discussed above authorizes states to refuse to recognize same-sex marriages if they so desire.⁷⁶ A different DOMA section prevents same-sex couples from being accorded the federal benefits of marriage, notwithstanding the recognition of their union by the couple's domicile. That DOMA section reads:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.⁷⁷

This DOMA section should help lay to rest the claim that the Act was passed to promote federalism,⁷⁸ although that claim was not plausible even with respect to the other section of the Act,⁷⁹ because: (1) DOMA does not permit a state to refuse to recognize *any* marriage offensive to an important local policy but instead merely authorizes the non-recognition of the marriages of an unpopular group, and (2) the language in the *Congressional Record* made clear that Congress was interested in punishing lesbians, gays, and bisexuals rather than in promoting federalism concerns.⁸⁰ If these reasons do not negate the claim that Congress, in passing DOMA, was trying to manifest its willingness to defer to the states about family matters, then the DOMA section addressing federal benefits should clarify further that Congress was not trying to support state choice. This section only *undermines* the choice of any state deciding to recognize same-sex unions and thus cannot be thought to embody federalist principles.⁸¹

⁷⁶ For the discussion of that section, see *supra* notes 23-75 and accompanying text.

⁷⁷ 1 U.S.C. § 7 (1994).

⁷⁸ See 1996 WL 256695 (written statement of Mr. Wardle before the Judiciary Comm. on H. 3396, the Defense of Marriage Act) (May 15, 1996) (stating that a main principle underlying DOMA is a "respect for federalism").

⁷⁹ See *supra* note 23 and accompanying text (describing the language of that section).

⁸⁰ For an analysis of the language and why Congress' attempt to impose legislative punishment on a particular group implicated bill of attainder guarantees, see generally Mark Strasser, Essay, *Ex Post Facto Laws, Bills of Attainder and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998).

⁸¹ See Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIAC L. REV. 1, 2 (1996) ("The second effect of DOMA, by centralizing the federal definition of marriage rather than deferring to state definitions as the federal government had in the past, cuts against the first theme of state choice . . .").

It might be thought that because this DOMA section “merely” concerns the *federal* benefits that married couples enjoy, Congress can do as it chooses⁸² and, probably, has often exercised its prerogative to decide which married couples will be entitled to receive those benefits. Both assumptions would be mistaken. Indeed, Congress has always deferred to a state’s definition of marriage,⁸³ even when many, but not all, states refused to allow interracial couples to marry.⁸⁴

Congress’ previous practice of deferring to the state definition of marriage was likely due to the fact that family law is a “peculiarly state province.”⁸⁵ As Justice Rehnquist explained, family law is a matter “of peculiarly local concern and therefore governed by state and not federal law.”⁸⁶ Indeed, in *United States v. Lopez*,⁸⁷ the Court struck down Congress’ power to criminalize the possession of a firearm within a school zone, at least in part, because the federal government’s rationale would imply that “Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”⁸⁸

The claim here is *not* that Congress is always prohibited from passing regulations affecting family law. For example, Congress has passed the Parental Kidnapping and Prevention Act⁸⁹ and the Full Faith and Credit for Child Support Orders Act,⁹⁰ and those have not been held by the Court to violate constitutional guarantees. Nonetheless, Congress bears a heavy burden if it is to justify the displacement of state law. As the Court explained in *Rose v. Rose*,⁹¹ “[b]efore a state law governing domestic relations will be overridden, it ‘must do ‘major

⁸² See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 4 (1997) (“The definitional provision of DOMA may be unwise, inhumane, and insulting, but its constitutionality seems, on first blush, to be secure from doubt. Congress obviously has the power to define the terms of the U.S. Code.”). Yet, there is nothing obvious about this, even when one sets aside equal protection issues. See *infra* notes 83-112 and accompanying text.

⁸³ See Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL’Y 203, 204 (1997) (suggesting that this was unprecedented).

⁸⁴ For example, such marriages were permissible in Rhode Island but not in Massachusetts in the early 1800s. In *Medway v. Needham*, 16 Mass. 157, 159 (1819), the Supreme Judicial Court of Massachusetts had to decide whether to recognize an interracial marriage validly celebrated in Rhode Island. The court decided that the marriage should be recognized.

⁸⁵ See *United States v. Yazell*, 382 U.S. 341, 353 (1966).

⁸⁶ *McCarty v. McCarty*, 453 U.S. 210, 237 (1981) (Rehnquist, J., dissenting).

⁸⁷ 514 U.S. 549 (1995).

⁸⁸ *Id.* at 564.

⁸⁹ See 28 U.S.C. § 1738A (1994).

⁹⁰ See *id.* at § 1738B.

⁹¹ 481 U.S. 619 (1987).

damage” to “clear and substantial” federal interests.”⁹²

Perhaps it would seem that Congress is not displacing state law in this DOMA provision because it is only defining marriage for *federal* purposes. Yet, this would misrepresent the relevant jurisprudence. The Court explained in *DeSylva v. Ballentine*⁹³ that the “scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”⁹⁴ Indeed, it is especially appropriate to apply state law “where a statute deals with a familial relationship”⁹⁵ After all, “there is no federal law of domestic relations, which is primarily a matter of state concern.”⁹⁶

Congress might be able to justify displacing state law if, for example, national defense were at issue.⁹⁷ The Court has made clear, however, that “generalities as to the paramountcy of the federal interest do not lead inevitably to the result the Government seeks.”⁹⁸ In *United States v. Yazell*,⁹⁹ the Court suggested that

solicitude for state interests . . . in the field of family and family-property arrangements . . . should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.¹⁰⁰

While saving money was viewed as a legitimate interest,¹⁰¹ that interest was held not to be sufficiently important to uphold the federal government’s claims.¹⁰²

When this DOMA section is finally challenged, the Court will have to decide whether the provision is preventing major damage to clear and substantial federal interests. While it is unclear what the Court will decide,¹⁰³ it is, at the very least,

⁹² *Id.* at 625 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (citation omitted)).

⁹³ 351 U.S. 570 (1956).

⁹⁴ *Id.* at 580.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (upholding insured service member’s right to designate freely the beneficiary of the insurance); *Wissner v. Wissner*, 338 U.S. 655 (1950) (upholding right to servicemen to make insurance benefit payable to relative of choice because this might affect morale).

⁹⁸ *United States v. Yazell*, 382 U.S. 341, 349 (1966).

⁹⁹ *Id.* at 352.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 348 (“Undeniably there is always a federal interest to collect moneys which the Government lends.”).

¹⁰² See *id.* at 343 (affirming the decision below and stating “[t]he Government was rebuffed by the trial and appellate courts”).

¹⁰³ Cf. James A. Riddle, Comment, *Preemption of Reconcilable State Regulation:*

surprising to suggest that the “only way to challenge this provision (i.e., the DOMA provision defining marriage for federal purposes) is to claim that it is impermissibly discriminatory,”¹⁰⁴ when the claim involving no major damage to clear and substantial federal interests has been successful in the past in limiting federal displacement of state family law,¹⁰⁵ and when the current Court has become increasingly willing to limit Congress’ power over the states.¹⁰⁶

Those arguing for the constitutionality of this DOMA section will have some difficulty establishing what clear and substantial federal interests it serves. The section’s proponents might claim that the federal government has a legitimate interest in saving money and that same-sex marriages would involve the extension of benefits that would not otherwise have to be extended.¹⁰⁷ However, the *Yazell* Court’s clarification that the mere saving of money, while legitimate,¹⁰⁸ is not a sufficiently important interest to justify displacement of state law suggests that such a tack would not be successful.¹⁰⁹

If the Court held that saving money met the relevant standard, then Congress would seem permitted to deny recognition to any sort of marriage that it chose (e.g., Republican, Democratic, interfaith, etc.) in the interest of protecting the Federal Treasury. Further, Congress would be entitled to pass a variety of measures regulating the family as long as federal funds might thereby be saved.

It seems clear that in passing DOMA, Congress was not motivated by a desire to promote federalism (or the first part would have been more general and the second part not passed at all) but, instead, sought to impose a burden on a disfavored group. On numerous occasions, members of Congress have made clear

Federal Benefit Schemes v. State Marital Property Law, 34 HASTINGS L.J. 685, 698-99 (1983) (suggesting that the interest implicated in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), was not substantial, the Court’s analysis to the contrary notwithstanding).

¹⁰⁴ See Koppelman, *supra* note 82, at 4-5.

¹⁰⁵ Indeed, it had already been successful when it was described by Professor Koppelman as “toothless,” see *id.* at 5 n.25, because *Yazell* was decided in 1966 and it basically incorporated the relevant language. See *supra* text accompanying note 100 (citing the relevant language of the opinion).

¹⁰⁶ See *supra* notes 87-88 and accompanying text (referring to *United States v. Lopez*).

¹⁰⁷ See Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 212 (1997) (“Section 3 of the DOMA would indeed protect the federal treasury from any claim to federal benefits by same-sex couples.”). A separate question is how much would be saved. See *id.* (“Although no estimates have been made of the cost of federally recognizing same-sex marriages, there are reasons to believe that the total cost would be small.”).

¹⁰⁸ It is precisely because the interest might be legitimate but not substantial that it is wrong to dismiss this analysis by pointing out that if “the law’s purpose is illegitimate, the law is already invalid.” See Koppelman, *supra* note 82, at 5 n.25.

¹⁰⁹ See *supra* notes 101-102 and accompanying text (suggesting that saving money does not meet the requisite standard).

that they do not wish to “condone” or “promote” the gay “lifestyle.”¹¹⁰ Yet, if Congress passed DOMA to express its disapproval of gays, lesbians, and bisexuals, this purpose itself may have constitutional significance. The Court has cautioned that legislators are not permitted to pass legislation that “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”¹¹¹ As the Court made clear in *United States Department of Agriculture v. Moreno*,¹¹² “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹¹³

The federal benefits provision of DOMA is at the very least constitutionally vulnerable. Were it in fact found unconstitutional, there would be yet another reason that Vermont’s domestic partnership system would not pass state constitutional muster. Because same-sex civil union partners still would not be entitled to federal marital benefits,¹¹⁴ but different-sex marital partners would,¹¹⁵ the Vermont civil union system would not be according Vermonters “the common benefit, protection, and security of the law”¹¹⁶ in yet another respect, for the Vermont civil union partners would have been denied the federal benefits that would “flow from marriage under Vermont law.”¹¹⁷

Regardless of whether DOMA is constitutional, the civil union option will not

¹¹⁰ See, e.g., 145 CONG. REC. E373-74 (daily ed. Mar. 9, 1999) (statement of Rep. Chenoweth) (suggesting that same-sex relations involve a “perversion”); 142 CONG. REC. E752 (daily ed. May 9, 1998) (statement of Rep. Dornan) (reading into record an article discussing the “reckless lifestyle inherent in the gay experience”); 142 CONG. REC. S10131-32 (daily ed. Sept. 10, 1996) (statement of Sen. Coats) (expressing concern about promoting gay lifestyle); 140 CONG. REC. 25,143-46 (1994) (supporting bill that would preclude funds from being used which would have the purpose or effect of depicting homosexuality as normal); 135 CONG. 13,332 (1989) (statement of Sen. Helms) (suggesting that same-sex relations involve a perversion).

¹¹¹ See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

¹¹² 413 U.S. 528 (1973).

¹¹³ *Id.* at 534.

¹¹⁴ See Foreman, *supra* note 4, at 342 (discussing government’s denial of marital benefits to domestic partners).

¹¹⁵ See 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski). This Federal definition would ensure that a State could not define a ‘marriage’ that the Federal Government would have to recognize. If the Federal Government does not act now, and Hawaii legalizes homosexual marriage, the Federal Government would then be obliged to provide the same benefits that heterosexual marriages currently receive. Unless this bill is passed establishing a Federal definition of marriage, all Americans will then be paying for benefits for homosexual marriages.

Id.

¹¹⁶ *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

¹¹⁷ *Id.*

be according same-sex couples equal benefits. Thus, it would be unnecessary to wait for DOMA to be declared unconstitutional to establish this inequality, although a declaration of the Act's unconstitutionality would make the inequality between marital and civil union status even clearer.

II. THE IMPOSITION OF STIGMA

Suppose that the issue of equal benefits was somehow resolved so that marriages and civil unions were held to accord the same benefits. One issue would be whether some of the relevant benefits had not been included within the comparison. A separate issue would be whether setting up a separate civil union system that accords equal benefits nonetheless imposes a stigma and, for that reason, is unconstitutional. It is difficult to see how the Vermont Supreme Court could examine the civil union legislation and fail to find *both* that some benefits had not been included in the comparison *and*, that in any event, the separate system was stigmatizing and hence unconstitutional.

A. *When Are Equal Benefits Being Accorded?*

The Vermont Supreme Court made clear that the possible parallel system to be set up by the Vermont legislature would have to accord same-sex couples equal benefits.¹¹⁸ The court gave examples of the rights that must be included,¹¹⁹ but also made clear that it had offered a non-exhaustive list.¹²⁰ The court did not make clear, however, which *kinds* of benefits had to be offered.

The issue of concern here can be made clearer when one considers the attempts that have been made to create separate but equal institutions in other contexts. For example, in *Sweatt v. Painter*,¹²¹ the Court struck down Texas' attempt to set up a segregated law school to avoid integrating the University of Texas. The Court noted some of the differences between the schools' students, faculty, and library.¹²² The Court also noted a difference in "those qualities which are incapable of objective measurement but which make for greatness in a law school."¹²³ By the same token, the Court in *United States v. Virginia*¹²⁴ suggested that intangible differences are sometimes even more important than the tangible ones.¹²⁵ Thus, the Court has made clear that intangible qualities or qualities incapable of measurement

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 883-84.

¹²⁰ See *id.* at 884 (finding that "other statutes could be added to this list").

¹²¹ 339 U.S. 629 (1950).

¹²² See *id.* at 632-33.

¹²³ *Id.* at 634.

¹²⁴ 518 U.S. 515 (1996).

¹²⁵ See *id.* at 554.

can have constitutional significance when a determination must be made regarding whether equal protection requirements have been met or whether equal benefits have been accorded.

When the Court rejected Virginia's proposal to set up a separate program for women at Mary Baldwin College so that the Virginia Military Institute would not have to accept women applicants, the Court pointed out that the Mary Baldwin program "does not qualify as VMI's equal," because, among other things, the two were not equal in prestige.¹²⁶ One question for the Vermont Supreme Court will be whether the prestige of the option is itself a constitutionally significant consideration, for it is difficult to understand how the civil union alternative plausibly could be considered equal to marriage in prestige.

The claim, of course, is not that no one would choose civil union status over marriage. Even those who have the option of marrying sometimes choose to register as domestic partners instead.¹²⁷ The point here is merely that the benefits accorded are not equal if the prestige or other intangible or difficult-to-measure qualities are unequal, even if particular individuals might nonetheless choose for their own reasons the option that accorded fewer benefits.

B. *On According Equal Benefits to Inferiors*

The *Baker* court understood that the "symbolic or spiritual significance of the marital relation"¹²⁸ would not be included within the benefits accorded by domestic partnership status but suggested that "it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that . . . characterizes this case."¹²⁹ As suggested above,¹³⁰ however, because qualities are intangible or difficult to measure does not make them of merely symbolic or spiritual significance. The benefits afforded by the more prestigious alternative, for example, can be quite real.

The above point notwithstanding, the importance of the symbolic should not be minimized. Indeed, the Vermont court seemed to appreciate the importance of symbolism when it explained that "the essential aspect of [plaintiffs'] claim is simply and fundamentally for inclusion in the family of state-sanctioned human relations."¹³¹ The court seemed not to notice that equality guarantees require not

¹²⁶ *Id.* at 551.

¹²⁷ See James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEX. 649, 656-57 (1998) (stating that most domestic partnership plans "extend their benefits to unmarried heterosexuals . . . [and] these plans typically result in unwed straight couples being the *majority* of beneficiaries").

¹²⁸ *Baker v. State*, 744 A.2d 864, 888-89 (Vt. 1999).

¹²⁹ *Id.* at 889.

¹³⁰ See *supra* notes 121-26 and accompanying text.

¹³¹ *Baker*, 744 A.2d at 889.

only that same-sex relationships be included within the "family" of human relations, but also that they not be included within the family merely as a poor relation. While it may be preferable to be considered a poor relation rather than a complete stranger, it should never be thought that according *better* treatment necessarily meets the requirement to accord *equal* treatment. Commentators are correct when they complain that lesbians and gays seek more than tolerance,¹³² but are incorrect when falsely implying that seeking equality somehow involves seeking preferential treatment.¹³³

In *Plessy v. Ferguson*,¹³⁴ the Court rejected the claim that "the enforced separation of the two races [in railway cars] stamps the colored race with a badge of inferiority,"¹³⁵ instead claiming that were a badge of inferiority thereby imposed, it would not be "by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."¹³⁶ Ultimately, the Court repudiated the claim that the stamp of inferiority imposed by requiring racial separation in railway cars had been "chosen."¹³⁷ It should be noted that both proponents and opponents of same-sex marriage recognize the symbolic importance of whether such unions are legally recognized,¹³⁸ and neither denies that the failure to recognize such marriages has implications for equality.¹³⁹

A brief examination of the *Congressional Record*, for example, reveals what

¹³² See Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 358 (1997) (pointing out that "when homosexual activists seek validity for same-sex marriages they are demanding much more than tolerance").

¹³³ See, e.g., Wardle, *supra* note 46, at 59 ("[T]he gay-lesbian demand that homosexual couples be allowed to marry is a demand for special preferred status, not merely for tolerance.").

¹³⁴ 163 U.S. 537 (1896).

¹³⁵ *Id.* at 551.

¹³⁶ *Id.*

¹³⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

¹³⁸ See Chambers, *supra* note 6, at 450 ("Whatever the context of the debate, most speakers are transfixed by the *symbolism* of legal recognition [of same-sex marriage].").

¹³⁹ See, e.g., *id.* at 450-51:

In a law-drenched country such as ours, permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted. Most proponents of same-sex marriage, within and outside gay and lesbian communities, want marriage first and foremost for this recognition. Most conservative opponents oppose it for the same reason.

See also Michael Mandell, *Same Sex Marriages: Arizona Reacts to a Perceived Threat to Traditional Marriages*, 29 ARIZ. ST. L.J. 623, 632 (1997) ("[O]pponents of same-sex marriages argue that a state's recognition of homosexual marriages would convey 'an unmistakable imprimatur of acceptability and legitimacy upon the practice of homosexuality' that would serve to undermine traditional heterosexual marriages.") (citation omitted).

members of Congress believe is at stake if same-sex marriages are recognized. Some members apparently believe that the survival of the country hangs in the balance,¹⁴⁰ which sounds strikingly familiar to the claims made by the Virginia Supreme Court with respect to what would happen were interracial marriages recognized.¹⁴¹ Others suggest that legal recognition of same-sex unions would somehow trivialize and demean marriage,¹⁴² notwithstanding that same-sex couples who contracted marriages would have the same rights and responsibilities that different-sex couples have,¹⁴³ and notwithstanding the claim of these same opponents that such marriages, even if recognized, would not be “real” anyway.¹⁴⁴ What is manifestly clear is that opponents of same-sex marriage want to assure that same-sex relationships are not viewed as “equal” to different-sex marriages.¹⁴⁵ These commentators seem to have forgotten that part of the rationale in *Loving v. Virginia*¹⁴⁶ for striking down Virginia’s anti-miscegenation statute was that Virginia had been attempting, via its marriage statute, to promote the view that one group was superior to another.¹⁴⁷

In his *Plessy* dissent, Justice Harlan asked rhetorically,

[w]hat can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public

¹⁴⁰ See 142 CONG. REC. H8820-21 (daily ed. July 30, 1996) (statement of Rep. Dornan) (referring to an address by Billy Graham); see also 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (suggesting that the survival of Western civilization was at stake).

¹⁴¹ See *supra* note 72 and accompanying text.

¹⁴² See 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Smith) (“Same-sex ‘marriages’ demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior. And they trivialize marriage as a mere ‘lifestyle choice.’”).

¹⁴³ This was one of the elements that the *Baker* court recognized as constitutionally required. See *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

¹⁴⁴ See 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk) (“If homosexuals achieve the power to *pretend* that their unions are marriages . . .”) (emphasis added); see also 142 CONG. REC. H7270, H7275 (daily ed. July 11, 1996) (statement of Rep. Largent) (“Destroying the exclusive territory of marriage to achieve a political end will not provide homosexuals with the *real benefits of marriage*, but it may eventually be the final blow to the American family.”) (emphasis added).

¹⁴⁵ See 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Canady) (“[T]he basic question . . . [is] whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships.”); see also 140 CONG. REC. 6824 (statement of Sen. Nickles) (reading letter into the record suggesting the importance of not equating same-sex and different-sex relationships).

¹⁴⁶ 388 U.S. 1 (1967).

¹⁴⁷ See *id.* at 7.

coaches occupied by white citizens?¹⁴⁸

An analogous question might be asked with respect to the refusal to permit same-sex marriages, since the state is implying that lesbian and gay citizens "are so inferior and degraded" that they cannot be allowed to marry their life-partners.

Same-sex marriage opponents seem to have the implicit, if not explicit, attitude¹⁴⁹ that lesbians, gays, and bisexuals are, at best, second-class citizens who are not equal to everyone else.¹⁵⁰ Yet, the Court in *United States v. Virginia* struck down the VMI policy, at least in part, because the state's policy denied women "full citizenship stature."¹⁵¹ In *Heckler v. Mathews*,¹⁵² the Court explained that

discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.¹⁵³

Denying same-sex couples the right to marry will continue to cause them both economic and non-economic injuries, and the issue in Vermont and elsewhere will be whether it is constitutionally permissible to continue to cause these harms.

In *Strauder v. West Virginia*,¹⁵⁴ the Court made clear how important it was to be "exempt[] from legal discriminations, implying inferiority in civil society"¹⁵⁵ Yet, the states' singling out lesbians and gays and denying them the right to marry "is practically a brand upon them, affixed by the law, [that is] an assertion of their inferiority"¹⁵⁶ It is precisely this kind of stigmatization that is an affront to our constitutional system. The Court in *Romer v. Evans* suggested that laws are

¹⁴⁸ *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

¹⁴⁹ See, e.g., 143 CONG. REC. S414 (daily ed. Jan. 21, 1997) (statement of Sen. Helms) (discussing turning back "the tide of the homosexual community in its efforts to force Americans to accept, and even legitimize, moral perversion").

¹⁵⁰ See Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 239 (1998) (discussing the "radical and dangerous agenda" of those who allege the "equal goodness of homosexuality and heterosexuality."); cf. *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

¹⁵¹ *United States v. Virginia*, 518 U.S. 515, 532 (1996).

¹⁵² 465 U.S. 728 (1984).

¹⁵³ *Id.* at 739-40 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

¹⁵⁴ 100 U.S. 303 (1879).

¹⁵⁵ *Id.* at 308.

¹⁵⁶ *Id.*

unconstitutional if they “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”¹⁵⁷ It is difficult to see how laws preventing same-sex marriage that are supported by claims to “protect” marriage and to prevent it from being “demeaned” and “trivialized” can fail to raise an inference of impermissible hostility.

CONCLUSION

In *Baker v. State*, the Vermont Supreme Court held that the state constitution requires that same-sex couples be afforded the opportunity to receive the same benefits, protections, and security that married couples receive. Yet, the Vermont legislature has not fulfilled that constitutional mandate by setting up a parallel civil union system, at least in part, because of the differing treatment that same-sex marriages and civil union would receive in other states. Because marriage has a unique status and accords benefits that simply could not be duplicated by a “parallel” civil union, the latter simply cannot be viewed as affording all of the benefits that flow from the recognition of the former.

Even if marital and civil union status should offer the same benefits, it is difficult to understand why a state would go to the trouble of setting up a parallel system if the state did not somehow feel that marriage would be “tainted” by allowing same-sex couples to enjoy that status. Yet, sincere worries about taint notwithstanding, states would be prohibited from setting up a parallel system for interracial or interfaith marriages that afforded equal benefits, because doing so would be stigmatizing. The taint justification is no more persuasive in the context of same-sex marriage than it would be in the context of interfaith or interracial marriages.

Even if Vermont could accord equal benefits by recognizing civil union status, the state is nonetheless constitutionally prohibited from setting up a parallel system precisely because of the stigma that will be associated with that status. As Justice Johnson noted in her concurring and dissenting opinion in *Baker*, “singling out a particular group for special treatment may have a stigmatizing effect more significant than any economic consequences.”¹⁵⁸

Certainly, the civil union status discussed here is better for lesbians and gays than what any other state has thus far offered. Yet, equality guarantees require more than a lessening of inequality so that lesbians and gays will be treated as poor relations rather than as complete strangers; those guarantees require the according of full citizenship and equal stature. That is something that a “separate but equal” status simply cannot achieve.

¹⁵⁷ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

¹⁵⁸ *Baker v. State*, 744 A.2d 864, 899 n.2 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).