I. Introduction

The question of legal recognition of same-sex unions consumes an ever-increasing amount of attention in the legal literature and case law. Much of that will now be directed to the entirely novel decision of the Massachusetts Supreme Judicial Court to announce a new definition of marriage: “the voluntary union of two persons as spouses, to the exclusion of all others.” There is however, another important issue receiving less attention but which as a practical matter may be significant in a number of future cases. This issue is the effect which states will give to quasi-marital statuses created by other states.

While there is a long-standing practice related to interstate marriage recognition—that a marriage valid where contracted will be treated as valid everywhere (with a long recognized public policy exception)—the entirely new phenomena of statuses created to provide the legal status of marriage to same-sex couples under a different name invokes no similar practice. Courts hearing a claim for recognition of a quasi-marital status contracted in another state are thus faced with a matter of first impression.

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The impetus of this development was a Vermont Supreme Court decision issued in 1999. In that decision, the court divined in the state constitution, a principle of “inclusion” that the court held was violated by the failure of the state to provide the benefits of marriage to same-sex couples. Reserving for itself the power to decide whether the legislature was sufficiently responsive to the court’s concerns, the decision included an order that the Vermont legislature extend marriage benefits to same-sex couples in some way. In response, the legislature created a new status of civil unions defined as “two eligible persons [who] have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.”

To be eligible, parties must “[b]e of the same sex and therefore excluded from the marriage laws of this state.” Those who contract a civil union “shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage” and “shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”

During the debate over civil unions in the Vermont Legislature, a proposal to include a

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5 Id. at 878, 884 & 886.
6 Id. at 886-887.
residency requirement for couples contracting civil unions was made but rejected.\textsuperscript{10} As a result, when the law went into effect and licenses began to issue in July 2000 many of those contracting civil unions were from out-of-state.\textsuperscript{11} The Vermont Secretary of State reports that in 2002, 1,707 civil unions were contracted in the state.\textsuperscript{12} Of these, 90 percent were contracted by couples from outside of Vermont (up three percent from 2001).\textsuperscript{13} These couples represent 47 jurisdictions.\textsuperscript{14} As of June 25, 2004, there have been 6,945 civil unions contracted in Vermont only 998 between Vermont residents (14\%).\textsuperscript{15}

Although the Vermont law has been the focus of the developments discussed in this article, other states have enacted significant provisions that are, in some ways, analogous to Vermont civil unions. For instance, the California Legislature recently created a new status of domestic partners defined as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring” but must involve persons of the same-sex or persons over 62.\textsuperscript{16} California law also provides that

\begin{quote}
Registered domestic partners shall have the same rights, protections, and benefits,
\end{quote}

\begin{enumerate}
\item Id. at 368.
\item Vermont Secretary of State, \textit{Civil Unions} at www.healthyvermonters.info/hs/stats/VSB2002/cu/htm.
\item Id.
\item Vermont Secretary of State, \textit{Table I-1 2002 Vermont Civil Unions} at www.healthyvermonters.info/hs/stats/VSB2002/i01/htm.
\item Email from Richard McCoy, Vermont Secretary of State’s Office (July 7, 2004) (in possession of author).
\item Cal. Fam. Code \textsection{297}.
\end{enumerate}
and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.\textsuperscript{17}

Even more recently, the New Jersey Legislature also created a domestic partnership statute. This law allows same-sex couples and opposite-sex couples older than 62 years old to register as partners.\textsuperscript{18}

The legislative findings of the bill creating New Jersey’s status says that

\begin{quote}
[a]ll persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including: statutory protection through the “Law Against Discrimination,” . . .; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse.\textsuperscript{19}
\end{quote}

This article will discuss the recognition of same-sex unions in jurisdictions other than those in which they are contracted. To do so, it will first describe the handful of cases that have addressed the out-of-state effect of Vermont civil unions (since there is not yet any case law related to the statuses created by California or New Jersey). It will then address state statutes and constitutional amendments which have addressed the effect of out-of-state quasi-marital statuses in those states. Section IV will then analyze questions related to the recognition of Vermont civil unions and domestic partnership statuses recognized in other jurisdictions.

II. Litigation

The first case to involve the extraterritorial effect of a Vermont civil union arose in Georgia.\textsuperscript{20} That case centered on a consent decree following divorce. In the decree, the parties

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17}Cal. Fam. Code §297.5.
\item \textsuperscript{20}Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002).
\end{itemize}
\end{footnotesize}
agreed that neither party could exercise visitation “during any time the party being visited cohabited
with or had overnight stays with any adult to whom that party was not legally married or related
within the second degree.” Two days after Vermont’s civil unions law went into effect, one of the
parties contracted a civil union with her same-sex partner. Subsequently, the ex-husband filed a
motion for contempt of his ex-wife alleging she had exercised visitation while living with her
partner. The ex-wife defended herself by arguing that her civil union satisfied the decree’s
requirement that she only exercise visitation while living with someone to who she is married. The
court of appeals rejected this argument concluding that a civil union was not a marriage based on the
specific legislative finding to that effect in the Vermont statute. The court added that “even if”
Vermont had redefined marriage to include same-sex couples, such a marriage would not be
recognized in Georgia because of an express statutory prohibition in state law. Further, the court
cited to the federal Defense of Marriage Act to support the proposition that Georgia courts are not
required to recognize same-sex marriages from other states.

In a Connecticut case, one of the parties to a Vermont civil union petitioned a Connecticut
court for dissolution of the union (the other partner did not file an appearance). The trial court

\[\text{Id. at 48.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at 48-49.}\]
\[\text{Id. at 49.}\]
\[\text{Id. at 49.}\]

Rosengarten v. Downes, 802 A.2d 170, 173 (Conn. App. 2002). See also Diana G. McShea,
dismissed the case for lack of subject matter jurisdiction. On appeal, plaintiff argued that the trial court could exercise jurisdiction under a statutory provision granting jurisdiction for matters of family relations. The court of appeals noted any explicit statutory authorization for treating a civil union as a “family matter” for jurisdictional purposes and noted the lack of any legislative history supporting that proposition. The court further held that Connecticut public policy does not favor recognition of civil unions.

A decision taking the contrary position is pending on appeal in New York. The decision arose from an action for wrongful death and medical malpractice brought by the man in a civil union whose partner had died while being treated in a hospital. The court limited its holding to whether the plaintiff could be “considered a spouse for purposes of the wrongful death statute.”

The court held that New York public policy did not preclude recognition of the Vermont civil union for this purpose noting (1) the absence of a specific statutory prohibition on same-sex marriage recognition, (2) case law recognizing same-sex couples in other contexts, (3) judicial recognition of second-parent adoptions involving same-sex couples, (4) the provision of benefits to same-sex


29Id. at 172.
30Id.
31Id. at 177-179.
32Id. at 177.
34Id. at 412.
35Id. at 415.
partners of 9/11 victims, and (5) New York City’s domestic partner registry. The court then notes that a Vermont civil union “is distinguishable from marriage only in title.” Since the court decides that “[s]pouse is a gender neutral word” which “is applied to plaintiff under the Vermont civil union” it concludes that the plaintiff is a “spouse” for purposes of the wrongful death law. The court adds that a “civil union is indistinguishable for societal purposes from the nuclear family and marriage.”

The most recent case discussing the out-of-state effect of a Vermont civil union arose in Massachusetts. It involved two men, residents of Massachusetts and Arkansas who contracted a civil union in Vermont in 2002. Four days after entering into a civil union, the parties separated and a few months later the plaintiff sought a decree of dissolution in a Massachusetts Superior Court (the defendant did not make an appearance in court). In a memorandum opinion, the trial court dissolved the union. The opinion noted that the civil union status “confers the couple with the same rights, and obligations as created by marriage and provides the same legal standards and remedies for dissolution.” The court recognized that “neither part has any contact” with Vermont and therefore could not obtain a dissolution there or a divorce anywhere else since, although “the substantial

36Id. at 415-416.
37Id. at 417.
38Id. at 420.
39Id. at 421.
41Id. at *1.
42Id.
43Id. at *2.
equivalent of marriage,” a civil union is not a marriage.\textsuperscript{44} Plaintiff out forward two theories for the Massachusetts court asserting jurisdiction to dissolve the union—a constitutional claim based on the Full Faith and Credit Clause and an assertion that the court’s equity jurisdiction gave it authority to grant a dissolution.\textsuperscript{45} The court concluded that since the parties were not married and Massachusetts law does not provide for civil union dissolution, “the application of the full faith and credit clause is not certain in this action.”\textsuperscript{46} The court then noted recent decisions of the Massachusetts Supreme Judicial Court and concluded that “[r]easoning follows therefrom that same-sex couples who enter into legal relationships should also be allowed to dissolve their legal relationships.”\textsuperscript{47} Relying on these precedents, the court concluded that the parties “should be afforded all of the responsibilities and rights that flow from a civil union, including a legal remedy for the dissolution of their legal relationship.”\textsuperscript{48} The court further sua sponte applied the standard for analyzing separation agreements for married couples to the parties in the case.\textsuperscript{49}

III. Statutes and Constitutional Provisions

For obvious reasons, prior to the creation of civil unions in Vermont no state had enacted legislation addressed to interstate recognition of quasi-marital statuses. However, at least two statutes enacted to address interstate recognition of same-sex marriages included language which

\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at *3.

\textsuperscript{47} Id. at *4 (citing Goodridge \textit{v. Department of Public Health}, 798 N.E.2d 941, 969 (Mass. 2003) and \textit{Opinions of the Justices to the Senate}, 802 N.E.2d 565 (Mass. 2004)).

\textsuperscript{48} Id. at *5.

\textsuperscript{49} Id.
might be applicable to such statuses. Alaska’s law provides that “[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of a marriage.” Thus, the provision could be read to prohibit the recognition of a relationship that provides marital benefits under a different name. Florida’s law provides that not only same-sex marriages but also “relationships between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state.” The law further specifies that the state “may not give effect to any public act, record, or judicial proceeding of any state . . . respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.” In order to apply to Vermont civil unions, the language “relationships between persons of the same sex which are treated as marriages in any jurisdiction” would have to be construed to include Vermont civil unions by arguing that the equivalence between marriage and civil unions amounts to treating the unions as marriages in Vermont.

In the wake of the civil unions law and the heavy influx of non-Vermonters into the state to take advantage of the law, a number of states added recognition provisions to their laws. Two did so as part of bills addressing same-sex marriage recognition. Texas law, for instance, specifically forbids recognition of “civil unions” which are defined as “any relationship status other than marriage that (1) is intended as an alternative to marriage or applies primarily to cohabiting persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.” Ohio law does not use specific terminology but precludes recognition of another

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50 Alaska Code §25. 05. 013.
52 Id.
state law that “extends the specific benefits of legal marriage to nonmarital relationships.”

Two other states enacted stand-alone provisions to address out-of-state marriage-like laws. Utah’s provides, “this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.” The law goes on to specify that it does not “impair[] any contract or other rights, benefits or duties that are enforceable independently of this section.” Virginia’s law mentions civil unions and creates a new term “partnership contract” and provides that either status

between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Also in response to Vermont’s civil unions law, one state amended its state constitution to address, in addition to marriage recognition, recognition of quasi-marital statuses. The Nebraska Constitution prohibits recognition of “civil union[s], domestic partnership[s], or other similar same-sex relationship[s].” In the spate of state constitutional amendments proposed to address the creation of same-sex marriage in Massachusetts, other states have addressed this issue. The Utah amendment prevents recognition of a “domestic union” as a marriage and disallow giving it “the

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54 2004 Ohio Laws File 61.
56 Id.
same or substantially equivalent legal effect” as a marriage.\(^59\) Kentucky and Wisconsin have amendments with identical language which prohibits recognition of a “legal status identical or substantially similar” to marriage.\(^60\) The Louisiana amendment provides that: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”\(^61\) The Oklahoma amendment says that the state constitution “nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”\(^62\) If the reference to “other provisions of law” includes conflicts law, it could be argued that this provision prohibits recognition of out-of-state quasi-marital statuses.

Two states have specific recognition provisions that take a markedly different approach. Interestingly, both were enacted as part of creating quasi-marital statuses in those states. The New Jersey domestic partnership law provides that “[a] domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State.”\(^63\) California’s approach is to treat quasi-marital statuses as domestic partnerships: “A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic

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partnership.”

IV. Analysis

The creation of quasi-marital statuses and the resulting litigation and statutory enactments raise a number of important questions that are as yet unsettled.

A. Effect in States Without Specific Recognition Provisions

An obvious question raised by the cases and statutes described above is whether states without specific provisions barring recognition of civil unions or similar statuses will have to recognize them. As we have seen, the Georgia court of appeals concluded that the answer is no for that state. Similarly an Alabama attorney general opinion issues before the civil union law went into effect comes to the same conclusion. The opinion was addressed to the question of whether Alabama would have to recognize a Vermont civil union under either state or federal law. The opinion examined the Full Faith and Credit Clause and noted the recognition of a public policy exception to the general principle of recognition in U.S. Supreme Court jurisprudence. Relying on the federal Defense of Marriage Act (DOMA) and a specific statutory non-recognition policy, the opinion concludes that a same-sex “marriage” would not have to be recognized “whether that relationship were legally styled a ‘marriage,’ a ‘civil union,’ or a ‘domestic partnership.’” In a note, the opinion notes that the purpose of the Vermont statute (to provide same-sex couples the benefits

64 Cal. Fam. Code §299.2.

65 See infra notes ***.


67 Id. at 1.

68 Id. at 3.

69 Id. at 7.
of marriage) “is directly contrary to the purposes of the Alabama Marriage Protection Act, which was intended to conserve the legal status, benefits and protections of marriage for heterosexual couples.” It further argues that the civil unions law “treat[s] a homosexual civil union relationship ‘as a marriage’ in all respects but name” and, thus DOMA would prevent Alabama being required to recognize it even in the absence of a specific statutory policy. A later Illinois attorney general opinion addresses the same question. It also notes the Supreme Court’s public policy exception to recognition of out-of-state law. The opinion relies on the second sentence of DOMA and Illinois law prohibiting recognition of same-sex marriages. The opinion characterizes civil unions as “clearly a relationship between persons of the same sex that is treated as a marriage under the laws of that State.” It also concludes that the “difference between a civil union in Vermont and a same-sex marriage, however, is merely a matter of nomenclature.” Thus, civil unions “are equivalent to same-sex marriages, for purposes of Illinois law” and need not be recognized. The Connecticut decision takes the same position even in the absence of a specific statutory policy (although some legislative intent is relied on).

70Id. at 7, note 1.
71Id. at 8.
73Id. at 2.
74Id. at 3-4.
75Id. at 3.
76Id. at 4.
77Id.
78See infra notes ***.
There is however, countervailing authority. The New York decision noted above cites to a lack of specific authority on same-sex marriage recognition (among other things) for the proposition that a civil union might be entitled to recognition, even if only for limited purposes. This seems to be in keeping with a recent New York attorney general opinion which suggests that an out-of-state same-sex marriages would be recognized in New York absent specific legislative pronouncements to the contrary. It may not be assumed, however, that this conclusion is inevitable where a state has no specific marriage recognition policy since the failure to enact a statute may be based on a reason other than a desire to have the state recognize foreign same-sex marriages, such as a belief among legislators that a statute would be unnecessary since current law would be expected to achieve the same result.

B. Similarity to Marriage

An important factor in the decisions and attorney general opinions noted so far has been the fact that Vermont civil unions are virtually identical to marriage. The question of how other similar arrangements would be recognized out of state has not yet resulted in any case law. That will likely change as the similarity of California domestic partnerships and marriage is the source of pending litigation. In March 2000, the people of California overwhelmingly approved (61% to 39%) Proposition 22 which stated “Only marriage between a man and a woman is valid or recognized in

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79 See infra notes ***.


California. During the public debate over Proposition 22, the California legislature approved AB 26 which established a registry for same-sex couples or couples over 62 to register as domestic partners. Like most municipal domestic partnership ordinances, this new registry had a largely symbolic effect—extending only hospital visitation privileges and health benefits for partners of state employees. However, in 2001, the legislature extended these benefits with the passage of AB 25 which granted a dozen new benefits to registered domestic partners. Three new benefits were added in 2002. An attempt to dramatically enlarge the scope of the legal benefits extended to same-sex couples by creating civil unions (patterned after the status mandated by the Vermont Supreme Court) was also attempted during this time but was tabled in January of 2002. The concept lingered though and came to fruition in 2003 with the passage of AB 205. AB 205 creates a de-facto marital status for same-sex couples and (probably for political reasons) couples over 62.

The challenge to AB 205 is premised on the argument that the new law amends Proposition 22 in violation of the state constitution which provides: “The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.” Thus, if the domestic partnership law is close enough to marriage to be understood as an amendment or repeal of

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83 Cal. Fam. Code §308.5.
84 1999 Cal. Legis. Serv. Ch. 588.
86 With the passage of AB 2216, SB 1575 and SB 1661.
88 Cal. Const., art. II, sec 10(c) (emphasis added).
Proposition 22, it will be unconstitutional. The argument that domestic partnerships is same-sex marriage by another name is not weak. The newly supplemented domestic partnership status closely follows California’s marriage law in a number of ways. First, the rules on capacity are almost identical: both can involve only two people, the partners can’t be married to anyone else, can’t be related by blood in a way that would invalidate a marriage, have to be 18, and must be capable of consenting.\textsuperscript{89} Second, the law specifically incorporates marital benefits by reference: “[r]egistered domestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed on spouses.”\textsuperscript{90} The provision relating to superior court dissolution of domestic partnerships also incorporates marriage by reference: “The dissolution of a domestic partnership . . . shall follow the same procedures, and the partners” have the same rights and duties “as apply to the dissolution of marriage.”\textsuperscript{91} The law also requires state agencies to modify forms that “use the terms spouse, husband, wife, father, mother, marriage, or marital status” to include “appropriate references to domestic partner, parent, or domestic partnership.”\textsuperscript{92} The section on construction calls for a liberal construction of the law so as to “secure to eligible couples who register as domestic partners” the benefits and duties which “the laws of California extend to and impose upon spouses.”\textsuperscript{93}

Proponents of the bill try to distinguish AB 205 from marriage in order to escape the charge that the new law conflicts with Proposition 22. One approach used in the debate over past legislation is to say that “[s]o long as the word marriage is not used” domestic partnerships do not

\textsuperscript{89}Cal. Fam. Code §297.

\textsuperscript{90}Cal. Fam. Code §297.5.

\textsuperscript{91}Cal. Fam. Code §299.

\textsuperscript{92}Cal. Gov’t. Code §14771.

\textsuperscript{93}AB 205, sec. 15.
violate Proposition 22. A second approach is to note the differences between the statuses of marriage and domestic partnership: (1) domestic partners can’t file jointly on their income tax returns, (2) the laws provide different entry and exit (before five years or children involved) procedures, (3) domestic partnerships are not guaranteed interstate recognition, (4) the law does not secure federal benefits for domestic partners, (5) and the law does not secure access to benefits controlled specifically by state constitutional provisions. Interestingly enough, these differences seem somewhat analogous to the covenant marriage legislation in Louisiana, Arkansas and Arizona which also has different entry and exit requirements and is not guaranteed out-of-state recognition. The other differences are unavailing. Of course a statute can’t change California constitutional requirements, the laws of other states or federal law. The only substantive difference between marriage and domestic partnership is joint income tax filing. Other than that, AB 205 borrows from marriage anything that isn’t nailed down.

C. Statutory Language

The statutes which specifically address quasi-marital statuses contain a range of approach to recognition. Some such as Texas, Virginia, Nebraska and Utah (the constitutional amendment), specifically enumerate the kind of statuses that will not be recognized. This approach has an inherent challenge since states have been creative in the naming of the quasi-marital statuses. The most important example is Vermont where the term civil unions was minted. Thus while the Texas recognition statute uses the term civil unions it also includes a definition that would include statuses

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94 Ed Fletcher, *Same-Sex Unions OK, Expert Says* SACRAMENTO BEE (Oct. 25, 2001)

95 See Equality California, *AB 205 Fact Sheet* (October 17, 2003) at eqca.org.

given another name. The Virginia law and the Utah amendment try to avoid this problem by using generic terms—“partnership contract” in Virginia and “domestic union” in Utah. Both, however, also include some descriptive language referencing the statuses’ similarity to marriage as a way to include other possible terms. Nebraska notes the two existing terms, civil unions and domestic partnerships, and uses these as a reference point for gauging the permissibility of other possibilities. The other provisions specify a legally recognized status such as marriage and use it as a comparison for determining whether another state’s statuses will be recognized. These include Ohio, Utah (the statute), Kentucky, Wisconsin and Louisiana.

Some general observations about the statutes are also possible. First, most prohibit quasi-marital statuses involving opposite- as well as same-sex couples. The Texas law, for instance, references “cohabiting persons,” Ohio uses “nonmarital relationships,” Louisiana references “unmarried individuals,” and Utah, Kentucky and Wisconsin use gender neutral terms. All of the new laws apply to public statuses rather than private arrangements such as employment benefits or powers of attorney. Utah’s statute specifically includes a provision noting that the law has no effect on “rights, benefits or duties” not created by a formal status in another state.

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99 Id.
the non-recognized status must be created by a “public act, record, or judicial proceeding.” Other states include a reference to “legal status” or “legal effect” which would preclude an effect on private arrangements. The references to state created statuses such as civil unions in Nebraska and Virginia law make clear that those provisions are also addressed to public statuses. As a result, while the statutes would allow for individual benefits to be extended to unmarried persons, they prohibit doing so by creating a new status.

**D. Constitutionality**

In some litigation, the constitutionality of non-recognition has been raised but not addressed at any length. The two attorney general opinions make a careful case for the constitutionality of statutory prohibitions of same-sex marriage recognition. As I have noted elsewhere, though, while the case for the constitutionality of such laws is strong, it is far from airtight because of the possibility of a novel judicial decision to the contrary. An example of this has arisen in the context of the Nebraska amendment cited above. In this case, plaintiffs are organizations that lobby the state legislature on gay rights issues. They argue in their suit that the amendment constitutes an

103 2004 Ohio Laws File 61


106 See infra notes ***.

107 See infra notes ***.


110 Id. at 1006.
unconstitutional Bill of Attainder (among other claims). In a ruling on the state’s motion to dismiss, the district court made the improbable holding that the legislation may attain a cognizable group (in the court language, the group is “civil unions” and “domestic partners”) and punishes them by “prohibit[ing] [the plaintiffs’] political ability to effectuate changes proposed by the majority.” I have criticized the decision elsewhere but it can hardly be denied that this is a novel decision.

E. Proposed Federal Marriage Amendment

A final open question is raised by the proposed federal marriage amendment. It provides:

“Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” It has been suggested that the second sentence of the amendment might affect the validity of quasi-marital statuses. This is not a plausible reading of the sentence. As currently drafted the second sentence would only prevent a status being created as the result of a decision that a state or federal constitution can be construed to mandate such a result. This would preclude the Vermont decision which led to the creation of civil unions but would not effect a state legislature’s ability to offer some benefits traditionally associated with marriage to unmarried persons.

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111 Id.
112 Id. at 1010. On the bright side, the court did not hold that Section 29 is a letter of marque or reprisal in violation of the Constitution’s Article I, section 10.
113 See Duncan, supra note **.
114 HJR 56 (May 21, 2003); SJR 26 (November 25, 2003).
IV. Conclusion

Recent decades have seen shift in family law “away from aspirational morality” to a system which “hesitates to set standards that cannot readily be enforced or that go beyond the minimal responsibility expressed in the can phrase, ‘Do your own thing, as long as you don’t hurt anybody else.’”116 Partly as a result, “family law now reflects less confidence in the value of marriage- and kinship-based models of family form.”117 Thus, family law increasingly seems to be willing to see marriage and the family in contractual terms based on a primacy of the individual interests of the parties involved rather than the intrinsic value of the status of marriage or family.118

A practical implication of these larger trends is an increasing diversity in family arrangements and an accompanying increase in pressures to grant legal recognition to the variety of structures. This creates a period of challenge when governmental entities struggle to respond. It is particularly difficult when some states outpace others in accepting novel arrangements. At these times conflict between the laws of different jurisdictions is inevitable. This kind of conflict is almost sure to produce significant controversy in the future. The result of these controversies will shape family law in the future to a great extent.


117 Bruce C. Hafen, Individualism in Family Law in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY (David Blankenhorn, Steven Bayme & Jean Bethke Elshtain, eds. 1990).