

Abstract: Hillel Y. Levin, *Resolving Interstate Conflicts Over Marriage, Marriage-Like, and Marriage-Lite Relationships*

Only six states currently permit same-sex couples to wed. However, several states that balk at the idea of extending marriage to same-sex couples are less vehemently opposed when marriage rights come packaged under other names. Thus, some states (the “Marriage-Like states”) offer alternatives functionally identical, or at least nearly so, to marriage; and others (the “Marriage-Lite states”) provide same-sex couples with some but not all of the rights and responsibilities associated with marriage. As the country continues to grapple with the debate over same-sex relationships, more states are likely to experiment with these alternative models. As a result, we can expect to see more and new kinds of conflicts of laws.

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?

Unfortunately, the law is a mess and legal scholarship offers little guidance. This Article addresses these new conflicts for the first time and develops a framework rooted in conflicts principles. The framework, which I call the Common Denominator Approach, offers a straightforward, comprehensive, and intuitive method for resolving these conflicts. Moreover, it suggests a new approach to several other conflicts problems and has implications well beyond conflicts context.

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Resolving Interstate Conflicts Over Marriage, Marriage-Like, and Marriage-Lite Relationships

Hillel Y. Levin*

Introduction

Only six states currently permit same-sex couples to wed.¹ However, several states that balk at the idea of extending marriage to same-sex couples are less vehemently opposed when marriage rights come 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

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¹ The history in brief: In 2004, Massachusetts became the first state in the United States to allow same-sex couples to marry. A decision by California’s Supreme Court made it the second state to do so in 2008, but a ballot initiative overturned that court decision. Subsequently, Connecticut’s and Iowa’s supreme courts required those states to allow same-sex couples to marry. Next, when Vermont’s legislature overrode a gubernatorial veto, it became the first state to successfully enact a same-sex marriage bill legislatively. Maine quickly followed suit. In June of 2009, New Hampshire became the sixth state to allow same-sex couples to marry. *See* National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships: Same-Sex Marriage Overview (July 2009), <http://www.ncsl.org/default.aspx?tabid=16430>.

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 are sometimes referred to (as in California) as 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 (upheld in *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009)); *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-

(the “Marriage-Lite states”) provide same-sex couples with some but not all of the rights and responsibilities associated with marriage.⁵ As the country continues to grapple with the debate

Appellants with Separate Appendix at 10-12, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (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 legislature fails to follow this acknowledgement to its logical end, that is, extending the status of marriage to same-sex couples); *see also infra* Part III.(b).

⁴ Marriage-Like states include California, New Jersey, Oregon, and Washington. *See* CAL. FAM. CODE §§ 297-297.5 (West 2004) (establishing California domestic artnerships that provide “the same rights, protections, and benefits” as an opposite-sex marriage); N.J. STAT. ANN. § 37:1-32 (West, Westlaw through 2009 Leg. Sess.) (enumerating several rights for civil unioned same-sex partners), Oregon Family Fairness Act § 9(1), Or. Pub. L. No. 99 (codified at OR. REV. STAT. ANN. § 106 note (West, Westlaw through 2009 Reg. Sess.)) (establishing Oregon domestic partnerships granting rights to same-sex partners “on equivalent terms” with opposite-sex married couples); *Domestic Partnerships—Expansion of Rights Act*, S. 5688, 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 U.S., several European countries, New Zealand, and parts of Australia, Brazil, Mexico, Argentina, and Uruguay also offer marriage-like alternatives for same-sex couples.

⁵ Marriage-Lite alternatives are sometimes called civil unions, domestic partnerships, or reciprocal benefit arrangements. Sometimes including 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 Wisconsin, Hawaii, New York, and Rhode Island, as well as the District of Columbia. *See* D.C. CODE § 32-704 to -06 (West, Westlaw through 2009) (providing limited health care and employment benefits); HAW. REV. STAT. ANN. § 572C-6 (West, Westlaw through 2009) (extending limited rights to same-sex reciprocal beneficiaries but explicitly providing that reciprocal beneficiaries enjoy fewer rights than married opposite-sex couples); Fair Wisconsin, Wisconsin Domestic Partnership Protections Reference Guide, http://www.fairwisconsin.com/downloads/DP_Reference_Guide.pdf (last visited Aug. 15, 2009) (detailing forty-three benefits for same-sex partners in Wisconsin); Office of the City Clerk, The City of New York, *Domestic Partnership Registration*, http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml (last visited Aug. 9, 2009) (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, Westlaw through 2009 Leg. Sess.) (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, Symposium, *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 (listing Denmark, Finland, France, Germany,

over same-sex relationships, more states are likely to experiment with these alternative models.⁶ As a result, we can expect to see more and new kinds of conflicts of laws.⁷

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:

- A same-sex couple marries in Massachusetts (a Marriage state) and moves to California (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?⁸

Greenland, Iceland, Norway, Sweden, and Britain as providing limited rights to same-sex couples).

⁶ See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE* 251-58 (2006) (describing the “emerging menu” of options available to same-sex couples in different states).

⁷ It is worth noting that there is rapid change in this area, with states moving from one category to another. 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. However, we should not expect the Marriage-Like and Marriage-Lite categories to disappear anytime soon, leaving ours a Marriage/No-Marriage country. Many No-Marriage 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. Furthermore, No-Marriage states and Marriage-Lite states are not necessarily moving to 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 Governor Chris Gregoire, *Gov. Gregoire Signs Legislation to Expand Rights to Domestic Partners*, May 18, 2009, <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 No-Marriage 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.

⁸ 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 18, 2009, http://www.nytimes.com/2009/05/19/health/19well.html?_r=1.

- The same facts, except that the incapacitated spouse dies. Who inherits? Who assumes the decedent's debts? Is it clear who has custody of any children?
- The same facts, except that the couple moves to Hawaii (a Marriage-Lite state) instead.
- A couple enters into a marriage-like relationship in California 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 California first? If so, how and where?
- The same facts, except that the couple wishes to file for bankruptcy jointly. Must they marry first?
- A couple enters into a Marriage-Lite relationship in Hawaii and then moves to California or Massachusetts. What rights, if any, do the members of the couple automatically enjoy in the new state?
- A couple marries in Massachusetts and then divorces. As part of the divorce, they enter into a consent decree of some kind. One of the former spouses moves to California or Hawaii. Do these states enforce the consent decree?

These are what I refer to as the Marriage/Marriage-Like/Marriage-Lite conflicts, and they will dominate the future legal debates over same-sex marriage at least until all states choose to (or, more likely, are required by the courts or federal government to) recognize same-sex marriage.⁹ And, as this incomplete list of examples shows, this problem has enormous significance in the lives of the affected individuals.¹⁰ Indeed, “[i]f there is one thing that people

⁹ Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855, 1858-59 (citing Hillel Y. Levin, *Marriages, Civil Unions Collide in CT, CA Court*, HARTFORD COURANT, Jan. 15, 2008, available at <http://www.jpus.org/forum/index.php?showtopic=95&mode=threaded>).

¹⁰ For examples of the conflicts issues that have arisen in litigation, see *Alons v. Iowa Dist. Ct. 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); *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-

are entitled to expect from the lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”¹¹

Unfortunately, the law is a mess, and existing legal scholarship offers very 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-Marriage conflict). Some scholars adopt a vertical federalist approach and argue that the Constitution requires states to recognize marriages lawfully performed in other jurisdictions.¹² This approach ignores marriage-like and marriage-lite relationships entirely, and, in any event, is deeply contestable both normatively and descriptively.¹³

The alternative approach offered by scholars, which draws heavily from a very limited and specific body of family law, similarly ignores the conflicts that arise from marriage-like and marriage-lite alternatives.¹⁴ Further, the framework this scholarship adopts for the Marriage/No-

sex marriage in Connecticut); *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, DOMA, state statutes and case law, and the court’s equity powers); *In re R.S. and J.A.* No. F-185063 PINCITE (Dist Ct Jefferson County, Tex., Mar 3, 2003); *Langan v. St. Vincent’s Hosp. of N.Y.*, 196 Misc. 2d 440, 441-55 (NY 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 (N.Y. 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 (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 9, at 1906-09, Appendix A. For a real world illustration of the problems unioned or married couples encounter, see Cox, *supra* note 5, at 703-11.

¹¹ *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

¹² See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1976-92 (1997) [hereinafter Kramer, *Public Policy Exception*] (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).

¹³ See *infra* notes 53-56 and accompanying text.

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

Marriage conflict does not readily transfer to the Marriage/Marriage-Like/Marriage-Lite conflicts contexts. Here's why: this framework inevitably begins with the holdings of cases arising from other marriage-related conflicts in the consanguineous, polygamous, and interracial marriage contexts. In each of these cases, some states recognized marriage relationships while others did not. Thus, the fundamental question was what to do when a couple lawfully married in one state and then traveled or moved to a state in which that marriage could not have been performed. "As a general rule, states that prohibited [those kinds of] marriages declined to recognize [such] marriages that had been lawfully created in other jurisdictions."¹⁵ This is

and non-recognition of same-sex relationships); Kramer, *Public Policy Exception*, *supra* note 12, at 1965-66 (focusing on recognition of same-sex marriage in No-Marriage states); Wardle, *supra* note 9, at 1907 (framing debate in terms of states recognizing 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-Marriage conflict. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES [hereinafter KOPPELMAN, SAME SEX] (focusing on the Marriage/No-Marriage conflict). Koppelman's otherwise excellent book SAME SEX, DIFFERENT STATES—the very best resource available on this topic—devotes nearly all of its attention to addressing the Marriage/No-Marriage conflict, but 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* text accompanying note 27. 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 With respect to interracial marriages, see Wardle, *supra* note 9, at 1893, n.168 and accompanying text. To be sure, there were cases on both sides of this question. 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); *State v. Ross*, 76 N.C. 242, 1877 WL 2696 at *1-2 (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, 1877 WL 2697 at *1-2 (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). See also Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2154 (2005) (comparing *State v. Ross*, 76 N.C. 242 (1877), with *State v. Bell*, 66 Tenn. 9 (1872)); 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. 88, 105 (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

because, generally speaking, a state may reject a marriage that violates its own public policy interests.¹⁶ Consequently, one can see how this precedent provides a useful starting point when considering the Marriage/No-Marriage conflict in the context of same-sex relationships.

However, when it comes to the Marriage/Marriage-Like/Marriage-Lite conflicts, this line of reasoning breaks down. What, exactly, is the public policy interest of a Marriage-Like or Marriage-Lite state? Is the rejection of marriage recognition the primary interest, or is the recognition of the relationship and the bestowing of substantial rights the greater interest? Only by returning to basic conflicts principles and confronting these questions—rather than by simply looking to holdings from inapt precedent—can we develop a comprehensive framework for resolving the unique and novel conflicts introduced by the marriage-like and marriage-lite alternatives offered in some states.

This Article offers the first analytical framework for resolving Marriage/Marriage-Like/Marriage-Lite conflicts. Rejecting both the vertical federalist approach adopted by some scholars and the family law centered approach adopted by others, I develop an approach rooted in the horizontal federalist values embodied in conflicts law, which I call the Common Denominator Approach to Marriage/Marriage-Like/Marriage-Lite conflicts. The basic structure of the approach is as follows. First, in deciding whether to recognize a same-sex relationship lawfully entered into in another state, the forum state should compare its policy interests in recognizing same-sex relationships to those of the state in which the relationship at issue was initially ratified. In doing so, the forum state should look to the substance of the rights and responsibilities of the legal relationship rather than to the formal name attached to it. Then, in order to advance its own policy interests, the forum state should automatically extend recognition to legalized same-sex relationships from the other state to the maximum extent allowable under the forum state's law—in other words, to the extent that the two states share a common denominator. Ultimately, this approach allows us to identify sensible, straightforward, and fairly comprehensive rules for addressing the Marriage/Marriage-Like/Marriage-Lite conflicts.

forum, if the couple was legitimately domiciled in that state). With respect to polygamous and consanguineous relationships, see Wardle, *supra* note 9, at 1896-1900.

¹⁶ See *infra* notes 66-69 and accompanying text. See also KOPPELMAN, SAME SEX, *supra* note 14, at 117; Kramer, *Public Policy Exception*, *supra* note 12, 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).

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-Marriage conflict. Additionally, it offers a solution to several complicated questions that will arise in the event that the federal government adopts a Marriage-Like or Marriage-Lite scheme, as seems likely. It also reveals a new legal argument in favor of same-sex marriage in some cases. From a more abstract perspective, the underlying conflicts questions and the Common Denominator Approach for resolving them reveal that the meaning of marriage itself is highly contestable and unstable.

The Article proceeds as follows. Part I provides the background to the Marriage/Marriage-Like/Marriage-Lite conflicts problems by reviewing the options states have for resolving such conflicts and showing that the law is unsettled. It also considers why scholars have not engaged with these issues and argues that we really ought to. Part II develops the Common Denominator Approach and explains how the approach provides a useful and intuitive framework for resolving these conflicts. Part III expands the inquiry beyond the Marriage/Marriage-Like/Marriage-Lite framework and considers how the Common Denominator Approach sheds light on several other practical questions. Finally, Part IV concludes by briefly exploring the important abstract implications of the argument.¹⁷

¹⁷ Unfortunately, scholarly debates over conflicts in the context of same-sex relationships sometimes seem to have as much to do with the positions of the scholars on the substantive question of same-sex marriage. 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 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, I also believe that conflicts law is not the appropriate avenue through which same-sex marriage should advance, for three reasons. 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 dishonest. 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

Part I: The Problem

In this Part, I present the backdrop of the Marriage/Marriage-Like/Marriage-Lite set of conflicts. I focus on several possible approaches to the Marriage/Marriage-Like/Marriage-Lite conflicts and show that the states' approaches are all over the map. I then argue that policymakers have failed to properly think through the problem and conclude by considering why scholars have also failed to confront it.

(a) The States' Current Approaches to the Marriage/Marriage-Like/Marriage-Lite Conflicts

Although courts and legal scholars have not yet satisfactorily addressed these questions, states have begun to develop policies for dealing with them. I begin with the Marriage/Marriage-Like conflict—what happens when a married same-sex couple moves from a Marriage state to a Marriage-Like state?—because the law in that context is the most developed; and 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 permit the couple to marry, it could recognize and adopt the status afforded by the Marriage state as a matter of comity.
- Option 2: Do not recognize the marriage, but automatically provide the maximum recognition for the couple afforded in the forum state. For example, a Marriage-Like state such as California would automatically treat a same-sex couple lawfully married in

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.

Massachusetts as though it had already entered into California's marriage alternative.

- Option 3: Decline to recognize the relationship altogether. In other words, because the forum state does not recognize same-sex marriage, it should simply reject the relationship entirely.

Each of these options is realistic. The second option has prevailed in a number of Marriage-Like states, including New Jersey and New Hampshire.¹⁸ But other states, including Connecticut (before it became a Marriage state) and California, have adopted the third option and chosen to accord no legal status to same-sex couples lawfully married in Marriage states.¹⁹

¹⁸ For New Jersey, see N.J. Op. Att'y Gen. No. 3-2007 (Feb 16, 2007). For the rule in practice, see State of New Jersey Dep't of Health and Senior Services, *Vital Statistics and Registration Frequently Asked Questions: Civil Union Records*, <http://www.state.nj.us/health/vital/faq.shtml#cur> (last visited Aug. 9, 2009), 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, Westlaw through Ch. 268 of the 2009 Reg. Sess.) (“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 New Hampshire Freedom to Marry Coalition, *About Civil Unions: New Hampshire Civil Unions*, <http://www.nhftm.org/Xtras/civilunions.html> (last visited Aug. 9, 2009) (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, but rather an “intention of the legislature” approach. It provides little support for its assertions about legislative intent (though it would certainly be sensible if the legislature actually had this 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.

¹⁹ For Connecticut's decision, see Conn. Op. Att'y Gen. No. 2005-024, 2005 WL 2293060 (Sept.

Indeed, this question is so contested that it is sometimes the focus of intense political lobbying.²⁰

With respect to the remaining possibility, recognizing a same-sex marriage performed elsewhere as a marriage under forum law, it admittedly does seem farfetched. After all, why would a state that does not allow its own citizens to marry treat similarly-situated citizens from other states differently—better!—by recognizing their marriages? However, while no American Marriage-Like state has yet adopted this approach, there is reason to believe that some might. 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,²¹ and one in which same-sex marriage bills have faced difficulties in the legislature,²² the governor controversially directed state agencies to treat same-

20, 2005). 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*, Sept. 2004, <http://library.findlaw.com/2004/Sep/27/172880.html> (“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.”).

²⁰ See Stephen Clark, *NH Anti-Recognition Bill Reintroduced*, Same-Sex Unions in the Conflict of Laws, <http://www.samesexconflicts.com/blog/2009/1/10/nh-anti-recognition-bill-reintroduced.html> (Jan. 10, 2009, 07:30 EST) (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).

²¹ See Office of the City Clerk, The City of New York, *Domestic Partnership Registration*, http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml (last visited Aug. 9, 2009) (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).

²² See FiveThirtyEight: Politics Done Right, *Whip Count: Gay Marriage Faces Uphill Odds in the New York Senate*, <http://www.fivethirtyeight.com/2009/05/whip-count-gay-marriage-faces-uphill.html> (May 13, 2009, 20:43 CDT) (speculating that 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 GOP Coup*, N.Y. TIMES, Jun. 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).

sex couples lawfully married in other jurisdictions as married for the purposes of New York law.²³ Rhode Island and the District of Columbia followed suit.²⁴ Internationally, Israel, best viewed as a Marriage-Like jurisdiction, did the same.²⁵ With these examples in mind, 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.

²³ Jeremy W. Peters, *New York to Back 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. 2, 2008, <http://www.nytimes.com/2008/09/03/nyregion/03marry.html> (“The decision [that Governor 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.”).

²⁴ 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 is a Marriage-Lite jurisdiction. *See* District of Columbia Department of Health, Vital Records Division, *What are the Benefits of Participation?*, http://dchealth.dc.gov/doh/cwp/view,a,3,q,573324,dohNav_GID,1787,dohNav,/33110/33120/33139/.asp#6 (last visited Aug. 9, 2009) (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). Because the Federal Congress would likely not permit it, a pro-same-sex marriage bill could probably not succeed in being enacted there. Nevertheless, the Council of the District of Columbia recently voted to recognize same-sex marriages lawfully performed in other jurisdictions. Chuck Colbert, *Judge Says No to Delay in Recognition of Same-Sex Marriage in D.C.*, BAY WINDOWS, Jul. 1, 2009, <http://www.baywindows.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=93247>.

²⁵ 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, *In Precedent-Setting Ruling Court Says State Must Recognize Gay Marriage*, HAARETZ, Nov. 21, 2006, <http://www.haaretz.co.il/hasen/spages/790724.html>.

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. Possible Resolutions of the Remaining Conflict Patterns

Thus far, I have only sketched 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; or 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 it altogether.²⁶ And, of course, the same options are available for cases in which a couple achieves recognition in a Marriage-Like state and relocates to a Marriage-Lite state (the Marriage-Like/Marriage-Lite conflict). This exhausts the possible approaches for couples moving “down” the scale in status—that is, those moving from a state in which they have achieved a higher level of recognition to a state that offers a lesser form of recognition.

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 second 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 theoretical option—that the second state will recognize the marriage alternative from another state on its own terms—is, as a practical matter, unrealistic, because it would be improbable and strange, both as a conflicts law matter and commonsensically, to require Massachusetts (a Marriage state) to recognize a New Hampshire 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

²⁶ Other than those I have already discussed, no states, including the Marriage-Lite states, attach any status to same-sex marriages performed elsewhere.

nothing.

(b) The Failure of Policy-Makers to Undertake a Proper Conflicts Analysis

As we have seen, some states have already begun to grapple with these conflicts. State policy-makers have devoted the most attention to the Marriage/Marriage-Like conflict. Again, what happens when a couple from a Marriage state moves to a Marriage-Like state?

In some states, it is legislatures that have answered 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.²⁷ 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 leave 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.

Some other states that have addressed the problem have done so outside of the legislative process. For instance, when Connecticut legislatively adopted a Marriage-Like scheme²⁸—a court ruling has since required it to permit and recognize same-sex marriages²⁹—its statutory provisions were not clear on this question. Connecticut's Marriage-Like statute contained within it a provision defining marriage as “the union of one man and one woman,” effectively a Defense of Marriage Act.³⁰ 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

²⁷ “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 (West, Westlaw through Ch. 268 of the 2009 Reg. Sess.).

²⁸ CONN. GEN. STAT. ANN. §§ 46b-38aa-00 (West Supp. 2006) (repealed 2009).

²⁹ Conn. Op. Att’y Gen., *supra* note 19 at *1 (Sept. 20, 2005).

³⁰ CONN. GEN. STAT. ANN. § 46b-38nn (repealed 2009).

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.³¹ And, of course, the fact that Connecticut defines 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 take the middle approach and convert 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.³²

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.³³ Third, the reasoning is based on principles from conflicts law, recognizing that the question presented is a conflicts question.³⁴ Fourth, because the Attorney General provided his reasoning, the opinion could be persuasive to policy-makers 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 another state unless such a union violates [Connecticut’s] public policy.³⁵ However, the extent of the analysis as to Connecticut’s public policy is that Connecticut defines marriage as between one man and one woman.³⁶ Therefore, the Attorney General concludes, the state could not automatically extend any rights at

³¹ *Davis v. Davis*, 175 A. 574, 575 (Conn. 1934).

³² Conn. Op. Att’y Gen., *supra* note 19 at *1-3.

³³ *Id.* at *1-5.

³⁴ *Id.* at *2-5.

³⁵ *Rosengarten v. Downes*, 802 A.2d 170, 178 (Conn. App. Ct. 2002).

³⁶ Conn. Op. Att’y Gen., *supra* note 19 at *3-4.

all to a same-sex marriage from another state.³⁷ Q.E.D.

As I have already suggested, and as I will shortly 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-Marriage conflict, but the proper question to begin with for a Marriage/Marriage-Like conflict is *why* does Connecticut choose 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 policy-maker has undertaken such an analysis.

(c) Why Legal Scholars Have Not Focused on the Marriage/Marriage-Like Conflicts—
and Why We Should

As we have seen, the approaches of the states on these questions are all over the map and offer little guidance. By the same token, although legal scholars have begun to grapple with conflicts questions in the context of same-sex relationships, they have offered little by the way of guidance in the Marriage/Marriage-Like/Marriage-Lite conflicts context.³⁹ Indeed, these questions have been virtually ignored; and when they have not been ignored, scholars—like policymakers—have mistakenly failed to appropriately distinguish between Marriage/No-Marriage conflicts and Marriage/Marriage-Like/Marriage-Lite conflicts.

The failure to address this set of conflicts is unfortunate, but it is perhaps understandable. First, much of the scholarship in the area has taken its cues from court battles.⁴⁰ Most of the

³⁷ *Id.* at *4.

³⁸ See *supra* introductory text; *infra* Part II.(a).

³⁹ See *supra* note 14.

⁴⁰ For instance, several articles were published immediately after it looked as though Hawaii would recognize same-sex marriages, and several more when Massachusetts adopted same-sex marriage. See, e.g., Cox, *supra* note 5, at 706 (commenting on the recent Massachusetts ruling requiring legalization of same-sex marriage); Kramer, *supra* note 12, at 1965 (“It finally happened. On Tuesday, December 3, 1996, a Honolulu judge struck down a Hawaii law permitting only opposite-sex couples to marry, and Hawaii became the first state to recognize same-sex marriages.”). The issue also received a great deal of public and scholarly attention around the time that DOMA was being debated and passed. See, e.g., Kramer, *supra* note 12, at 1966 (noting the recent passage of DOMA); Andrew Koppelman, *Same-Sex Marriage, Choice of*

conflicts issues concerning same-sex couples that have made their way into courts have involved Marriage/No-Marriage conflicts.⁴¹ The body of law that has emerged from these cases has been somewhat less than coherent, but the majority of courts in No-Marriage states have refused to recognize Marriage and Marriage-Like relationships from other states.⁴² For example, courts in New York, Washington, and New Jersey (all essentially No-Marriage states at the time the cases arose) refused to recognize Marriage-Like relationships from other states and the corresponding rights to bring wrongful death actions, receive workers' compensation death benefits, or file for joint bankruptcy.⁴³ In the context of dissolution, courts in Texas and Virginia (No-Marriage states) have held that they could dissolve Marriage-Like relationships that had lawfully been entered into elsewhere,⁴⁴ while courts in Connecticut (at the time of trial a No-Marriage state) refused to dissolve such same-sex marriages or civil unions.⁴⁵ In contrast, much of what little action there has been in the context of the Marriage/Marriage-Like/Marriage-Lite conflicts has taken place outside of courts—in legislatures and executive agencies—which appears to present something of a blind spot for scholars in the area.

Second, Marriage/Marriage-Like/Marriage-Lite conflicts can usually be practically resolved by the couple faced with the question. After all, a same-sex couple married in Massachusetts could, upon moving to California, register for the local marriage alternative.

Law, and Public Policy, 76 TEX. L. REV. 921, 970 (1998) (“No survey of recent lawmaking on this subject would be complete without consideration of the widely publicized Defense of Marriage Act (DOMA), which passed both houses of Congress by huge margins.”).

⁴¹ See *supra* note 10.

⁴² Wardle, *supra* note 9, at 1906-09.

⁴³ See *In re Kandu*, 315 B.R. 123, 130-48 (Bankr. W.D. Wash. 2004) (declining to consider a lesbian couple “married” for purposes of determining joint debtors in a Chapter 11 bankruptcy proceeding, citing and upholding the constitutionality of DOMA); *Hennefeld v. Township of Montclair*, 22 N.J. Tax 166, 184-91 (N.J. Super. Ct. App. Div. 2007) (holding that New Jersey was not required to provide a couple, joined in a Vermont civil union, the right to own property as tenants by the entirety or the right to a disabled veteran’s property tax exemption normally provided to married couples); *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 477-80 (N.Y. App. Div. 2005) (requiring strict adherence to wrongful death statute thus preventing a surviving partner from a same-sex civil union under Vermont law from recovery and holding that this prohibition on recovery did not violate the Equal Protection Clause).

⁴⁴ *In re R.S. and J.A.* No. F-185063 PINCITE (Dist Ct Jefferson County, Tex., Mar 3, 2003); *In re Marriage of Gorman and Gump* [think this is the same case as *In re M.G. and S.G.*] (W. Va. 2002).

⁴⁵ *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002); *Lane v Albanese*, No. FA044002128S, 2005 WL 896129 at *2-4 (Conn. Super. Ct. Mar. 18, 2005).

Similarly, a couple having entered into a reciprocal benefits arrangement in Hawaii could, upon moving to Massachusetts, get married. Doing so would obviate any need for a conflicts analysis in the first place.

Finally, as we have seen, courts and scholars have precedent to work from in the Marriage/No-Marriage conflict context.⁴⁶ Indeed *all* of the scholarship on this issue invokes that precedent. It is an easy (though mistaken, for the reasons I have already articulated) leap to apply that precedent to the Marriage/Marriage-Like/Marriage-Lite conflicts contexts.⁴⁷ Therefore, many scholars seem to lump all of these conflicts together without undertaking any real analysis that is sensitive to the differences between these contexts.

However, focusing on these conflicts is worthwhile and important. Practically speaking, married same-sex or otherwise unioned couples may be more likely to relocate to states with gay-friendly policies than they would be to relocate to states that reject any recognition of, and offer no protection to, same-sex couples.⁴⁸ This is both because they might seek out states that would extend recognition and protection to their family relationships,⁴⁹ and also because gay-friendly states, with few exceptions, tend to be clustered geographically and share some cultural values. The move from Massachusetts to New Hampshire or vice versa, for example, may thus be more attractive and likely for a gay or lesbian couple than would be a move from Massachusetts to Texas. It would therefore be helpful to provide such couples with guidance as to their rights, responsibilities, and options.

Perhaps more importantly, although same sex couples could, as a practical matter, resolve any questions about their status by filling out the necessary paperwork in their new state, they

⁴⁶ See *supra* notes 14-16 and accompanying text.

⁴⁷ See *id.*

⁴⁸ Although I have been unable to find an authoritative citation on this point, each married or otherwise officially unioned or partnered same-sex couple that I have spoken with in Marriage and Marriage-Like states has reported that the couple felt constrained in its choice of where to relocate for job opportunities by whether the state offering the job opportunity had gay-friendly laws and policies.

⁴⁹ See Lou Chibbaro Jr., *New Law Benefits Children of Same-Sex Couples: Measure Grants Rights Related to Artificial Insemination*, WASHINGTON BLADE, July 31, 2009, <http://www.washblade.com/2009/7-31/news/localnews/14951.cfm> (“[B]ecause other states may not recognize the parental rights of same-sex couples now recognized in D.C., same-sex couples should consult a lawyer before moving outside D.C.”).

may not do so. They may not do so because they do not wish to. Perhaps they are politically opposed to any recognition short of marriage; or perhaps the couple relocates from Massachusetts to California and then decides to split up; or perhaps they split up while still in Massachusetts without formally dissolving their relationship and then one relocates to California. Alternatively, they may not fill out the necessary paperwork because they do not realize that they must do so in order to attain recognition. That is, they may assume that California will recognize their relationship and treat them as having entered into a marriage or civil union. Finally, they may not fill out the necessary paperwork because something that triggers a conflict question happens before they have the chance. For instance, one member of the couple may be hospitalized or die soon after moving. In any case, some conflicts questions—particularly those related to dissolution of relationships—will arise regardless of whether the partners choose to fill out paperwork or not. Indeed, it is no accident that dissolution cases are the primary context in which the Marriage/Marriage-Like/Marriage-Lite conflicts *have* already ended up in courts.⁵⁰ And, of course, the fact that the states are all over the map suggests that there is room for work in this area.

More generally, even apart from these immediate reasons for addressing the Marriage/Marriage-Like/Marriage-Lite conflicts questions, developing an analytical framework for dealing with them can have major implications on how we address other questions, including some that resonate more broadly.⁵¹

All of this is a long-winded way of saying that it is time to develop a framework for dealing with Marriage/Marriage-Like/Marriage-Lite conflicts.

Part II: The Common Denominator Approach

The task now is to develop a general approach to this set of questions.⁵² Because these are conflicts issues, I begin with a general overview of how to conduct a conflicts analysis and show

⁵⁰ See *supra* note 10 and accompanying text.

⁵¹ See *infra* Parts III & IV.

⁵² By this point, my hope is that I have convinced you that (1) there is such a thing as a Marriage/Marriage-Like/Marriage-Lite conflict; (2) it is worth addressing; and (3) we currently have no satisfactory framework for doing so, whether from scholars, courts, policymakers, or precedent. If so, great!—and it only took __ pages and 51 footnotes (or perhaps you were convinced rather sooner). If not, please consider reading again. Or giving up.

how the principles I identify are at work in the background in several different kinds of conflicts contexts. Next, I apply the general conflicts framework to the Marriage/Marriage-Like/Marriage-Lite context and develop the Common Denominator Approach. Finally, I suggest that in addition to being doctrinally sound, this approach is intuitive and, compared to other possible approaches, relatively straightforward; but at the same time, it is unlikely to please partisans of same-sex marriage debates.

(a) The Framework: How to Conduct a Proper Conflicts Analysis

In popular discourse, the discussion of interstate recognition of same-sex relationships always seems to begin with the Full Faith and Credit clause and the federal Defense of Marriage Act (“DOMA”)⁵³—despite the fact that, according to the vast majority of legal scholars, these have nothing whatever to do with the question.⁵⁴ To put it simply, there is near-universal agreement that couples seeking recognition of same-sex relationships from other states find no refuge in the Full Faith and Credit clause. Furthermore, DOMA, whatever its drafters intended, does little to change the pre-existing legal landscape governing these conflicts.⁵⁵ As importantly, the current Supreme Court is exceedingly unlikely to hold otherwise.⁵⁶ Finally, even if DOMA

⁵³ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); KOPPELMAN, SAME SEX, *supra* note 14, at 117-18 (“For some years now, the press has fecklessly repeated the claim that the full faith and credit clause will require every state to recognize same-sex marriages”).

⁵⁴ KOPPELMAN, SAME SEX, *supra* note 14, at 117-18 (“Legal scholars have had to say, over and over, that this is a fundamental misconception [T]here is no uncertainty here. Full faith and credit does not require other states to recognize same-sex marriages from Massachusetts.”). To be sure, there are some dissenters. *See* Kramer, *Public Policy Exception*, *supra* note 12, at 1976-92 (arguing that the Full Faith and Credit clause determines the outcome of these conflicts, requiring states to recognize same-sex relationships lawfully entered into in other jurisdictions).

⁵⁵ KOPPELMAN, SAME SEX, *supra* note 14, at 114-29.

⁵⁶ The Supreme Court has never held “that full faith and credit requires states to recognize marriages that violate their own public policies concerning who may marry.” *Id.* at 118. Further, the present Supreme Court is highly unlikely to take that step, seeing as it would be a leap doctrinally and that the current Court, dominated by conservatives, is not particularly receptive towards argument in favor of same-sex marriage. As Eskridge and Spedale have noted:

In 2000, five justices said that the Boy Scouts could exclude gay people and even struck down a state law barring such discrimination. Their reasoning was that a private group has a First Amendment interest in expressing an anti-gay identity and that the government could not censor that expression. Yet when universities

were relevant, it would have little to say about marriage-like and marriage-lite alternatives and the conflicts that arise from such relationships. So this is not the place to start (though I suppose I did just that, if only to disclaim it).

The truth is that the resolution to these conflicts lies in mundane and fairly well-established principles of conflicts law. Laws of one jurisdiction often conflict, or appear to conflict, with those of other jurisdictions.⁵⁷ Indeed, even laws within one jurisdiction can create conflicts, requiring courts to choose among them.⁵⁸ Because conflicts arise in an extraordinary range of cases, a considerable body of law has developed to resolve them.

Courts use a two-step approach 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.⁵⁹ In its most basic formulation, a true conflict is when the two laws actually lead to different results.⁶⁰ If, on the other hand, both states' laws would lead to the same conclusion, there is no true conflict, only a false one.⁶¹ Although the rule for determining whether a true

asserted the same freedoms to express their pro-gay identity by treating anti-gay military recruiters differently from other recruiters conducting student interviews, a unanimous Supreme Court ruled against the universities.

William N. Eskridge & Darren Spedale, *Sit Down, Ted Olson and David Boies: Let the States Experiment with Gay Marriage—It's Not Time Yet for a Federal Lawsuit*, SLATE, May 29, 2009, <http://www.slate.com/id/2219252/>. Indeed, it is no coincidence that supporters of same-sex marriage have not brought federal cases on full faith and credit grounds. They (correctly) judge that they would lose such a lawsuit.

⁵⁷ Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 281 (1990).

⁵⁸ *Id.* at 284-89.

⁵⁹ *See, e.g.*, *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (comparing New Jersey and Pennsylvania law).

⁶⁰ Kramer, *supra* note 57, at 304.

⁶¹ “[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.” R. LEFLAR, *AMERICAN CONFLICTS LAW* § 93 at 188 (3d ed. 1977); *see also* E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 2.6 at 17 (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

conflict exists is easily stated, applying this rule sometimes requires additional work. In difficult cases, one must undertake an interest analysis in order 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.⁶² 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.⁶³ Because "[e]ach state restricts its laws to cases it really cares about and thereby minimizes conflicts,"⁶⁴ if a state's real interests are not implicated, then there is no true conflict.⁶⁵ Finally, states sometimes adjust their own laws in ways that minimize conflicts.⁶⁶

Second, once the court makes the determination of whether the conflict is 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.⁶⁷ If there is a true conflict, the court must choose one state's approach over the other's.⁶⁸ There is a great deal of disagreement among scholars and courts as to precisely how to do so, but most agree that in many true conflicts cases, the forum court must refuse to apply the other state's laws to advance the forum state's interests.⁶⁹

interests would be impaired by the application of the other jurisdiction's laws." (citations and footnotes 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.

⁶² KOPPELMAN, SAME SEX, *supra* note 14, at 15-16, 51-52.

⁶³ *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).

⁶⁴ LARRY KRAMER, (CASEBOOK TEACHING MANUAL TITLE) 63 (EDITION, DATE).

⁶⁵ *See* Silberman, *supra* note 63, at 2198-99 & n.18 (holding 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).

⁶⁶ KOPPELMAN, SAME SEX, *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").

⁶⁷ *Id.* at 15-20, 51-52.

⁶⁸ *See* DAVID P. CURRIE, HERMA H. KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES AND COMMENTS 174-204 (7th ed. 2006).

⁶⁹ *See id.*

(b) The Conflicts Analysis in Action

The approach that I have just described is, for the most part, the fairly standard, black-letter approach for dealing with all kinds of conflicts questions. However, the notion that courts will modify forum law in order to minimize conflicts to the extent possible is rarely acknowledged explicitly. As I show below, these principles are at work in the background of some of the cases arising in the context of polygamous, consanguineous, and interracial marriages cases. Further, although American conflicts law has not been entirely clear in acknowledging it, the parallel doctrines in French conflicts law make the point much more clearly and help us to see that the concept is at work in American law as well.

1. Making Sense of the “Incidents” Cases

Although, as I have argued—and contrary to the approach taken by many scholars in the field—the specific case holdings in earlier Marriage/No-Marriage conflicts shed little light on the Marriage/Marriage-Like/Marriage-Lite problems, one can see that the conflicts principles I have described are implicitly at play in some of those cases.⁷⁰ Sometimes, when courts have been confronted with conflicts arising from polygamous, consanguineous, and interracial marriages, they have held that although the No-Marriage state has an interest in rejecting the marriage, it might nevertheless have an interest in recognizing aspects of the marriage—the “incidents” of marriage.⁷¹ For instance, although a No-Marriage 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.⁷² In this way, the forum state adjusts its laws so as to minimize conflicts where possible; however, when true conflicts are unavoidable, they reject the foreign state’s law.

⁷⁰ See KOPPELMAN, SAME SEX, *supra* note 14, at 15-20 & ch. 6; Deborah M. Henson, *Will Same-Sex Marriages be Recognized in Sister States? Full Faith and Credit and Due Process Limitations on States’ Choices of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 564-66, 581-83 (1993) (comparing the public policies behind the same-sex “incidents” of marriage debate to those of the polygamous “incidents” cases).

⁷¹ See KOPPELMAN, SAME SEX, *supra* note 14, at 91-95.

⁷² See *id.*

Consider also the famous *In re Estate of Dalip Singh Bir*.⁷³ There, an Indian national with a California bank account and four wives in India died intestate in California.⁷⁴ 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).⁷⁵ 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.⁷⁶ Again, the forum state would look beyond the title (“divorced”) conferred by the other state, and 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 the conflicts principles I have introduced; 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).⁷⁷ However, the conflicts principles that I have offered, aside from representing the standard conflicts approach to all kinds of cases, can be seen to have been operating in at least some of these cases. This may, in fact, be the best way to retrospectively make sense of them.

2. The French Doctrine of Equivalence as a Lens on American Conflicts Law

American conflicts law is filled with many debates and much jargon, and some straightforward concepts, like the fact that American courts sometimes modify forum law in order to minimize conflicts, are sometimes buried within. However, a parallel French conflicts

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

⁷⁴ *Id.* at 499.

⁷⁵ *Id.* at 501-02.

⁷⁶ 334 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.

⁷⁷ For a discussion of the many different approaches to these kinds of cases, see generally Wardle, *supra* note 9 (reviewing “incidents” cases involving interracial, polygamous, and same-sex marriages).

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.⁷⁸ However, under the doctrine of 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.⁷⁹ 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.⁸⁰

An example may help to clarify this concept. In the past, France, like other civil law countries, did not recognize trusts.⁸¹ 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.⁸²

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.

⁷⁸ BERNARD AUDIT, *DROIT INTERNATIONAL PRIVE* paras. 465, 664, 668, 725, & 737 (5th ed. 2008); Loussouarn, Bourel, Vareilles-Sommieres, *DIP* (9th ed. 2007) does so at par. # 5,240, 496-5, 505.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* See also 1 ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 173ff, 116-19 & n.61 (1972); 3 ALBERT A. EHRENZWEIG & ERIK JAYME, *PRIVATE INTERNATIONAL LAW* 51-52 (1977); 4 ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 464ff (1958).

To be sure, American conflicts law does not necessarily take its cues from French law.⁸³ However, on this particular question, the doctrine of Equivalence is simply a more clearly-stated and expansive version of what American courts sometimes do. First, 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”⁸⁴ As we have seen, this general rule mirrors general American law in the context of marriage as well: a state will recognize a marriage lawfully performed in another state unless the marriage would violate the policies of the forum state.⁸⁵ However, 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.”⁸⁶ In other words, even where the other state’s law is incompatible with forum law, the forum need not reject entirely the status bestowed by the other state. Rather, the forum state should find and apply the best match available under its own law.

Further, American conflicts law reflects the doctrine of Equivalence much more broadly, albeit in a more inchoate and less explicit way. For example, there is some variation among the states in precisely what rights travel along with marriage. Some states are community property states,⁸⁷ while others are common law states.⁸⁸ If a couple were to move from the first state to

⁸³ See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006) (comparing the American choice of law approach to European approaches).

⁸⁴ LA. CIV. CODE ANN. art. 3536 (West, Westlaw through 2008 Reg. Sess.).

⁸⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (“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.”). The Restatement has been adopted in approximately half of the states. Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 13 (2001). Of the remaining states to directly address the issue, although they have not explicitly adopted the Restatement, they have similar marriage recognition provisions.

⁸⁶ LA. CIV. CODE ANN. art. 3536 cmt. h.

⁸⁷ 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 U.S. include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and several others. Lee Ann Sontheimer

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.⁸⁹ 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 any recognition of the relationship at all. This is a version of the Equivalence approach: the forum state rejects that which conflicts with its policies and embraces that which it can—not for the sake of comity or any particular respect for other jurisdictions’ laws, but because this is what best advances the forum state’s interests.

(c) The Conflicts Analysis in the Marriage/Marriage-Like/Marriage-Lite Context

In the Marriage/Marriage-Like case, again, there are three possible approaches to the question of recognition, and choosing among them can be translated into a conflicts question: should a Marriage-Like forum apply the foreign law that declares the couple to be married, the local law that declares that a same-sex couple cannot be married, or the local law that declares that a same-sex couple can enter into a relationship that gives them all of the legal rights of marriage? Obviously, similar questions apply in the reverse scenario or in scenarios involving either a Marriage or Marriage-Like state and a Marriage-Lite state.

As we have seen, the first step in analyzing these conflicts is to determine whether there is a true conflict. This depends 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 states give to these relationships to the underlying

Murphy & Tiffany Knight, *The Inns and Outs of Community Property Law*, <http://www.legalzoom.com/legal-articles/community-property-law.html> (last visited Aug. 13, 2009).

⁸⁸ Wiggin & Dana LLP, *Community Property States Versus Common Law Property States* (Fall 2000), http://www.wiggin.com/pubs/advisories_template.asp?ID=10511110302000.

⁸⁹ *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.

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 marriage” 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. Possible answers include: to establish bonds of kinship among potential rivals;⁹⁰ to enforce and make use of a gendered division of labor;⁹¹ to comply with God’s law or to otherwise make God happy;⁹² to

⁹⁰ 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.

⁹¹ See ANDREW SULLIVAN, *SAME-SEX MARRIAGE: PRO AND CON: A READER* (1997) (comparing opposite-sex marriage to same-sex marriage).

⁹² I do not think it is controversial to say that some view marriage as primarily a religious institution. See Family Research Council, “One Flesh”: A Sample Sermon Outline, <http://www.frc.org/get.cfm?i=Wx06E13&f=Wx06E07> (last visited Aug. 13, 2009) (asserting that marriage is “created by God” and symbolizes the relationship between God and the people of Israel and between Christ and the Church).

rein in male sexuality;⁹³ to control female sexuality;⁹⁴ to create a family unit capable of naturally bearing children;⁹⁵ or to create units in which one spouse is responsible to and for the other, thereby reducing the responsibility of society at large.⁹⁶ 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.⁹⁷

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 as me as significant: concerning this question, 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

⁹³ JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 140.

⁹⁴ Sam Schulman, *The Worst Thing About Gay Marriage: It Isn't Going to Work*, WEEKLY STANDARD, June 1, 2009, <http://weekllystandard.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.”).

⁹⁵ See Family Research Council, *supra* note 92 (“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.”).

⁹⁶ RAUCH, *supra* note 93.

⁹⁷ See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2004) (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*, 7 N.Y.3d 338, 359-60 (N.Y. 2006) (concluding that the purpose of marriage is procreation and stable childrearing).

analysis” may well obscure the underlying questions. This may mean that the public 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.⁹⁸

⁹⁸ Perhaps we should not be particularly surprised that this question persists; long before same-sex marriage was ever even 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 for 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* BeyondMarriage.org, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships: Executive Summary*, <http://www.beyondmarriage.org> (last visited Aug. 13, 2009) (calling for a reformation same-sex marriage debate into a debate about “household diversity” a term that encompasses polyamorous relationships). To be sure, Justice 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. *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.

In any case, that this fundamental question reappears—suggesting that it has never really been resolved—does not change the fact that we must confront it. Happily, in the context of the Marriage/Marriage-Like conflicts, this question is answered, at least to the extent necessary, fairly readily. Whatever state interests are served by marriage, the marriage-like alternatives serve the same interests. If marriage establishes 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.⁹⁹

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,¹⁰⁰ and the same would be true if the state articulated some religious interest in marriage.¹⁰¹

⁹⁹ 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 Jonathan Rauch, the most descriptively and normatively compelling. RAUCH, *supra* note 93.

¹⁰⁰ 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 promote 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 and footnotes omitted)).

¹⁰¹ 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.”).

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? Andrew Koppelman argues that marriage has both an administrative component and a normative component.¹⁰² The administrative component, which one might alternatively call the utilitarian component, relates to the couple's internal relationship and its lawful relationship to the state and everyone else.¹⁰³ 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.¹⁰⁴ A Marriage-Like state has apparently chosen to offer the administrative/utilitarian aspects of marriage to same-sex 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. 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. (Otherwise, it would offer same-sex couples the same rights and responsibilities.) 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 decisionmaking,¹⁰⁵ 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, and few if any of these rights have

¹⁰² KOPPELMAN, SAME SEX, *supra* note 14, at 53-58.

¹⁰³ *Id.* at 55-57.

¹⁰⁴ *Id.* at 53-54.

¹⁰⁵ *See supra* note 5.

anything to do with children or gender stereotypes and roles (which same-sex couples could not comport with in any case).

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 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.¹⁰⁶ In other words, 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. When a couple moves from a Marriage-Lite state to a Marriage or Marriage-Like state, however, there is a true 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 figure out how best to bring these interests in line with one another. With respect to the remaining true conflict, (Marriage-Lite/Marriage or Marriage-Like) we must also consider how best to resolve them. The Common Denominator Approach provides a framework for doing so.

(d) Applying the Interest Analysis: The Common Denominator Framework

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—that is, to the extent the states share a

¹⁰⁶ RAUCH, *supra* note 93.

common denominator. 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. 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—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 his 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. 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 (or both) give citizens living in other states advantages over local citizens or incentivize local couples to travel for the sake of getting married, 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 also 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—and no state legislature should be foolish enough to harm its own interests by prohibiting this approach.

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 them 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 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, 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.¹⁰⁷

¹⁰⁷ 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

In each of these situations, by focusing on the common denominator rather than the formal titles that each of these states give to same-sex relationships, we 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 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.

(e) Conclusion: A Simple(r) Framework that Makes No One Happy

One way to reframe the analysis I have just offered (perhaps rendering it more intuitive, if less doctrinal) is that a couple that has entered into a marriage relationship has accepted a very large bundle of rights and responsibilities—one that includes marriage-like and marriage-lite bundles. Similarly, a couple that has accepted the marriage-like bundle has also accepted the smaller marriage-lite bundle and, it is safe to say, would also happily accept the normative benefits of having their relationship treated as a marriage. However, a couple that has accepted a marriage-lite bundle has not agreed to be bound by the much larger marriage-like and marriage-lite bundles. Finally, and most crucially, the state has every interest in extending its own recognition schemes to the extent that it reflects the couple's agreements.

In addition to being intuitive in this way, the Common Denominator Approach also offers a more straightforward framework, in a wide variety of cases, than those offered by other scholars. Andrew Koppelman's foundational book, *Same Sex, Different States*, tackles the same-sex marriage conflicts and offers a set of rules for resolving them. His is by far the most

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.

complete analysis of the topic. He concludes that “evasive marriages” (a couple domiciled in a No-Marriage state travels to a Marriage state in order to get married and then returns to the domicile) should generally not be recognized in the domicile state.¹⁰⁸ In contrast, “migratory marriages” (a couple domiciled and married in a Marriage state subsequently relocates to a No-Marriage state) should not be recognized, with several exceptions and exceptions to exceptions.¹⁰⁹ Next, “visitor marriages” (a couple domiciled in a Marriage state travels to a No-Marriage state) should always be recognized.¹¹⁰ Finally, “extraterritorial marriages” (a couple domiciled and married in a Marriage state has never been to the No-Marriage forum state, but the marriage is “relevant to litigation conducted there”) should also always be recognized.¹¹¹

Koppelman’s framework is useful in that, unlike much that has been written on the topic, it moves beyond theory and history and offers a set of constructive rules for resolving these conflicts. But his approach leaves critical questions unanswered, primarily because he views the world in binary Marriage/No-Marriage terms. Thus, his approach offers little guidance for couples that enter into marriage-like and marriage-lite relationships, and it is unclear whether his prescriptions distinguish between a married couple that relocates to a No-Marriage state and one that relocates to a Marriage-Like state. Further, his analysis sometimes requires a court to determine whether a couple relocates for the evasive purposes or for migratory purposes—a determination that he agrees is sometimes difficult and contestable¹¹²—whereas my approach does not require that determination. Therefore, in several respects, the Common Denominator Approach is more complete and straightforward, at least with respect to the Marriage/Marriage-Like/Marriage-Lite conflicts.¹¹³

¹⁰⁸ KOPPELMAN, SAME SEX, *supra* note 14, at 102-06.

¹⁰⁹ *Id.* at 106-10.

¹¹⁰ *Id.* at 110-12.

¹¹¹ *Id.* at 112.

¹¹² *Id.* at 106.

¹¹³ It is worth noting that, beyond these differences, which stem from our different treatment of Marriage/Marriage-Like/Marriage-Lite conflicts, we have other differences as well. I am not convinced that visitor and extraterritorial marriages should always be treated by the forum state as marriage. Indeed, it is possible that a No-Marriage or Marriage-Lite forum state that rejects same-sex marriage and offers no equivalent would see its interests disserved by recognizing a same-sex marriage, even in the case of visitor and extraterritorial marriages. It may well depend on the precise circumstances of the case, and it would require a return to the original question of whether the two states’ interests can be reconciled, and if not, which states’ interests to advance.

Thus, the Common Denominator Approach has the benefits of being doctrinally sound, commonsensical, designed to be fairly comprehensive and readily adaptable to a wide variety of cases. 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 Larry Kramer, who argues that the Full Faith and Credit clause of the Constitution requires such recognition.¹¹⁴ 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.

But making people happy is not my goal, and, for reasons I have already explained, I suggest that the Common Denominator Approach is simultaneously the most sensible way to approach the problem and one that best conforms to the most basic contours of conflicts law.

Part III. Beyond the Marriage/Marriage-Like/Marriage-Lite Conflicts: The Broader Practical Implications of the Common Denominator Approach

Beyond helping us to resolve the Marriage/Marriage-Like/Marriage-Lite conflicts, this analysis sheds light on several other important questions. First, it can help to formulate a new approach to the Marriage/No-Marriage conflict that has generated a greater degree of commentary. Second, it allows us to resolve any conflicts that arise in the event the federal government adopts a marriage-like or marriage-lite scheme. Finally, it points to a new equality-based argument for same-sex marriage in some cases.

(a) The Marriage/No-Marriage Conflict

Thus far, I have argued that the Marriage/Marriage-Like/Marriage-Lite conflicts ought to be treated differently from the Marriage/No-Marriage conflict. And indeed, a state that has explicitly rejected *any* form of recognition for same-sex couples may be on fairly safe and well-

I hasten to add that despite these differences, our approaches would lead to similar results in many cases; and, further, while I view our differences as critical, I cannot help but repeat that his book is required reading on the subject of conflicts arising from same-sex marriage.

¹¹⁴ Kramer, *Public Policy Exception*, *supra* note 12, at 1976-92.

trodden ground when it declines to extend recognition to same-sex couples married in other jurisdictions. This conclusion flows both from precedent¹¹⁵ and from the very interest analysis I have offered. All the same, the Common Denominator Approach has significant implications for resolving some Marriage/No-Marriage conflicts.

The truth is that even No-Marriage 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-Marriage 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 that same-sex couples may enter into.¹¹⁶ I do not mean to suggest that this is *much* or *enough* 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-Marriage states permit same-sex couples to enter into these kinds of agreements, we can see why and how it makes sense to apply the Common Denominator Approach to Marriage/No-Marriage conflicts.¹¹⁷ Recognizing and protecting these agreements advances many of the same interests for No-Marriage 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 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-Marriage states and the Marriage, Marriage-Like, and Marriage-Lite states. In each case, the couple has entered into some number of agreements that

¹¹⁵ See *supra* notes 14-16 and accompanying text.

¹¹⁶ 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 8 (illustrating the often 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).

¹¹⁷ 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 (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.

the state would independently recognize, uphold, and protect. Therefore, No-Marriage states should apply the Common Denominator 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-Marriage 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-Marriage 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.

To begin with, formalities do not generally implicate a state's public policy interests.¹¹⁸ Second, there is some precedent for the approach I have offered. The incidents of marriage cases I referenced earlier arose in the Marriage/No-Marriage context, and we find No-Marriage states sometimes recognizing elements of marriage relationships despite the fact that they would not recognize the marriage if performed locally.¹¹⁹ For instance, states that deemed interracial and consanguineous relationships to be against their public policy nevertheless recognized some aspects of the marriage for forum law purposes.¹²⁰ Indeed, the Common Denominator Approach may be the best way to synthesize and make sense of these incidents of marriage cases.

Third, states routinely put aside forms requirements when it makes sense to. For example, a will executed in California may routinely be upheld in Georgia even if it does not

¹¹⁸ See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS, & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 974 (4th ed. 2004) (noting that variations among contract requirements do not implicate public policy concerns).

¹¹⁹ See *supra* notes 70-76 and accompanying text.

¹²⁰ Wardle, *supra* note 9, at 1893-97.

conform to Georgia's forms requirements.¹²¹ There is little reason, I think, to exclude same-sex couples from this kind of flexibility.

Applying the Common Denominator Approach may appear at first glance to be somewhat radical; states that have adopted constitutional amendments against recognizing same-sex couples *emphatically* don't approve 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

The Common Denominator Approach will also help to resolve conflicts that will arise if, as seems likely, 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 Government Accountability 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.¹²² 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. To begin with, President Obama announced support for federal civil unions, as has Vice President Joe Biden.¹²³ Indeed, they went so far as to promise full legal equality—

¹²¹ 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. 1995).

¹²² Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to The Honorable Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004) (on file with author), available at <http://www.gao.gov/new.items/d04353r.pdf>.

¹²³ Michael Blood, *Obama Argues for Civil Unions for Gays*, FORBES, Aug. 6, 2007, available at http://www.barackobama.com/2007/08/09/obama_argues_for_civil_unions.php; On the Issues: Every Political Leader on Every Issue, *Joe Biden on Civil Rights*, http://www.ontheissues.org/2008/Joe_Biden_Civil_Rights.htm (last visited Aug. 12, 2009).

apart from the word “marriage”—for same-sex unions under federal law.¹²⁴ Even leading Republicans, like former President George Bush,¹²⁵ former Vice President Dick Cheney,¹²⁶ and former Utah Governor (and speculative presidential aspirant¹²⁷) Jon Huntsman¹²⁸ 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 this represents 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, a majority of the American public supports a same-sex marriage bill,¹²⁹ suggesting that opposition to a federal bill, while inevitable, will be something less than absolute. For these reasons, it is not difficult to predict that a federal marriage-alternative bill will be one of the next dominos to fall in the steady progress towards marriage equality. If I am correct, then the conflicts question will likely arise.

¹²⁴ See Blood, *supra* note 124 (“As I’ve proposed [civil unions], it wouldn’t be a lesser thing, from my perspective.”); On the Issues, *supra* note 124 (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”).

¹²⁵ See Good Morning America: ABC America Exclusive (ABC television broadcast 2004), available at <http://www.youtube.com/watch?v=qL5qSiW3LUQ> (last visited Aug. 12, 2009) (“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.

¹²⁶ 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. *Id.*

¹²⁷ See The Fix: Political News & Analysis By Chris Cillizza, *The Rising: Jon Huntsman, Jr.*, <http://voices.washingtonpost.com/thefix/the-rising/the-rising-jon-huntsman-jr.html> (Dec. 9, 2008, 06:07 EST) (speculating that Huntsman may make a bid for the 2012 presidential election); CNN Political Ticker, *Cheney Says GOP Presidential Bench Still Strong*, <http://politicalticker.blogs.cnn.com/2009/06/29/cheney-says-gop-presidential-bench-still-strong/> (June 29, 2008, 21:15 EDT) (indicating that former Vice President Cheney mentioned Huntsman in his list of potential GOP presidential candidates).

¹²⁸ 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.

¹²⁹ FiveThirtyEight: Politics Done Right, *Two National Polls, for First Time, Show Plurality Support for Gay Marriage*, <http://www.fivethirtyeight.com/2009/04/two-national-polls-for-first-time-show.html> (April 30, 2009, 18:00 CDT); cf Grossman, *supra* note 15, at 113 (2004) (“As we saw with interracial marriage, a deeply held belief against a practice can undergo a complete reversal with the passage of enough time.”).

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 recognizes a marriage, the federal government will as well; if the state prohibits the couple from getting married—for example if the couple is consanguineous under state law—the federal government does not offer an alternative avenue for the couple.¹³⁰ 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 potential 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.¹³¹

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?

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¹³¹ There are, of course, possible variations on each of these models, but these are the prototypical possibilities.

The Common Denominator 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 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.

(c) A New Argument for Same-Sex Marriage

Recognizing the existence of the Marriage/Marriage-Like/Marriage-Lite conflicts and articulating the problems they raise also suggests a new equality-based argument in favor of same-sex marriage in some cases. In other words, apart from whether the Common Denominator Approach is adopted, identifying and articulating the underlying problem reveals a new argument for same-sex marriage in some jurisdictions.

In 2007, the supreme courts of California and Connecticut were confronted with lawsuits arguing that the states' constitutions required them to recognize same-sex marriage.¹³² Both states' legislatures had adopted marriage-like alternatives for same-sex couples—domestic partnerships in California¹³³ and civil unions in Connecticut¹³⁴—and the issue before the courts was whether these alternatives were sufficient under the state constitutions.¹³⁵

In each case, a key question for the judges was whether the marriage-like alternatives were substantively equal to marriage under the law—that is, whether they carried all of the benefits of marriage—or whether there were meaningful differences beyond the normative ones

¹³² *In re Marriage Cases*, 183 P.3d 384, 397 (Cal. 2008), *superseded by Constitutional Amendment*, CAL. CONST. art. 1 § 7.5 (upheld in *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009)); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008).

¹³³ CAL. FAM. CODE §§ 297-297.5 (West 2004).

¹³⁴ CONN. GEN. STAT. ANN. §§ 46b-38aa (West Supp. 2006) (repealed 2009).

¹³⁵ *See supra* note 132.

resulting from the withholding of the title marriage from same-sex couples.¹³⁶ The lower courts in both states concluded that the marriage-like alternatives were identical to marriage in all ways except for name, and so they were equal enough, so to speak, under the law.¹³⁷ As a trial court judge opined, “civil union and marriage in Connecticut now share the same benefits, protections and responsibilities under law.”¹³⁸ On review, California’s Supreme Court considered this question to be so important that it requested further briefing from the parties on whether there were “differences in legal rights or benefits and legal obligations or duties [] under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses[.]”¹³⁹

The best interpretation of this request and, more generally, of the courts’ keen interest in this question is that they were begging the petitioners to argue and demonstrate that their marriage-like alternatives were not functionally identical to marriage. Had they succeeded in doing so, the courts would have grabbed the opportunity to declare that the state constitutions demanded full equality. In each case, however, both sides essentially agreed on the substantive equivalence of marriage and the marriage-like alternatives. That is, even the attorneys for the petitioners seeking recognition of same-sex marriage conceded that Marriage and Marriage-Like were functionally equivalent, with only very slight and minor differences.¹⁴⁰

¹³⁶ *In re Marriage Cases*, 183 P.3d at 398-99; *Kerrigan*, 957 A.2d at 411-15.

¹³⁷ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 699-726 (Cal. Ct. App. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008), *superseded by Constitutional Amendment*, CAL. CONST. art. 1 § 7.5 (upheld in *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009)); *Kerrigan v. State*, 909 A.2d 89, 102 (Conn. Super. Ct. 2006).

¹³⁸ *Kerrigan*, 909 A.2d at 102.

¹³⁹ See Campaign for California Families’ Consolidated Brief in Reply to Supplemental Briefs Pursuant to June 20, 2007 Order at 1-9, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (answering the court’s question).

¹⁴⁰ See Brief of the Plaintiffs-Appellants with Separate Appendix at 10, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716) (conceding that the legislature “acknowledg[ed] that committed lesbian and gay couples are identically situated to and deserving of the same legal rights as married couples”); California Courts, Proposition 8 Cases: MP3 Audio of the March 5th Oral Argument, <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm> (follow “MP3 Audio of the March 5th oral argument” hyperlink) (last visited Aug. 13, 2009) (“There are tangible rights and benefits at stake in today’s debate, but you’re right that more important, and what divides the parties is a symbol, and that symbol has deep meaning for people on both sides of the case More important[] than the tangible differences is the name ‘marriage.’ The name matters.”).

However, each states' handling of the Marriage/Marriage-Like conflict suggests that the advocates conceded too quickly. Indeed, there *were* meaningful differences between marriage and the marriage-like alternatives offered in those states. Both California and Connecticut refused to treat same-sex marriages performed in other states as having any status under state law.¹⁴¹ (That is, they did not adopt the Common Denominator Approach.) This meant that same-sex couples lawfully married elsewhere that subsequently moved to California or Connecticut were treated differently from similarly-situated opposite-sex couples whose marriages were effectively dissolved at the border for all purposes. This is an example of true inequality, and the advocates for same-sex marriage might have made something out of it. In other words, the existence of the conflict and the way in which some states have resolved it offers an independent legal argument in favor of marriage equality.

It is interesting to speculate as to why the petitioners did not pursue this argument. One explanation is that they simply did not think of it. Indeed, given how off-the-radar the Marriage/Marriage-Like conflict has been, one could hardly fault the petitioners for not raising this argument to the courts. Alternatively, it could be that the petitioners were aware of this inequality but feared that the courts would have stopped short of requiring recognition of same-sex marriage on its account. Instead, the courts might have simply required the states to treat same-sex couples married in Massachusetts as though they had entered into the local Marriage-Like alternative (that is, effectively to adopt the Common Denominator Approach). Ultimately, of course, this is not what marriage advocates sought.

A third possibility is that the petitioners downplayed the legal differences between Marriage and the Marriage-Like alternatives as a gamble, hoping to push the courts to declare that even where Marriage and the Marriage-Like alternative are substantively identical, they still do not achieve full equality—a powerful precedent for future cases. If this was indeed their strategy, it proved successful: both courts ruled that the difference in name was unequal enough on its own to require the states to recognize marriage.¹⁴² Finally (and relatedly), it is possible that the advocates wished to minimize the differences between marriage and the marriage-like alternative because they wished to make the point that if there really is *no* difference between a

¹⁴¹ See *supra* note 19 and accompanying text.

¹⁴² See *supra* note 132.

marriage and a domestic partnership or civil union, then there is no rational basis for giving them different names. Again, if this was the strategy, it was successful.

Whatever the reason, the fact remains that these states' handling of the Marriage/Marriage-Like conflict shows that the marriage-like alternative was not functionally identical to marriage. To the extent that other states with robust constitutional equality guarantees follow the California and Connecticut models, the existence of the Marriage/Marriage-Like conflict suggests a new kind of equality-based argument for same-sex marriage.

Part IV. 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 marriage 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 get out of.

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.¹⁴³

¹⁴³ 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 Kenji Yoshino and Heather Gerken. See Posting of Kenji Yoshino to Convictions, *Gerkin-Yoshino Discussion of Liberty and Equality*, SLATE,

Under the earlier view, where 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, then 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. After all, once the argument for marriage became 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 this 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, 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.¹⁴⁴ This suggests that our laws and cultural understandings are constantly in flux, and so we should not be

<http://www.slate.com/blogs/blogs/convictions/archive/2008/05/21/gerken-yoshino-discussion-of-liberty-and-equality.aspx> (May 21, 2008 09:48 EDT) (asserting that courts must protect the rights of same-sex couples via a liberty analysis); Posting of Heather K. Gerken to Balkinization, *Yoshino-Gerken on the Liberty/Equality Debate*, <http://balkin.blogspot.com/2008/05/yoshino-gerken-on-libertyequality.html> (May 21, 2008 11:36 EDT) (positing that Yoshino's liberty approach is problematic and that an equality approach better suits courtroom debate); Posting of Heather K. Gerken to Balkinization, *Gerken-Yoshino on the Liberty/Equality Debate: Round 2*, <http://balkin.blogspot.com/2008/05/gerken-yoshino-on-libertyequality.html> (May 22, 2008 09:27 EDT) (favoring, from a normative perspective, an equality approach); Posting of Kenji Yoshino to Convictions, *Gerken-Yoshino Debate on Liberty and Equality, Round 2*, SLATE, <http://www.slate.com/blogs/blogs/convictions/archive/2008/05/22/gerken-yoshino-debate-on-liberty-and-equality-round-2.aspx> (May 22, 2008 10:17 EDT) (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 Posting of Hillel Levin to PrawfsBlawg, *Gay Rights: Equality or Due Process?*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/10/gay-rights-equa.html> (Oct. 2, 2008 15:11 EST).

¹⁴⁴ 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 to give full meaning to the concept of property"); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. 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 . . .").

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 from marriage. They also include the rising number of committed cross-sex couples that choose not to marry.¹⁴⁵ All of these cultural and legal developments are 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, then would there be so much opposition to marriage equality but relatively less to marriage-like and marriage-lite alternatives? And if it did not, then 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 Common Denominator Approach takes as a given that different states will have different approaches—a menu of possible resolutions, in the formulation of Eskridge and Spedale¹⁴⁶—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.

¹⁴⁵ 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>.

¹⁴⁶ William N. Eskridge, Jr. and Darren R. Spedale, *Gay Marriage: For Better or For Worse? What We've Learned from the Evidence*, 251-57. OR ESKRIDGE, JR. & SPEDALE, *supra* note 6.