Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union?

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CHOICE OF LAW: WILL A WISCONSIN COURT RECOGNIZE A VERMONT CIVIL UNION?

I. INTRODUCTION

It was not too long ago that interracial marriages were prohibited in many states across the nation. The first case to successfully challenge and strike down a state miscegenation statute, Loving v. Virginia, did not come before the United States Supreme Court until 1967.

Just as legal barriers have since been lifted for interracial couples wishing to marry, legal recognition of marriage between parties of the same gender may not be too far in the future. Developments in the past decade in Hawaii, Alaska, and more notably Vermont, have propelled this issue onto the legislative agenda in numerous states and the federal government. The debate over the recognition and prohibition of same-sex unions is not, however, new. Several years ago, the nation's

1. Peter Wallenstein, Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Law in North Carolina, South Carolina, and Virginia, 1860s-1960s, 32 AKRON L. REV. 557, 557-58 (1999) (recounting the stories of several interracial couples who sought recognition of their marriages). In 1967, the Supreme Court heard that there were sixteen states in the nation that explicitly prohibited interracial marriages. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (listing the sixteen states which punished interracial marriages at the time).

2. 388 U.S. 1 (1967). The Loving Court noted "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." Id. at 12. In addition, the Court stated, "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." Id.


4. Id. § 13.19, at 574.

5. In 1996, Congress passed the Defense of Marriage Act (DOMA) and since then numerous state legislatures have passed little "domas" based on the federal act. See David O. Coolidge & William C. Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate, 32 CREIGHTON L. REV. 3, 4-7 & n.29 (1998); see Same-Sex Marriages Across the United State (May 25, 2000), available at http://www.CNN.com/2000/LAW/05/25/same.sex.marriages [hereinafter Same-Sex Marriage Laws] (discussing legislative action taken by states in recent years).

spotlight shone on Hawaii, as the legal recognition of same-sex marriage in Hawaii became a strong possibility.\(^7\)

Vermont recently revolutionized the debate when the Vermont Civil Union Bill became law in April of 2000. The bill grants same-sex couples virtually the same rights, benefits, and protections afforded to married couples, without actually calling the union a marriage.\(^8\) As of September 15, 2000, approximately five hundred couples had entered civil unions in Vermont.\(^9\) As of May 22, 2001, that number had grown to 2043 civil unions.\(^10\) Over three-quarters of the couples who have taken advantage of the new law are from out-of-state.\(^11\)

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7. STRASSER, supra note 6, at 1. Although Hawaii residents pioneered efforts to sanction same-sex marriages, Hawaii does not currently recognize same-sex marriage. HAW. REV. STAT. ANN. § 572-1 (Michie 1999). The debate over the constitutionality of same-sex marriage made its way to the Hawaii courts in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), aff'd, 950 P.2d 1234 (Haw. 1997). In *Baehr*, three same-sex couples had sued John Lewin, the then Director of the Hawaii Department of Health because they were denied marriage licenses. Id. at 48. A plurality of the Hawaii Supreme Court held that the trial court erred in dismissing the plaintiffs' complaint and remanded the case to the trial court. The court placed the burden on the state "to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights" under the state constitution. Id. at 68. Three years later, in *Baehr v. Miike*, the trial court found that the state had failed to meet its burden and ordered the state to issue the three couples marriage licenses. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *21-22 (Haw. Cir. Ct. Dec. 3, 1996). The case went up again on appeal to the Hawaii Supreme Court, but in April 1997, the Hawaii legislature approved a bill proposing an amendment to the Hawaii Constitution that grants the legislature power to "reserve marriage to opposite-sex couples." Cheryl Wetzstein, *Hawaii Agreement on Same-Sex Unions Won't Work, Foes Say; Marriage Amendment in Jeopardy*, WASH. TIMES, Apr. 29, 1997, at A10. On November 3, 1998, Hawaii voters approved the marriage amendment to the Hawaii Constitution. Lyle Denniston, *Voters in Alaska, Hawaii Defeat Initiatives on Homosexual Marriage; Washington State Quashes Affirmative Action Effort; Election 1998: Nation*, BALT. SUN, Nov. 5, 1998, at 15A. Upon public approval of the amendment, Hawaii's highest court recognized, "[i]n light of the marriage amendment, HRS § 572-1 must be given full force and effect." *Baehr v. Miike*, No. 20371, slip op. (Haw. 1996) (summary disposition order, rev'd and remanded at *Baehr v. Lewin*, 994 P.2d 566 (Haw. 1999)).

8. Cheryl Wetzstein, *Vermont Governor Signs Bill Legalizing Same-Sex Unions; Foes say Measure 'Railroaded,' Vow to Continue Fight*, WASH. TIMES, Apr. 27, 2000, at A3. The Vermont civil union bill is unprecedented in breadth and possible impact. See Neil Miller, *For Better or For Worse, Vermont Civil Union Legislation Has been a Boon to Gay Couples-But Dissenters are Still Pressing Their Case*, BOSTON GLOBE, June 17, 2001, Magazine at 13 (quoting state Representative Bill Lippert, who noted: "The phrase 'civil union' didn't exist before this. We made it up.").


10. Miller, supra note 8.

11. Id. (noting that of the 2043 couples who had entered into civil unions in Vermont, only 430 couples were Vermonters).
Already we have seen the impact of the Vermont bill as other states have explored adopting Vermont's model. By creating a new legal option for gay and lesbian couples, the debate has expanded beyond a simple approval or ban on same-sex marriages.

This Comment discusses the choice of law questions raised by the Vermont civil union law. It ultimately seeks to answer the question of whether a court of another state, more specifically Wisconsin, would be required to recognize a civil union performed in Vermont.

Using Wisconsin as the forum state, this Comment explores the hypothetical situation of a couple domiciled in Wisconsin who enters into a "suitcase" civil union in Vermont, and then returns to Wisconsin seeking full recognition of the rights and benefits provided under Vermont law to couples united in a civil union.

Part II of this Comment provides an overview of the Vermont case and highlights key provisions of the civil union bill. Part III analyzes our hypothetical choice of law situation in three main steps. The Comment first explores state legislative efforts to revise or clarify the definition of marriage. Second, the Comment examines Wisconsin's statutory choice of law approach to marriages performed in foreign jurisdictions. Wisconsin has a marriage evasion statute, which serves as a springboard for this analysis, but is arguably not applicable, or simply ill-fitting to the civil union analysis. Third, because Wisconsin's statutory choice of law guidelines prove to be unhelpful, this Comment reviews

12. Already, in August 2000, seven states were considering whether to follow Vermont's footsteps and authorize similar civil union laws. States May Copy Vermont's Civil Union, CHRISTIAN CENTURY, Aug. 16, 2000, at 826. The seven states were: California, Connecticut, Massachusetts, New Hampshire, New Jersey, New York, and Rhode Island. See id.; Eleanor Yang, Civil Union Bill May Open Doors, ALLENTOWN MORNING CALL, Aug. 6, 2000, at A5.


14. The phrase "suitcase marriage" refers to the hypothetical situation in which a couple marries in a state recognizing same-sex marriages and then returns to their home state seeking full legal recognition of their rights. Kirk C. Jenkins, RECORDER, Mar. 1, 2000, at 5 (discussing hypothetical same-sex Californian couple). For example, Professor Barbara Cox extensively discusses a suitcase marriage hypothetical involving a Wisconsin same-sex couple who marries in Hawaii. Barbara Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 WIS. L. REV. 1033 (1994).

15. WIS. STAT. ANN. § 765.04 (West 1993).
and applies Wisconsin's choice of law methodology as exemplified in case law to the hypothetical situation. Part IV of this Comment asks whether refusing to recognize a Vermont civil union violates the directives of the Full Faith and Credit Clause of the Constitution. In addition, this Comment discusses the interplay between the Defense of Marriage Act and the Full Faith and Credit Clause.

Wisconsin presents a particularly interesting case study for several reasons. Wisconsin is one of few states that has not passed legislation amending its marriage statutes to expressly prohibit same-sex marriages or unions. Furthermore, Wisconsin is one of only a handful of states with a marriage evasion statute currently in force. In addition, Wisconsin courts have not consistently followed one specific choice of law theory, resulting in what one commentator has described as a "melting pot."

II. OVERVIEW OF VERMONT LAW

A. The Vermont Case: Baker v. State

Baker v. State, which would eventually set the agenda for the Vermont legislature, began much like the Hawaii Baehr case: three same-sex couples brought an action against the State of Vermont and their local governments because, in their respective towns, they were denied a marriage license by the town clerk. The plaintiffs sought a declaratory judgment that the clerks' actions violated the Vermont marriage laws and the state constitution. The trial court found against the plaintiffs. The plaintiffs appealed, contending that the lower court erred in its interpretation of Vermont law.

16. See Same-Sex Marriage Laws, supra note 5 (providing a lengthy list of states which have passed statutes explicitly banning same-sex marriages or unions).
17. STRASSER, supra note 6, at 123. Generally, a marriage evasion "statute might declare that domiciliaries who attempt to evade a statute prohibiting their marriage by going to another state which recognizes the union will not have their marriage recognized by the domicile." Id.
20. Id. at 867–68.
21. Id. at 868.
22. Id.
23. Id.
While recognizing that the "plain and ordinary" definition of marriage as the union between husband and wife is "rooted in Vermont common law," the Vermont Supreme Court held that the Common Benefits clause of the Vermont Constitution grants same-sex couples the "common benefits and protections that flow from marriage under Vermont law." The Court relied on the following provision: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."

Although the Baker court concluded that same sex couples were entitled to the "common benefits and protections" extended to couples of the opposite sex, the court fell short of implementing this constitutional finding. Instead, the court prescribed the job of determining the scope and consequence of this constitutional obligation to the Vermont legislature. The court stated, "[w]hatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law." With this statement, the court laid the groundwork for the elected officials of the legislature to take action.

**B. The Vermont Civil Union Bill**

Faced with the agenda handed down by the Vermont Supreme Court, the Vermont legislature began the process of crafting a bill that would meet the court's guidelines. The efforts of the legislature culminated on April 25, 2000 when the House and Senate reached

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24. Id.
25. Id.
26. Id. at 867.
29. Id.
30. Id. at 867.
agreement on a civil union bill and passed H. 847. The Vermont governor signed the law on April 26, 2000. Most of the legislation, entitled "An Act Relating to Civil Unions," became effective on July 1, 2000, while others, such as the insurance provisions, became effective January 1, 2001.

When the Vermont legislature passed the civil union bill, it did not legitimize same-sex marriage; technically, a civil union is not the same as a marriage under Vermont law. Due to political pressure and intense lobbying, the legislature felt compelled to explicitly articulate Vermont's definition of a civil marriage as the "union between a man and a woman."

To form a civil union, the parties must "[b]e of the same sex and therefore excluded from the marriage laws of this state." To qualify as a party to a civil union, a person may "[n]ot be a party to another civil union or marriage," and the other party to the civil union must not be a close relative.

Although a civil union is technically distinct from a civil marriage, benefits granted to parties in a civil union parallel those benefits currently enjoyed by married couples. The statute identifies the benefits and protections afforded to parties that enter in a civil union:

(a) Parties to a civil union shall have all the same benefits,

33. World and National Report: Vermont Gov Inks Gay Civil Union Law, NEW YORK DAILY NEWS, Apr. 27, 2000, available at http://www.nydailynews.com/2000-04-27/News_andViews/Beyond_the_city/a-64722.asp. Upon signing the civil union bill, Vermont Governor Howard Dean was quoted as saying, "This is a statement that Vermont values people for who they are, not what they are." Id.
34. H. 847, sec. 42 (enacted as Act 91, titled "An Act Relating to Civil Unions").
35. Currently, no state recognizes same-sex marriages and most states explicitly prohibit them. See Same-Sex Marriage Laws, supra note 5.
37. The first legislative finding of H. 847 states: "Civil marriage under Vermont's marriage statutes consists of a union between a man and a woman. This interpretation of the state's marriage laws was upheld by the Supreme Court in Baker v. State." H. 847, sec.1. The House version of the bill did not initially have this as its first finding, but upon recommendation of the Senate, the House Committee on the Judiciary urged the House to give this definition forefront status. See Journalized Remarks, supra note 31.
38. VT. STAT. ANN. tit. 15, § 1202(2) (Supp. 2000).
39. Id. § 1202(1).
40. Id. § 1203.
41. Id. § 1204(a).
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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. (b) A party to a civil union 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. (c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons. (d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.42

The Act also provides a "nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union."43 The twenty-four benefits, responsibilities, and protections specifically mentioned include: property rights, family leave benefits, damages for actions based on spousal status (e.g., loss of consortium), adoption rights, spousal abuse programs, and homestead property tax allowance.44

The Vermont Civil Union Review Commission45 has been charged to "[c]ollect information about the recognition and treatment of Vermont civil unions by other states and jurisdictions, including procedures for dissolution."46 The Commission issued its first report in January of 2001, in which it summarized its work and findings related to this directive thus far.47 The Commission's preliminary efforts have included posting a request-for-information announcement in the November 2000 issue of the Vermont Bar News, and submitting a similar announcement to the American Bar Association Newsletter and to the National Association of Bar Executives Journal for publication.48 In addition, the Commission has been in touch with legislative council staff in all fifty states, urging them to contact the Vermont Legislative Council

42. Id. § 1204(a)–(d).
43. Id. § 1204(e).
44. Id.
45. The Vermont Civil Union Review Commission was established by Sec. 40 of 1999 Act 91 (H.847).
47. Id.
48. Id.
concerning any relevant legislative proposals and ballot initiatives in their states.\textsuperscript{49}

III. CONFLICT OF LAWS

Because the rights granted to couples united in a civil union are so extensive, it is possible that non-Vermont residents who enter into a civil union will ask their home state to recognize such a union. In fact, many couples who went to Vermont in the first few weeks following the enactment of the civil union bill to be joined in a civil union were non-Vermont residents.\textsuperscript{50} Several of these couples were already anticipating a tough legal battle to get their licenses recognized in their home states.\textsuperscript{51}

Assume, for purposes of this Comment, that one of these couples who traveled to Vermont to enter into a civil union was from Wisconsin. They return shortly to Wisconsin and are denied one of the rights reserved exclusively for spouses in Wisconsin. They sue in state court, claiming that Wisconsin should recognize their union and grant them the same rights as a married couple. What effect should a Wisconsin court give the Vermont civil union?

In addressing the hypothetical of our Wisconsin couple who travels to Vermont, two questions need to be examined: Wisconsin choice of law theory—as exemplified by statutory and case law—and federal action under the Full Faith and Credit Clause, and its interplay with the Defense of Marriage Act. Let us begin with the first question.

A. Legislative Trends

As we have seen, the Vermont civil union bill grants same-sex couples virtually the same rights and benefits as married couples, without actually calling the relationship marriage.\textsuperscript{52} The situation of our hypothetical couple has not yet been litigated in Wisconsin. Therefore, the best guidance may be to simply analogize what Wisconsin would do if the Vermont couple was actually married, noting any possible distinctions that might affect the outcome because the civilly united couple is not technically married.

\begin{footnotes}
\item[49] Id.
\item[51] Id.
\item[52] VT. STAT. ANN. tit. 15 § 1204 (Supp. 2000).
\end{footnotes}
Under traditional choice of law doctrine, typically a marriage entered into in State X is valid elsewhere, as long as it is valid under the law of State X.\textsuperscript{53} However, public policy considerations of the state in which recognition of the marriage is being sought may result in the converse result.\textsuperscript{54} Or, in an attempt to provide its courts with guidance, a state may have adopted a marriage evasion statute.\textsuperscript{55}

Since 1995, with the advent of the Defense of Marriage Act\textsuperscript{56} as well as the developments in Hawaii\textsuperscript{57} and Alaska,\textsuperscript{58} the majority of states have revised their marriage statutes to either explicitly prohibit same-sex marriage or specifically define marriage as the union between a man and woman, or male and female.\textsuperscript{59} One could argue that because Vermont's civil unions are essentially marriages for all practical purposes, these marriage statutes, modeled after the federal DOMA, can also be understood to encompass and apply to civil unions.

With the advent of the Vermont civil union law in November 2000, Nevada and Nebraska approved ballot initiatives "prohibiting recognition of same-sex relationships."\textsuperscript{60} Nebraska's efforts go one step further to explicitly include the prohibition of civil unions, not just same-sex marriages, by amending the constitution to state that "only marriage between a man and a woman shall be valid or recognized in Nebraska and to provide further that the uniting of two persons of the same sex in a civil union, domestic partnership or other similar relationship shall not be valid or recognized in Nebraska."\textsuperscript{61} Nevada's efforts, which must be approved by voters in 2002, are similar to other measures taken by the majority of states, which define marriage as the

\textsuperscript{53} SCOLES, supra note 3, § 13.5, at 548.
\textsuperscript{54} Id. § 13.5, at 550.
\textsuperscript{55} Wisconsin is one of only five states which initially enacted a marriage evasion statute modeled after the Uniform Marriage Evasion Act, before it was replaced with the Uniform Marriage and Divorce Act. In addition to Wisconsin, Illinois, Louisiana, Massachusetts, and Vermont had adopted the earlier version of the uniform act. \textit{See} SCOLES, \textit{supra} note 3, § 13.13, at 564 & nn.1–2.
\textsuperscript{57} As the nation's attention was drawn to the events in Hawaii, in early 1996, twenty-four states introduced marriage recognition bills defining marriage as a female-male union or explicitly prohibiting same-sex marriage. \textit{See} Coolidge and Duncan, \textit{supra} note 5, at 7 & n.29.
\textsuperscript{58} \textit{See} Kevin G. Clarkson et al., \textit{The Alaska Marriage Amendment: The People's Choice on the Last Frontier}, 16 ALASKA L. REV. 213 (1999) (discussing recent developments in Alaska, specifically the marriage amendment to the state's constitution).
\textsuperscript{59} \textit{See} Same-Sex Marriage Laws, \textit{supra} note 5.
\textsuperscript{60} \textit{Report of the Vermont Civil Union Review Commission, supra} note 46.
\textsuperscript{61} Id.
union of a man and a woman.\textsuperscript{62}

Wisconsin has not followed suit and legislative efforts to revise the marriage statute have failed. Unlike the majority of states,\textsuperscript{63} Wisconsin law does not \textit{specifically} prohibit same-sex marriage nor make explicit reference to marriage as the union between man and woman, or male and female.\textsuperscript{64} However, the Wisconsin statutes state, "Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and a wife, who owe to each other mutual responsibility and support.\textsuperscript{65}" Furthermore, the Wisconsin statutes currently define marriage as "a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife."\textsuperscript{66}

Wisconsin law does not permit marriage between: 1) parties which already have a living husband or wife, or 2) parties who are "nearer of kin than 2nd cousins."\textsuperscript{67} No specific mention is made of same-sex marriages or of civil unions. The reasons why these types of marriages are prohibited likely include the state's desire to promote stability among families, prevent genetic defects, and preserve the family unit. Arguably, none of these reasons, which seek to further the stated goals of Wisconsin's Family Code, apply to civil unions.\textsuperscript{68}

Thus, one could argue that although the statute uses the terms "husband" and "wife," this does not automatically mean that any other type of marriage is prohibited. Apparently following the national trend,\textsuperscript{69} some members of the legislature were sufficiently concerned

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} \textit{See Same-Sex Marriage Laws, supra} note 5.
\item \textsuperscript{64} WIS. STAT. ANN. § 765.01 (West 1993).
\item \textsuperscript{65} Id. § 765.001.
\item \textsuperscript{66} Id. § 765.01.
\item \textsuperscript{67} Id. § 765.03.
\item \textsuperscript{68} The Wisconsin Statutes state:

\begin{quote}
It is the intent of [Wisconsin's Family Code] to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state.\textsuperscript{69}
\end{quote}

\item \textsuperscript{69} One commentator suggests that many legislatures have felt compelled, "[o]nce convinced they have no choice," to take on the task of answering the "definitional question with a definitional answer: marriage is a male-female community; marriage is not anything else." Coolidge & Duncan, \textit{supra} note 5, at 14–15.
\end{itemize}
about this possibility, that they proposed bills which would have amended Wisconsin's current definition of marriage.\textsuperscript{70} The two bills proposed during the 1999–2000 legislative session were 1999 Assembly Bill 781 and 1999 Senate Bill 401. They were proposed to amend the statute in order to explicitly state that the Wisconsin legislature intended marriage to be defined only as the union "between one man and one woman."\textsuperscript{71}

The proposed assembly and senate versions are virtually identical and would have amended section 765.01 to state that marriage "is a civil contract between one man and one woman, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife."\textsuperscript{72} Furthermore, the bills addressed the situation in which a same-sex couple goes to another state to get married and then returns to Wisconsin seeking recognition of their marriage. The proposed language would have created section 765.01(2) to read: "Regardless of whether s. 765.04 applies and regardless of whether a marriage takes place in another jurisdiction in which marriage other than between one man and one woman is defined as valid, only marriage between one man and one woman shall be recognized as valid in this state."\textsuperscript{73}

\textbf{B. Wisconsin and Same-Sex Marriage}

Unlike other states, the Wisconsin courts have also been relatively silent on the issue of same-sex marriages. The court was presented with the opportunity to address the issue of same-sex marriage in \textit{Burkett v. Zablocki}, in which two females sued the Milwaukee County Clerk.\textsuperscript{74} The women sought "an order compelling the clerk of Milwaukee County to issue them an application for a marriage license."\textsuperscript{75} The clerk moved to dismiss, and the plaintiffs failed to submit timely briefs in response to the clerk's motion.\textsuperscript{76} Faced with no other viable option, the court dismissed the case.\textsuperscript{77} The only hint of the court's inclination is found in dicta, in which the court suggests that two possible sources of

\begin{thebibliography}{99}
\bibitem{70} Wis. Assemb. B. 781 (1999); Wis. S. B. 401 (1999).
\bibitem{71} \textit{Id.}
\bibitem{72} \textit{Id.}
\bibitem{73} \textit{Id.}
\bibitem{74} Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972).
\bibitem{75} \textit{Id.}
\bibitem{76} \textit{Id.}
\bibitem{77} \textit{Id.}
\end{thebibliography}
guidance may be found in *McConnell v. Anderson* and *Baker v. Nelson* from our neighboring jurisdiction.

Dicta in two Wisconsin cases have stated that "Wisconsin does not recognize same-sex marriages." In *Phillips v. Wisconsin Personnel Commission*, a female filed an employment discrimination complaint against the Department of Health and Social Services because she was not allowed to include her lesbian companion in her insurance coverage. In a footnote, the court noted that the plaintiff based her arguments "on the fact that Wisconsin does not recognize same-sex marriages." In *In re Angel Lace M.* involved a child adoption dispute, in which a party sought to adopt the child of her former partner with whom she had previously entered into a "marriage-like ceremony." Citing to *Phillips* and to section 765.001(2) of the Wisconsin Statutes, the court stated in a footnote that Wisconsin "does not recognize same-sex marriages." However, neither case states that Wisconsin explicitly prohibits marriages between parties of the same gender.

Even if the Wisconsin judicial branch had fully addressed the issue beyond dicta in a footnote, it is not clear that a Wisconsin court would have recognized same-sex marriages by virtue of the fact that the marriage statute is silent with regard to same-sex marriages. The Minnesota court in *Baker v. Nelson* did not find this argument convincing. The facts in *Baker* are similar to the situation in *Burkett*. In *Baker*, two males sought an order compelling the Hennepin County clerk to issue them a marriage license, and in *Burkett*, two females sought an order compelling the Milwaukee County Clerk to issue a marriage application. The plaintiffs argued that the Minnesota marriage statute in effect at that time did not contain an "express

78. Id.
79. 451 F.2d 193 (8th Cir. 1971).
80. 191 N.W.2d 185 (Minn. 1971).
82. 482 N.W.2d 121 (Wis. Ct. App. 1992).
83. Id. at 123.
84. Id. at 123 n.1.
85. *In re Angel Lace M.*, 516 N.W.2d at 680.
86. Id. at 680 n.1.
88. Id. at 185–86.
89. Id. at 185; Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972).
90. The Minnesota marriage statute in question has since been revised to read:
statutory prohibition against same-sex marriages [which] evince[d] a legislative intent to authorize such marriages." The court noted that it would have been "unrealistic" to believe that such an interpretation of the marriage statute would be faithful to the intent of the original drafters of the statute; marriage was intended to mean the union of a female and a male only. Making reference to the book of Genesis and Black's Law Dictionary, the court held that the statute was constitutional and did not require the clerk to issue a marriage license.

A similar argument was advanced by the plaintiffs with nearly identical facts in Singer v. Hara. In Singer, two Washington men argued that the county auditor's refusal to grant them a marriage license impinged upon their constitutional right. The plaintiffs contended that Washington's statute only required that parties entering a marriage have attained age eighteen and be capable of entering marriage, but not that the parties be of different genders. The court rejected the plaintiff's argument, stating that other provisions of the marriage statutes refer to "the male" and "the female," which indicated that the legislature intended for marriage to exist only between two persons of different genders. Just as the Baker court had ruled in Minnesota, the

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.


91. Baker, 191 N.W.2d at 185.
92. Id. at 186.
93. Id. at 186 & n.1.
95. Id. at 1188.
96. The statute in effect at the time the plaintiffs applied for a marriage license, stated:

Marriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable: Provided, That every marriage entered into in which either party shall not have attained the age of seventeen years shall be void except where this section has been waived by a superior court judge of the county in which the female resides on a showing of necessity.

97. Singer, 522 P.2d at 1189.
98. Id.
Singer court held that neither the state statute nor the due process clause of the Fourteenth Amendment required that the court rule in favor of the result desired by the plaintiffs. In short, the court noted that it would not engage in judicial legislating; it is within the legislature's constitutional power to alter the definition of marriage.

Following the decisions of Baker and Singer, both the Washington and Minnesota lawmakers have amended their statutes to explicitly prohibit same-sex marriages. However, as we have seen, the Wisconsin legislature has chosen not to amend the state's marriage statutes. In other words, if the Wisconsin legislature truly wanted to make clear that same-sex marriage was not prohibited, one could argue that it would have passed legislation like so many of the other states, to ensure that the legislative intent of the marriage statutes is honored.


Because choice of law cases are often complex, legislatures sometimes enact laws addressing special situations, instead of relying on the courts. The Wisconsin legislature enacted a marriage evasion statute to address a situation in which a couple left the state solely for the purpose of evading Wisconsin restrictions. A strong argument can be made that because a civil union is virtually identical to marriage, a Wisconsin court could look to Wisconsin's marriage evasion statute for guidance and treat the civil union like a same-sex marriage.

Section 765.04 of the Wisconsin Family Code provides that if a person who is prohibited from marrying in Wisconsin leaves the state and goes to another state in order to evade the restrictions imposed by Wisconsin on marriage, and returns to Wisconsin seeking recognition of that marriage, Wisconsin will not recognize that marriage and will deem it void. Stated affirmatively, Wisconsin will recognize a marriage if it is valid where it is made, as long as it is not prohibited in Wisconsin.

For example, in In re Canon's Estate, a Wisconsin couple traveled

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99. Id. at 1197.
100. Id.
103. WIS. STAT. ANN. § 765.04 (West 1993).
104. Id.
105. 266 N.W. 918 (Wis. 1936).
to Illinois in order to get married. Wisconsin law at the time prohibited an epileptic from contracting marriage, and the couple sought recognition of their marriage in Wisconsin. Invoking the marriage evasion statute, the Wisconsin Supreme Court refused to validate their marriage.

Thus, if same-sex marriage was explicitly prohibited in Wisconsin, the marriage evasion statute would govern and find the couple's marriage void. Given the fact that Wisconsin has not approved a marriage recognition statute stating that same-sex marriage is specifically prohibited, the marriage evasion statute may not be helpful and may even be irrelevant if a Wisconsin court faced this issue today. Thus, if a Wisconsin court were faced with our hypothetical couple, it would likely turn to Wisconsin's choice-of-law principles.

D. Wisconsin's Choice of Law Theory as Applied by Courts

As one commentator notes, "Choice of law arbitrates values. When a court chooses one state's law over another's, it is not only determining the rule of the decision, it is deciding which state's values it should adopt." Choice of law theories and principles are numerous; they include traditional theory, the First Restatement, the Second Restatement, and Leflar's Rule, or a combination of some or all. In addition, courts often resort to escape devices to achieve their desired result. The most notable device, and the one warranting our attention, is the public policy exception, which offers courts a mechanism to justify an outcome based on the state's public policy.

For our purposes, two of these analyses are of most concern to us: the Restatement (Second) Conflict of Laws and Leflar's choice-influencing factors. The Second Restatement proposes a number of factors to guide a court in its analysis for determining which state has the most appropriate law, in the absence of a clear "statutory directive of its own state on choice of law." These factors are:

106. Id. at 918–19.
107. Id. at 919.
108. Id. at 920.
110. See generally SCOLE, supra note 3.
111. See generally Richard S. Myers, Same-Sex "Marriage" and the Public Policy Doctrine, 32 CREIGHTON L. REV. 45 (1998).
112. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
(a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied.\textsuperscript{113}

In addition, for contracts, a court can consider specific "contacts," such as: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties."\textsuperscript{114}

Leflar's methodology proposes that a court consider five elements in its conflicts of law approach: "A. Predictability of Results; B. Maintenance of Interstate and International Order; C. Simplification of the Judicial Task; D. Advancement of the Forum's Governmental Interests; and E. Application of the Better Rule of Law."\textsuperscript{115}

Wisconsin's approach to choice-of-law issues has been described as a "melting pot" and one that cannot be easily classified into a neat category.\textsuperscript{116} From 1904 to the mid-1960s, Wisconsin's highest court observed traditional conflict of laws methodology.\textsuperscript{117} In 1965, in Wilcox v. Wilcox,\textsuperscript{118} the Wisconsin Supreme Court abandoned its traditional choice of law approach and applied a new standard. This new standard non-uniformly combined bits and pieces of various choice-of-law principles, including the Restatement (Second) of Conflict of Laws, Brainerd Currie's governmental interest analysis, and Albert A. Ehrenzweig's presumptive forum law principles.\textsuperscript{119}

In its next significant case, Heath v. Zellmer\textsuperscript{120} the supreme court later adopted Robert A. Leflar's considerations, seemingly ignoring the

\textsuperscript{113} Id. § 6(2).
\textsuperscript{114} Id. § 188(2).
\textsuperscript{116} Wiegand, supra note 18, at 761.
\textsuperscript{117} Id. at 772.
\textsuperscript{118} 133 N.W.2d 408 (Wis. 1965).
\textsuperscript{119} Wiegand, supra note 18, at 773–76.
\textsuperscript{120} 151 N.W.2d 664 (Wis. 1967).
analysis it had adopted just two years earlier. Following *Wilcox* and *Zellmer*, the Wisconsin Supreme Court struggled to articulate a uniform standard to follow when faced with a conflict-of-law situation, vacillating between various approaches and unpredictably modifying the standard. Probably due to unclear guidance from the Wisconsin Supreme Court, lower courts and federal courts sitting in diversity applying Wisconsin law have also failed to develop and apply a uniform conflict of law standard.

Because Wisconsin courts have treated Wisconsin choice-of-law issues somewhat erratically, it would be difficult to chart the course a Wisconsin court might take. However, Leflar's methodology merits our consideration due to its practicality and relatively widespread use, albeit inconsistently, in Wisconsin courts. In addition, since Wisconsin courts have indicated a willingness to accept section 187 of the Restatement (Second) of Conflicts, and have made numerous references to the Restatement, this analysis also merits some attention.

1. Leflar's Better Rule

*Hunker v. Royal Indemnity Co.* probably represents Wisconsin's best application of Leflar's choice of law considerations. In *Hunker*, two Ohio employees rented a vehicle in Illinois and, while in Wisconsin, collided with another vehicle, driven by a Wisconsin resident. One of the employees, who was a passenger in the vehicle, was injured and sued the Ohio insurance company that had issued a car insurance policy to the driver co-worker. The injured employee also sued another insurer, a foreign company doing business in Wisconsin, which had issued coverage for the rental vehicle. Upon his return to Ohio, the plaintiff

122. *Id.* at 781–89.
123. *See id.* at 798–807 (discussing numerous lower court and federal court decisions applying diverse methodology).
124. *See id.* at 807–14 (urging the Wisconsin courts to take a "workable" approach towards their choice of law methodology).
125. *See id.* at 813 (urging Wisconsin courts to "return to Leflar analysis, re-learn its principles, focus on its choice-influencing considerations—all of them—and eliminate references to Restatement (Second), significant contacts, and forum preference").
126. 204 N.W.2d 897 (Wis. 1973).
127. Wiegand, *supra* note 18, at 814 (noting Professor Leflar's observation that *Hunker* is a "good example of his analysis.").
128. *Hunker*, 204 N.W.2d at 898.
129. *Id.* at 898–99.
130. *Id.* at 899.
received a worker's compensation award.\textsuperscript{131} The insurers then moved to
dismiss, urging the court to apply Ohio law, which would prevent the
plaintiff from recovering from the co-worker or his insurer.\textsuperscript{132}

Given the conflict-of-law situation, the court noted that it was
compelled to apply the choice-influencing considerations. If that
determination did not point toward an application of foreign law, then
the law of the forum, Wisconsin, would govern.\textsuperscript{133}

In applying Leflar's first criterion, "predictability of results," the
court noted it was "reasonable to assume that the parties . . . expected
that Ohio law" would govern the insurance transaction and that the
"legal consequences of an accident . . . would be determined by Ohio
law."\textsuperscript{134}

The court observed that the second consideration, "maintenance of
interstate and international order," "require[d] that a state that is
minimally concerned defer to the interests of a state that is substantially
concerned."\textsuperscript{135} The court weighed Wisconsin's interest against Ohio's
interest.\textsuperscript{136} The court found that although the accident took place in
Wisconsin, Wisconsin did not have a likely concern.\textsuperscript{137} In contrast,
Ohio's concerns were more consequential, given the fact that the two
workers were Ohio residents working for an Ohio employer.\textsuperscript{138}

In examining Leflar's third factor, "simplification of the judicial
task,"\textsuperscript{139} the court found that it did not have bearing on the situation at
hand.\textsuperscript{140} It was just as easy for the Wisconsin judge to apply Ohio law as
it would be to apply Wisconsin law.\textsuperscript{141}

Moving on to the next choice-influencing consideration, the forum's
"governmental interests,"\textsuperscript{142} the court considered Wisconsin's tort
jurisprudence, which does not limit recovery in a suit against a
coworker.\textsuperscript{143} However, the court concluded that Wisconsin had no

\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 903.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 903-04 (quoting Conklin v. Homer, 157 N.W.2d 579, 584 (1968)).
\textsuperscript{136} Id. at 903-04.
\textsuperscript{137} Id. at 904.
\textsuperscript{138} Id.
\textsuperscript{139} Leflar, supra note 115, at 1586.
\textsuperscript{140} Hunker, 204 N.W.2d at 904.
\textsuperscript{141} Id.
\textsuperscript{142} Leflar, supra note 115, at 1586.
\textsuperscript{143} Hunker, 204 N.W.2d at 904-06.
"identifiable or serious governmental interest in having an Ohio resident recover more than the expressed policy of that state permits."\textsuperscript{144}

The court gave the most consideration to the last factor, the "better law" factor.\textsuperscript{145} Commenting that Ohio's law is not a "vestige of a 'creed outworn'\textsuperscript{146} but rather represents the trend among numerous states,\textsuperscript{147} the court found Ohio law to be the "better law.\textsuperscript{148} The court held that Ohio law applied to the case.\textsuperscript{149}

In our hypothetical situation of a Wisconsin couple traveling to Vermont and shortly returning thereafter to Wisconsin, Leflar's first consideration, "predictability of results,"\textsuperscript{150} does not weigh in too strongly one way or the other. However, our couple could argue that their 'expectation'\textsuperscript{151} was that Wisconsin would recognize their union. Given the fact that this would be a case of first impression for a Wisconsin court, however, it is difficult to imagine that a Wisconsin court might be swayed by that argument because the couple would have little guidance in advance of what law governed their transaction.

Likewise, Leflar's second consideration, "maintenance of interstate and international order"\textsuperscript{152} is not wholly decisive in our case, yet seems to indicate that Wisconsin law should apply. This factor admonishes that "[n]o forum whose concern with a set of facts is negligible should claim priority for its law over the law of a state which has a clearly superior concern with the facts."\textsuperscript{153} At face value, it appears that because the couple is domiciled in Wisconsin, and wants Wisconsin to recognize the protections afforded to them in marriage, Wisconsin has a greater interest than Vermont. On the other hand, Vermont permits out-of-staters to enter civil unions, and one would imagine that Vermont also expected many couples from out of state to flock to Vermont seeking a civil union license. Furthermore, one could argue that recognition of a Vermont civil union by other states will be inevitable in the future. Is a couple who enters into a civil union forever trapped in

\begin{itemize}
\item \textsuperscript{144} Id. at 906.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Id. at 907.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id. at 908.
\item \textsuperscript{150} Leflar, supra note 115, at 1586.
\item \textsuperscript{151} The court in Hunker noted that the parties "predictions and expectations" are important considerations. 204 N.W.2d at 903.
\item \textsuperscript{152} Leflar, supra note 115, at 1586.
\item \textsuperscript{153} Id.
\end{itemize}
Vermont if they want to enjoy the benefits of their license? One could imagine a couple living in Vermont for ten years, and then deciding to move to Wisconsin. Is the ten-year period of residence so influential as to warrant recognition of this union, but not of a "suitcase civil union."

Just as in *Hunker*, Leflar's third consideration, "simplification of the judicial task," does not seem to matter much in our case. It would not be any simpler for the Wisconsin court to apply Vermont law than to apply Wisconsin law.

Leflar's last two choice-influencing considerations, "advancement of the forum's governmental interests" and "application of the better rule of law," are perhaps the most significant in our analysis. Wisconsin's interests in the hypothetical case are rather substantial because the couple is domiciled in Wisconsin. But just what are Wisconsin's interests? While Wisconsin has numerous laws protecting discrimination because of sexual orientation, the highest court in the state has "not been as receptive to recognizing the rights of gay men and lesbians." But the Wisconsin court may be showing signs of change, at least when it comes to visitation rights in cases involving non-traditional marriage-like unions. In 1995, in a case involving two women in a "close, committed relationship," the Wisconsin Supreme Court recognized that "public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation... on the basis of a co-parenting agreement between a biological parent and another when visitation is in the child's best interest."

The last consideration, the "better rule law," offers perhaps the best argument for advocates of recognition of a same-sex union entered into in Vermont. As one commentator notes, in the case of same-sex marriage, "[A]dvocates could argue that state laws which do not

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154. *Id.*
155. *Id.* at 1587.
156. *Id.*

157. One commentator notes that a state may have both direct and indirect interests in the marital status of its residents. Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 6-8 (2000). An indirect interest might be aiding citizens comply with obligations or obtain appropriate redress; a direct interest involves state's interest in "having people act one way rather than another." *Id.* at 7.


159. *In re* H.S.H.-K., 533 N.W.2d 419, 434 (1995). The 1995 decision effectively overruled an earlier decision in which the Wisconsin court had refused to grant a lesbian co-parent custodial or visitation rights in a case involving her former partner's biological child. *See* Cox, *supra* note 14, at 1181 n.275 (citing *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1991)).

recognize same-sex marriage are 'archaic and unfair.' Same-sex couples are the only adults, other than those who violate some additional statutory proscription, who are not freely permitted to marry the partner of their choice.\textsuperscript{161} Likewise, an attorney representing our hypothetical Wisconsin couple, could argue that Vermont's civil union law is a step in the right direction toward recognition of committed, same-sex relationships.

Furthermore, as one commentator points out, "[t]he Wisconsin legislature has not simply evinced a passive attitude toward sexual minorities living in Wisconsin. It has taken significant steps to prevent harmful differences in treatment."\textsuperscript{162} For example, section 939.645(1)(b), Wisconsin's hate crime law, increases penalties for crimes committed against a person based "in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ."\textsuperscript{163}

In addition, efforts to define marriage only as the union between one man and one woman have failed in the legislature, which may be evidence that legislators are unwilling to block support for same-sex unions, or at the very least open to the possibility of recognizing such unions in the future.\textsuperscript{164} However, section 944.01 of the Wisconsin statutes also makes it clear that "[a]lthough the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage."\textsuperscript{165} Thus, in order to succeed in this argument, our couple would need to convince the court that a civil union is practically and realistically synonymous with marriage.

Another argument for our couple's attorney would be to draw parallels between anti-miscegenation statutes and laws prohibiting same-sex marriages.\textsuperscript{166} Clearly, the argument goes, just as bans on interracial marriage "promoted feelings of inferiority and second-class citizenship,"\textsuperscript{167} failure to recognize same-sex marriages is outdated and discriminatory. Slightly modified for our purposes, an attorney could argue that Wisconsin's failure to recognize the civil union would be

\begin{itemize}
\item \textsuperscript{161} Cox, supra note 14, at 1109.
\item \textsuperscript{162} Id. at 1080 n.273.
\item \textsuperscript{163} WIS. STAT. ANN. § 939.645 (b)(1) (West 1996).
\item \textsuperscript{164} Wis. Assemb. B. 781 (1999); Wis. S. B. 401 (1999).
\item \textsuperscript{165} WIS. STAT. ANN. § 944.01 (West 1996).
\item \textsuperscript{166} Cox, supra note 14, at 1110–11.
\item \textsuperscript{167} Id. at 1116.
\end{itemize}
irrational and archaic.

2. Restatement (Second) of Conflict of Law

Since Wisconsin courts have indicated a willingness to accept section 187 of the Second Restatement and have made numerous references to the Second Restatement, a Wisconsin court may look to these rules for guidance.

Not surprisingly, an analysis under the Second Restatement does not yield conclusory, bright-line results. Given the fact that a civil union is a new alternative, the Second Restatement does not offer direct guidance for a court. The Second Restatement does not specifically treat civil unions for the simple reason that they were not in existence prior to the promulgation of the rules. Despite the Second Restatement's limited guidance, two possibilities exist to analyze the civil union hypothetical: first, by analogizing to marriage, and second, by treating it as a contract. At the very least, the analysis reveals the extent of the legal jumble courts will face; at the very most, it provides loose guidance as to a court's possible course.

Clearly, a civil union is not a marriage, yet it confers upon a couple virtually the same legal benefits and rights as a married couple. Section 283(1) of the Second Restatement urges courts to consider the "local law of the state which ... has the most significant relationship to the spouses and the marriage under the principles stated in § 6." Section six delineates a list of factors the court should consider:

(a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.

In addition, section 283(2) provides that a "marriage which satisfies

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169. See Wiegand, supra note 18, at 1814.
171. RESTATEMENT § 283(1).
172. Id. § 6(2).
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.\textsuperscript{173} The approach suggested by the Second Restatement clearly favors recognition of a marriage entered into outside a state's borders.\textsuperscript{174}

In the case of our hypothetical couple, the analysis seems straightforward, even without a detailed evaluation of the section six factors. The couple is domiciled in Wisconsin, has strong ties to Wisconsin, and the couple's only contact with Vermont occurred for the sole purpose of entering the union. Wisconsin is the state with the "most significant relationship."\textsuperscript{175} Thus, in substituting the word "marriage" with "civil union," the essential question becomes whether the recognition of the couple's union would violate Wisconsin's public policy and whether Wisconsin has a "sufficiently strong policy... to warrant invalidation of the [union]."\textsuperscript{176}

Just because Wisconsin does not have a statute recognizing civil unions does not mean that a Wisconsin court automatically would refuse to recognize a Vermont civil union based on a public policy exception.\textsuperscript{177} As a New York court noted in deciding which law to apply in a tort action, "[i]f aid is to be withheld... it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare."\textsuperscript{178} Thus, an advocate for our hypothetical couple would argue that the absence of a civil union statute is not decisive in defining Wisconsin's view of same-sex marriages.

Wisconsin's various legislation protecting gay and lesbian individuals would seem to indicate that Wisconsin's public policy favors protection

\textsuperscript{173} Id. § 283(2).
\textsuperscript{174} The introductory comment of the Restatement (Second) of Conflict of Laws in chapter 11 states: "A person's status remains the same during his travels from state to state. So persons who have been validly married will be regarded as husband and wife as they move from state to state."
\textsuperscript{175} Id. § 283(1).
\textsuperscript{176} Id. § 283 cmt k.
\textsuperscript{177} See Loucks v. Standard Oil Co., 120 N.E.2d 198, 201(N.Y. 1918) (describing the public policy exception and stating in reference to a foreign statute: "Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right.... If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him.").
\textsuperscript{178} Id. at 201.
for such individuals. In exploring whether states would recognize a Hawaii same-sex marriage, Barbara Cox noted that a couple may actually fare better in Wisconsin that in other states because of Wisconsin's favorable laws toward gays and lesbians. Current Wisconsin statutes specifically provide anti-discriminatory protections for gays and lesbians in various areas, such as in state employment. An alternative option under the Second Restatement would be to treat the civil union like a contract between two parties. The shortcomings of this alternative, however, are obvious with just a cursory review of the factors the court is urged to consider. Section 188, which governs contracts, proposes that in evaluating the contacts with a particular state, a court should consider: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." This analysis should be done in light of the factors listed in section six of the Restatement. This section also contains a presumptive rule which instructs the court that if the place of negotiation of the contract and the place of performance of the contract coincide in the same state, the court should apply that state's law. Clearly this list of contacts was not written with civil unions in mind, and is not intended to apply to marriages since section 283 is reserved exclusively for analysis of marriage contracts. While the parties entered into the contract in Vermont, they are domiciled in Wisconsin. Determining where a civil union was negotiated or determining the "location of the subject matter" of a civil union seems absurd because the factors were clearly not written with this type of contract in mind. One would be hard-pressed to imagine a Wisconsin court analyzing our hypothetical situation under section 188 by taking each factor one by one and evaluating them in light of section six.

However, the factors delineated in section six could help the court or

179. Cox, supra note 14, at 1080 & n.273.
180. Id. at 1080. Wisconsin was a pioneer in promulgating laws explicitly protecting gays and lesbians against discriminatory practices. Id.
181. Id. at 1080 & n.273 (citing numerous Wisconsin statutes including section 230.01(2) which addresses state employment).
182. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).
183. Id.
184. Id. § 188(3).
185. Id. § 188(2).
the couple reach or justify a desired outcome. The couple could argue that the first factor, "the needs of the interstate and international systems," would suggest that recognition of a Vermont civil union facilitates mobility among states. Otherwise, a couple entering into a Vermont civil union would be forced to always stay in Vermont if they wanted the protection and recognition of the rights afforded by Vermont law. One could imagine the situation of a couple who lived in Vermont for years who upon being forced to move to another state, has to see all their benefits and rights disappear into thin air. The counterargument is simple, yet strong: the Vermont legislature has no right to meddle and impose its view on other states.

The second and third factors reflect an effort to urge the court to consider each state's public policies. A comment to the second factor, "the relevant policies of the forum," urges the court to recognize that "[e]very rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state . . . ." The third factor, "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," reminds the court to evaluate the competing interests of each state.

The analysis under these factors is similar to the public policy exception discussed earlier under the section 283 rules addressing marriage. Wisconsin does not specifically prohibit same-sex unions nor does it explicitly permit it. An examination of Wisconsin's statutory law suggests, however, that Wisconsin seeks to protect and advance the interests of its gay and lesbian population. As evidenced by the passage of their civil union bill, Vermont strongly favors the advancement of the interest of gays and lesbians to the extent that it created the civil union relationship, which elevates a committed relationship between two same sex individuals to nearly the same level as marriage.

The Wisconsin couple would be hard-pressed to argue that a

186. Id. § 6(2)(a).
187. Id. § 6(2)(b).
188. Id. § 6 cmt. e.
189. Id. § 6(2)(c).
190. See supra notes 171–76 and accompanying text.
191. Id.
recognition of their civil union would advance "protection of [their] justified expectations," the fourth factor. Given that this is a case of first impression and given the controversial nature of the Vermont law, the couple may find it difficult to convince the court that they expected only Vermont law to apply. On the other hand, the couple could suggest that just like most individuals expect a valid marriage entered into in Vermont to be recognized in Wisconsin, they too expected that their valid Vermont civil union would be honored in Wisconsin. Again, the argument here is weak.

The fourth factor concerning the "basic policies underlying the particular field of law," would probably not receive much weight. One would imagine that parties typically enter marriages or civil unions freely and are not under duress.

The comments explaining the fifth factor, "certainty, predictability and uniformity of result" suggest that these concerns are most relevant when there is evidence that the parties "are likely to give advance thought to the legal consequences of their transactions." The Wisconsin couple most likely entered the Vermont civil union, in addition to emotional reasons, to gain the legal protections conferred to couples who enter such unions. However, given the still strong moral and political resistance to same-sex unions, it would be difficult for the couple to argue that they predicted or expected the court to fully embrace their union and extend them all benefits conferred under Vermont law.

The analysis for the final factor for consideration, "ease in the determination and application of the law to be applied," closely resembles Leflar's "simplification of the judicial task" consideration. A Wisconsin court could just as easily apply either Vermont or Wisconsin law, although arguably Vermont law is fairly novel and unchartered, which could present a problem for a Wisconsin court. Overall, under the Second Restatement it would appear that a Wisconsin court would be inclined to not recognize the civil union.

193. RESTATEMENT § 6(2)(d).
194. Id. § 6(2)(e).
195. Id. § 6(2)(f).
196. Id. § 6(2)(f) cmt. i.
197. Id. § 6(2)(g).
IV. CONSTITUTIONAL AND FEDERAL RESTRICTIONS

Once the Wisconsin court has reached a conclusion as to whether Wisconsin would honor a Vermont civil union, the court must then subject its choice to the constitutional test prescribed by the Supreme Court in *Allstate Insurance Co. v. Hague* and followed in *Phillips Petroleum Co. v. Shutts*. In addition, the Wisconsin Court will likely be concerned with the guidelines imposed by the Federal Defense of Marriage Act.

A. Federal Defense of Marriage Act

Since its enactment in 1996, the Federal DOMA has spurred much controversy. The federal measure has two primary purposes: (1) to define and protect the institution of marriage and (2) to guide and shield the rights of the states in promulgating their own laws concerning same-sex marriage. DOMA defines marriage as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Furthermore, the act provides:

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

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199. 449 U.S. 302 (1981) (discussing convergence of due process and full faith and credit analyses). Initially, the analyses under the Full Faith and Credit clause and the Due Process requirements of the U.S. Constitution were discussed in two separate strands of cases; however, the Supreme Court in *Allstate* eliminated the dichotomy and converged the analysis into one single question. See *id.* Since then, the Supreme Court has applied the *Allstate* analysis. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). This is the test I will use in my discussion of the Full Faith and Credit Clause.

200. 472 U.S. 797 (1985) (noting that a court should conduct an examination to determine whether the application of the laws of a state is constitutionally justified).


Making reference to the "threat[s]" and "legal assault" waged against traditional heterosexual marriage, the legislative history reveals Congress's sense of urgency in defining marriage as a heterosexual union. Furthermore, Congress was particularly concerned with the Full Faith and Credit Clause of the Constitution and whether states would be required to recognize a same-sex marriage performed in another state. The underlying conclusion of the House Report analyzing DOMA is that a state may refuse to recognize a same-sex marriage performed outside its boundaries, if the state has a strong public policy argument against such unions.

Numerous commentators have attacked DOMA, arguing it is unconstitutional because Congress cannot abridge the rights granted under the Full Faith and Credit Clause of the Constitution to the states. On the other hand, some commentators have noted that much of the criticism of DOMA has been unfounded and mistaken, since DOMA does nothing more than simply restate the power granted to states by the Full Faith and Credit Clause of the U.S. Constitution. Thus, DOMA may be "essentially irrelevant" to our inquiry.

Defending or attacking the constitutionality of DOMA is beyond the scope of this Comment. To fully analyze the hypothetical at hand, let us assume that DOMA is constitutional, but indicative of Congress' concerns about maintaining a more traditional definition of marriage.

B. Full Faith and Credit

More significant than DOMA, is the directive given to the states by the Full Faith and Credit Clause of the U.S. Constitution. While the

207. The Full Faith and Credit Clause states "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.
209. See id.
212. The intent of the Full Faith and Credit Clause appears to have been to provide a sense of unity among the numerous states of the nation. ROBERT H. JACKSON, FULL FAITH AND CREDIT: THE LAWYER'S CLAUSE OF THE CONSTITUTION 29 (1945) (stating that "[b]y the full faith and credit clause [our forefathers] sought to federalize the separate and
language of the clause seems to clearly mandate that Wisconsin fully recognize Vermont civil unions, the case law interpreting the clause has diluted the directive of the clause to the point that the clause today offers more of a guideline than a strong mandate.\textsuperscript{213}

Under the test articulated by the Supreme Court in \textit{Allstate Insurance Co. v. Hague}\textsuperscript{214} and followed in \textit{Phillips Petroleum Co. v. Shutts},\textsuperscript{215} the limits imposed by the Full Faith and Credit Clause are not so strict. \textit{Shutts} confirmed the \textit{Allstate} court's observation that the Full Faith and Credit Clause "provide[s] modest restrictions on the application of forum law."\textsuperscript{216} The \textit{Shutts} court stated that a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."\textsuperscript{217}

Because Wisconsin courts have recognized and applied the constitutional guidelines set by \textit{Allstate} and \textit{Shutts}, a Wisconsin court will likely subject the choice of law inquiry to these guidelines.\textsuperscript{218} As the forum, a Wisconsin court will have little difficulty articulating Wisconsin's interests in the litigation under discussion. The parties are domiciled in Wisconsin and intend to continue to live in Wisconsin. While the civil union took place in Vermont, Vermont had minimum contact with the Wisconsin couple, who only traveled to Vermont for the sole purpose of entering into the marriage-like union. One would be hard-pressed to convince a court that it would be unconstitutional for

\textsuperscript{213} As it stands today, the Full Faith and Credit Clause has lost much of its bite. The strand of cases analyzing the Full Faith and Credit Clause prior to \textit{Allstate Insurance Co. v. Hague}, evidence this shift. In \textit{Bradford Electric Light Co. v. Clapper}, the Supreme Court began moving away from an interpretation of the Full Faith and Credit Clause as a strong mandate to a balancing test analysis. \textit{See} 286 U.S. 145 (1932). In \textit{Alaska Packers Assoc. v. Industrial Accident Comm'n}, the court noted that the Full Faith and Credit Clause requires a balancing test; that is, a forum can apply its own law unless another state has a superior interest. 294 U.S. 532, 547 (1935). Furthermore, the Court stated, a presumption existed that the forum state could apply its own law unless the forum's interest were overridden by some other states. \textit{Id.} Four years later, in \textit{Pacific Employers Ins. Co. v. Industrial Acc. Comm'n}, the court considerably weakened the \textit{Alaska Packers} test, holding that an interested state can always apply its law notwithstanding the interest of any other state. 306 U.S. 493 (1939).

\textsuperscript{214} 449 U.S. 302 (1981).
\textsuperscript{215} 472 U.S. 797 (1985).
\textsuperscript{216} \textit{Id.} at 818.
\textsuperscript{217} \textit{Id.} (quoting \textit{Allstate Ins. Co. v. Hague}, 449 U.S. 302, 313 (1981)).
Wisconsin to refuse to recognize the union. The couple would need to convince the court that it would come as an "unfair surprise" and that it would "fundamentally unfair" if the Wisconsin court refused to recognize their same-sex union. The couple's best chance would be to invoke the various public policy arguments previously cited and argue that recognizing the Vermont civil union is not only consistent with Wisconsin's public policy, but also advances Wisconsin's interest in promoting familial stability.

V. CONCLUSION

The hypothetical couple presented here may not be too far from becoming a reality in our courts. As of May 2001, over 2043 couples have flocked to Vermont to join in a civil union. Other states may follow in Vermont's example. Although several states have been debating the same-sex marriage controversy, Connecticut and Rhode Island appeared to be the most promising candidates in early 2001. In addition, the Vermont measure may lead to greater acceptance of same-sex unions. Because of the Vermont developments, "the phrase same-sex marriage no longer sounds like an oxymoron."

Given the fact that Wisconsin does not have a statute specifically prohibiting same-sex marriages and the fact that Wisconsin has relatively progressive laws prohibiting discrimination against gays and lesbians, our hypothetical couple may fare better in a Wisconsin court than elsewhere. However, Wisconsin's conflict of law methodology is not cogent, and the court may finesse its decision by picking out factors from various methodologies that might lead to the desired result.

As evidenced throughout this Comment, choice of law issues are murky and courts must often grapple with complex and various


220. Id. at 837 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 326 (Stevens, J., concurring)).

221. See Miller, supra note 8 (observing that as of May 2001 the Vermont Department of Vital Statistics had counted 2043 couples who had entered into civil unions in Vermont).

222. As of February 2001, Rhode Island and Connecticut legislatures were planning to hold public hearings to consider civil union or same-sex marriage legislation. E.J. Graff, Civil Unions are Homemaking Here for a Reason, BOSTON GLOBE, Feb. 11, 2001, at E3. But following public hearings in March 2001, Connecticut gay rights activists appear to have "reined in the effort." Lisa Prevost, Conn. Backs Away from Gay Unions, BOSTON GLOBE, Apr. 5, 2001, at B5. One Connecticut lawmaker, State Representative Michael Lawlor, believes that same-sex unions may become legal reality in Connecticut within a year or two. Id.

223. Graff, supra note 222, at E3.
theories.\textsuperscript{224} Letting the courts decide whether couples such as our hypothetical couple will be able to enjoy the rights and benefits of a civil union outside the borders of Vermont may not be the best solution. The clearest course may be for lawmakers in the elected governmental bodies to enact legislation either similar to Vermont's civil union bill, which would likely eliminate the conflict of law problem, or pass legislation explicitly prohibiting all types of same-sex unions so that couples are not subject to unfair surprise. Given Wisconsin's current statutory law favoring gays and lesbians, and given failed efforts in the Wisconsin legislature in approving a marriage recognition statute,\textsuperscript{225} the latter course is unlikely in Wisconsin.

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\textsuperscript{224} In what has become a famous quote, William Prosser once noted: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." William Prosser, \textit{Interstate Publication}, 51 MICh. L. REV. 959, 971 (1953).

\textsuperscript{225} Wis. Assemb. B. 781 (1999); Wis. S. Bill 401 (1999).

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