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# AVAILABILITY OF SPOUSAL PRIVILEGES FOR SAME-SEX COUPLES

LISA YURWIT BERGSTROM\*

AND

W. JAMES DENVIL\*\*

## I. INTRODUCTION

Just as a house typically comes with a roof that keeps it safe from the elements, a marriage typically comes with evidentiary privileges that keep it safe from the storms of litigation. Sometimes, however, a couple gets married, expecting the protection of those privileges, but the marriage is less, legally, than the couple expected it to be—like a house without a roof.

Same-sex couples, along with their allies, have fought to gain legal recognition for their unions, and more and more jurisdictions are recognizing that same-sex couples have the right to marry. Denying same-sex spouses the marital privileges, which “promote family harmony and . . . encourage spouses ‘to share their most closely guarded secrets and thoughts, thus adding an additional measure of intimacy and mutual support to the marriage,’”<sup>1</sup> undermines the matrimonial bonds that same-sex couples fought so hard to achieve. The law of evidence has recognized two distinct marital privileges, which are designed to protect marital unions. The first of these privileges, the “anti-marital facts privilege,” which is available only in criminal cases in some jurisdictions, protects one spouse from being

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1. *Ulibarri v. Sup. Ct. in & for Cnty. of Coconino*, 909 P.2d 449, 454 (Ariz. Ct. App. 1995) (quoting MORRIS K. UDALL ET AL., *LAW OF EVIDENCE* § 73 (3d ed. 1991)).

compelled to testify against the other during the marriage.<sup>2</sup> The second, the “confidential communications privilege,” protects spouses from having their confidential marital communications disclosed in legal proceedings.<sup>3</sup> All jurisdictions in the United States recognize one or both of these privileges.<sup>4</sup>

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2. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 501.02[8] (9th ed. 2006).

3. *Id.*

4. *See* Trammel v. United States, 445 U.S. 40, 48–53 (1980); ALA. R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); ALA. CODE § 12-21-227 (2009) (anti-marital facts privilege in criminal proceedings); ALASKA R. EVID. 505 (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); ARIZ. REV. STAT. ANN. §§ 12-2231 to 2232 (2010) (confidential communications and anti-marital fact privileges in civil proceedings); ARIZ. REV. STAT. ANN. § 13-4062 (2010) (confidential communications and anti-marital fact privileges in criminal proceedings); ARK. R. EVID. 504 (confidential communications privilege limited to criminal proceedings); CAL. EVID. CODE §§ 970–73, 980–87 (West 2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); COLO. REV. STAT. § 13-90-107(1)(a) (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); CONN. GEN. STAT. ANN. §§ 54-84a (West 2011) (anti-marital facts privilege limited to criminal proceedings); *State v. Christian*, 841 A.2d 1158, 1173 (Conn. 2004) (confidential communications privilege in both civil and criminal proceedings); DEL. R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); D.C. CODE § 14-306 (2011) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings for spouses and domestic partners); FLA. STAT. § 90.504 (2010) (confidential communications privilege in both civil and criminal proceedings); GA. CODE ANN. §§ 24-9-21, -23 (2010) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege limited to criminal proceedings); HAW. R. EVID. 505 (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege limited to criminal proceedings); IDAHO R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); 735 ILL. COMP. STAT. 5/8-801 (2010) (confidential communications privilege in civil cases); 725 ILL. COMP. STAT. 5/115-16 (2010) (confidential communications privilege in criminal cases); IND. CODE § 34-46-3-1(4) (2010) (confidential communications privilege in both civil and criminal proceedings); IOWA CODE § 622.9 (2009) (confidential communications privilege in both civil and criminal proceedings); KAN. STAT. ANN. § 60-423(b) (2011) (confidential communications privilege in criminal proceedings); KAN. STAT. ANN. § 60-428 (2011) (confidential communications privilege in both civil and criminal proceedings, but only applicable during the life of the marriage); KY. R. EVID. 504 (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); LA. CODE EVID. ANN. arts. 504–05 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal, commitment, or interdiction proceedings); ME. R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); MD. CODE ANN., CTS. & JUD. PROC. §§ 9-105–06 (West 2010) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); MASS. GEN. LAWS ch. 233 § 20 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); MICH. COMP. LAWS § 600.2162 (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); MINN. STAT. § 595.02 (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); MISS. R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); MISS. CODE ANN. § 13-1-5 (2010) (anti-marital facts privilege in both civil and

One must be married, of course, to avail oneself of these evidentiary privileges. Therefore, the privileges were not available to same-sex couples in the United States until 2004, when Massachusetts first legalized same-sex marriage.<sup>5</sup> Now, six states and the District of Columbia recognize and grant same-sex marriages.<sup>6</sup> Additionally, the

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criminal proceedings); MO. REV. STAT. § 546.260 (2009) (confidential communications and anti-marital facts privilege in criminal proceedings); MONT. CODE ANN. § 26-1-802 (2009) (confidential communications privilege in both civil and criminal proceedings); NEB. REV. STAT. § 27-505 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege limited to criminal proceedings); NEV. REV. STAT. § 49,295 (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); N.H.R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings); N.J. STAT. ANN. §§ 2A:84A-17, 22 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege limited to criminal proceedings); N.M. STAT. ANN. § 38-6-6 (2009) (confidential communications privilege in both civil and criminal proceedings); N.Y. C.P.L.R. 4502 (CONSOL. 2007) (confidential communications privilege in both civil and criminal proceedings; limited anti-marital facts privilege in issues founded on adultery); N.C. GEN. STAT. §§ 8-56–57 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); N.D. R. EVID. 504 (confidential communications privilege limited to criminal proceedings); OHIO REV. CODE ANN. §§ 2317.02, 2945.42 (West 2010) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); OKLA. STAT. tit. 12, § 2504 (2010) (confidential communications privilege limited to criminal proceedings); OR. REV. STAT. § 40.255 (2009) (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege limited to criminal proceedings); 42 PA. CONS. STAT. §§ 5913, 5915, 5923–24 (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); R.I. GEN. LAWS § 9-17-13 (2010) (confidential communications privilege and limited anti-marital facts privileges in civil proceedings); S.C. CODE ANN. § 19-11-30 (2010) (confidential communications privilege in both civil and criminal proceedings); S.D. CODIFIED LAWS §§ 19-13-12–19-13-15 (2010) (confidential communications privilege limited to criminal proceedings); TENN. CODE ANN. §24-1-201 (2010) (confidential communications privilege in both civil and criminal proceedings); TEX. R. EVID. 504 (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); UTAH R. EVID. 502 (confidential communications privilege in both civil and criminal proceedings; anti-marital facts privilege in criminal proceedings); VT. STAT. ANN. tit. 12, § 1605 (2009) (confidential communications privilege in both civil and criminal proceedings); VA. CODE ANN. §§ 8.01-398, 19.2-271.2 (2010) (confidential communications privilege in both civil and criminal cases); WASH. REV. CODE ANN. § 5.60.060 (2011) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); W. VA. CODE § 57-3-4 (2010) (confidential communications and anti-marital facts privileges in both civil and criminal proceedings); WIS. STAT. ANN. § 905.05 (West 2011) (confidential communications privilege in both civil and criminal proceedings); *Curran v. Pasek*, 886 P.2d 272, 275 (Wyo. 1994) (interpreting WYO. STAT. ANN. § 1-12-104 (2010) to grant both confidential communications and anti-marital facts privileges in both civil and criminal proceedings).

5. See NAT'L CONFERENCE OF STATE LEGISLATURES, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NCSL, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated July 14, 2011) ("Massachusetts began issuing marriage licenses to same-sex couples in May 2004.").

6. See *infra* Part II.B. California also granted same-sex marriages for a short period, such that although same-sex couples cannot marry in California today, "approximately 18,000

Maryland Attorney General recently issued an opinion stating that Maryland should recognize same-sex marriages validly entered into outside the state.<sup>7</sup> Also, ten states that do not recognize same-sex marriages have enacted statutory schemes that provide for unions that are decidedly not marriages but are meant to be imbued with at least some of the burdens and benefits of marriage, including one or both marital privileges.<sup>8</sup> Despite of the growing number of jurisdictions that legally recognize same-sex unions, the Federal Defense of Marriage Act—which remains in effect even though the Obama administration recently announced that it will not defend the Act<sup>9</sup>—limits marriages to man–woman unions and specifies that states need not recognize same-sex unions or their incidental rights.<sup>10</sup> In fact, more than thirty states either give no legal recognition to same-sex relationships or grant limited rights to same-sex couples that do not include the marital evidentiary privileges.<sup>11</sup> This discord between varying jurisdictions may leave attorneys, judges, and married couples without a clear understanding of the rights and privileges possessed by same-sex married couples who are involved in court proceedings. Availability of

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same-gender couples were legally wed in California prior to the November 2008 passage of California Proposition 8 and most of them may well remain validly married for all purposes under California law.” *In re Balas*, 449 B.R. 567, n.2 (Bankr. C.D. Cal. 2011).

7. Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Att’y Gen. Md. 3, 3–4 (2010).

8. CAL. FAM. CODE § 297.5 (West 2010) (granting domestic partners the same rights as spouses); DEL. CODE ANN. tit. 13 §§ 201–217 (2011) (establishing civil unions and granting members of civil unions the same rights as same-sex couples); S. 232, 26th Legis., Reg. Sess. (Haw. 2011) (allowing for civil unions and giving participants the same rights as married couples); Illinois Religious Freedom Protection and Civil Union Act, 2010 Ill. Legis. Serv. 96-1513 (West) (allowing civil unions between same-sex partners; granting participants the same protections given to married couples; and recognizing same-sex marriages from other jurisdictions as civil unions); NEV. REV. STAT. §§ 122A.010–510 (2009); N.J. STAT. ANN. §§ 37:1-28–34 (West 2009) (providing for and recognizing civil unions; granting the marital privilege to members of civil unions); OR. REV. STAT. §§ 106.310, 340 (2009) (providing for domestic partnerships and giving domestic partners the same rights as married couples); An Act Relating to Domestic Relations—Civil Unions, 2011 R.I. Pub. Laws 198; WASH. REV. CODE §§ 26.60.010–901 (2009) (providing for domestic partnerships and giving partners the same rights as married couples); WIS. STAT. § 770.05 (providing for domestic partnerships); WIS. STAT. §905.05 (granting the confidential communications privilege to domestic partners).

9. Press Release, U.S. Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

10. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). *But see In re Balas*, 449 B.R. at 574 n.5 (concluding that the Federal DOMA is unconstitutional and citing in support *In re Levenson (Levenson I)*, 560 F.3d 1145, 1149–51 (9th Cir. 2009)); *In re Levenson (Levenson II)*, 587 F.3d 925, 931–33 (9th Cir. 2009); *Dragovich v. United States Dep’t of Treasury*, 764 F. Supp. 2d 1178, 1190–91 (N.D. Ca. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010)).

11. See *infra* Table 1.

spousal privileges affects trial strategy<sup>12</sup> and may affect the outcome of a case.

This article will identify both the forums and circumstances in which same-sex spouses may assert the evidentiary spousal privileges and the impediments to making such assertions.<sup>13</sup> To do so, it will examine evidentiary privileges generally, the two spousal privileges, and their purpose.<sup>14</sup> It will then provide background information regarding same-sex marriages, civil unions, and domestic partnerships.<sup>15</sup> Next, it will look at federal and state Defense of Marriage Acts and explore their impact on the availability of evidentiary privileges to those joined in same-sex legal unions.<sup>16</sup> Applying a conflict of laws analysis and categorizing same-sex marriages to determine their validity in a forum state, this article will determine the availability of state marital privileges to couples in same-sex marriages.<sup>17</sup> It will also determine the availability of the marital evidentiary privileges in federal court and the availability of those privileges to same-sex couples joined in other legal unions.<sup>18</sup> Finally, this article will provide equal protection arguments to challenge the denial of evidentiary privileges to same-sex couples joined in legal unions.<sup>19</sup>

## II. BACKGROUND

Parties and witnesses may assert evidentiary privileges under certain circumstances, and two of these privileges are designed to protect marriages. Because some jurisdictions recognize same-sex marriages or similar unions, and others prohibit such unions, the scope and availability of these marital privileges to same-sex couples is not always clear.

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12. *See* *People v. Rockey*, 601 N.W. 2d 887, 890 (1999) (“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.”).

13. *See infra* Parts III–V.

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. *See infra* Part II.C.

17. *See infra* Part III.

18. *See infra* Parts IV and V.

19. *See infra* Part VI.

*A. Evidentiary Privileges, Including the Spousal Evidentiary Privileges*

Evidentiary privileges are used at trial to exclude certain testimonial evidence. Thus, evidentiary privileges may suppress the truth, even though trials are meant to be searches for the truth.<sup>20</sup> “Testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’”<sup>21</sup> Courts therefore construe evidentiary privileges narrowly to ensure that the privileges do not exclude more evidence than necessary.<sup>22</sup> Indeed, the courts disfavor evidentiary privileges.<sup>23</sup> For a privilege to stand, it must “promote[] sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice.”<sup>24</sup> Two distinct spousal evidentiary privileges are essential to promote the important interest of preserving marriage. The anti-marital facts privilege provides that courts cannot compel one spouse to testify against the other spouse during their marriage.<sup>25</sup> The confidential communications privilege protects confidential communications that occurred during a marriage whether or not couple still is married.<sup>26</sup> Although the availability and scope of the privileges vary by jurisdiction, the policy reasons behind these evidentiary privileges are largely the same across the United States.<sup>27</sup>

Common law provides for both federal spousal privileges<sup>28</sup> and shows that the two privileges share the similar purpose of protecting

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20. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (explaining that ascertaining the truth is normally the predominant goal of a trial); *United States v. Lea*, 249 F.3d 632, 641 (7th Cir. 2001) (“[T]he cost of that [evidentiary] privilege is a reduction in truthful disclosure.”).

21. *Trammel*, 445 U.S. at 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

22. *Pierce Cnty. v. Guillen*, 537 U.S. 129, 144–45 (2003).

23. *Herbert v. Lando*, 441 U.S. 153, 175 (1979) (footnote omitted).

24. *Trammel*, 445 U.S. at 51.

25. SALTZBURG, *supra* note 2; *see infra* notes 30–37 and accompanying text.

26. SALTZBURG, *supra* note 2; *see infra* notes 37–43 and accompanying text.

27. *See infra* notes 36–37, 41–47 and accompanying text.

28. FED. R. EVID. 501 provides, in pertinent part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

marriages.<sup>29</sup> Under the federal “anti-marital facts privilege,”<sup>30</sup> when one spouse is the defendant in a criminal matter in federal court, the other spouse cannot be compelled to testify against the defendant spouse.<sup>31</sup> This federal privilege applies only when the defendant and potentially adverse witness are married at the time of trial.<sup>32</sup> Under federal law, the testifying spouse holds the privilege and can choose to waive it; the defendant spouse does not hold the privilege and therefore cannot prevent the other spouse from testifying.<sup>33</sup>

The anti-marital facts privilege originated as an extension of a man’s control over his chattel, including his wife.<sup>34</sup> It was not so much the wife’s privilege not to testify, but rather the husband’s privilege not to have his property used against him.<sup>35</sup> As this conceptualization of marriage changed, so did the privilege, such that it now preserves the “important public interest in marital harmony,” not proprietary interests.<sup>36</sup> It also “protect[s] a witness from the difficult choice of incriminating a spouse or going to jail for contempt.”<sup>37</sup>

Under the federal confidential communications privilege, spouses who communicated to their marital partners in confidence can prevent testimony about the communication in two ways: by refusing

The legislature rejected a codification of specific evidentiary privileges and adopted the more general Rule 501 to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,” and to leave the door open to change.” *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).

29. See *infra* notes 36–37, 41–43 and accompanying text.

30. See *United States v. White*, 974 F.2d 1135, 1137 (9th Cir. 1992) (referring to this privilege as the “anti-marital facts privilege”).

31. *United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978). Exceptions exist, for instance in a domestic violence case where the defendant’s spouse is a victim witness, *Trammel*, 445 U.S. at 46 n.7, but these exceptions fall outside the scope of this article.

32. SALTZBURG, *supra* note 2.

33. *Id.* (discussing *Trammel v. United States*, 445 U.S. 40 (1980)). For an in-depth examination of the impact of Defense of Marriage Acts on a same-sex spouse trying to assert this privilege, see Maria A. La Vita, Note, *When the Honeymoon is Over: How a Federal Court’s Denial of the Spousal Privilege to a Legally Married Same-Sex Couple Can Result in the Incarceration of a Spouse Who Refuses to Adversely Testify*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (2007).

34. See *Trammel*, 445 U.S. at 52 (“The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside . . .”).

35. *Id.*

36. *Id.* at 53 (“Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.”).

37. SALTZBURG, *supra* note 2.



to testify, or by refusing to allow their spouses to testify.<sup>38</sup> The privilege protects any confidential communications that happened during marriage, and the couple need not be married at the time of trial to assert the privilege.<sup>39</sup> Either spouse may assert the privilege.<sup>40</sup> Federal cases tout the confidential communications privilege as a safe harbor for the marital relationship,<sup>41</sup> reiterating the United States Supreme Court's long-standing characterization of the marital relationship as "the best solace of human existence."<sup>42</sup> This privilege protects "marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice [that] the privilege entails."<sup>43</sup>

States offer similar policy reasons in support of their spousal privileges,<sup>44</sup> which generally reflect the federal privileges.<sup>45</sup> All states and the District of Columbia recognize the confidential communications privilege, but twenty-one states do not recognize the anti-marital facts privilege.<sup>46</sup> Five states limit the application of spousal privileges to criminal proceedings.<sup>47</sup> This article does not focus on the nuances of the spousal privileges across jurisdictions. Rather, it addresses when and where the marital privileges that different-sex couples can invoke are available to same-sex couples joined in marriages, civil unions, or partnerships.

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38. *Id.*

39. *Id.*

40. *United States v. Westmoreland*, 312 F.3d 302, 307 (7th Cir. 2002).

41. *E.g.*, *Trammel v. United States*, 445 U.S. 40, 51 (1980); *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997).

42. *Stein v. Bowman*, 38 U.S. 209, 223 (1839). The Court also notes that domestic relations "constitute the basis of civil society." *Id.*

43. *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

44. *See, e.g.*, *Coleman v. State*, 380 A.2d 49, 51–52 (Md. 1977) (identifying the purpose of the confidential communications privilege as "promoting marital harmony" and listing policy reasons as follows: "(1) that the communications originate in confidence, (2) the confidence is essential to the relation, (3) the relation is a proper object of encouragement by the law, and (4) the injury that would inure to it by the disclosure is probably greater than the benefit that would result in the judicial investigation of truth."); *Johnson v. State*, 848 A.2d 660, 667 (Md. Ct. Spec. App. 2004) ("The purpose of the [spousal adverse testimony] privilege is to maintain and foster the marital relationship."); *People v. Suarez*, 560 N.Y.S.2d 68, 68–69 (N.Y. Sup. Ct. 1990) ("The public policy rationale for creation of the privilege was the need to encourage marital confidences free from State intrusion. Moreover, the privilege would foster the goals of the institution of marriage by enabling couples to communicate deepest feelings to each other without fear of eventual exposure in court.").

45. *See infra* Table 1.

46. *See infra* Table 1.

47. *See infra* Table 1 (showing that Arkansas, Missouri, North Dakota, Oklahoma, and South Dakota do not recognize either privilege in civil proceedings).

*B. Same-Sex Marriages, Civil Unions, and Domestic Partnerships*

In recent years, several jurisdictions have recognized same-sex relationships as valid under the law. Courts in Iowa, Massachusetts, New Jersey, and Vermont have recognized explicitly that denying the benefits and protections of marriage to same-sex couples violates their state constitutions.<sup>48</sup> Legislatures have done the same in Connecticut, New Jersey, and Oregon.<sup>49</sup> For example, the New Jersey Supreme Court held “that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.”<sup>50</sup> Following that court decision and “to comply with [its] constitutional mandate,” the New Jersey Legislature found that “[p]romoting such stable and durable relationships as well as eliminating obstacles and hardships these couples may face is necessary and proper and reaffirms this State’s obligation to insure equality for all the citizens of New Jersey.”<sup>51</sup>

To provide the benefits and burdens of marriage, including spousal privileges, to same-sex couples, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont have legalized same-sex marriages;<sup>52</sup> Delaware, Hawaii, Illinois, and New Jersey have established civil unions;<sup>53</sup> and California, Nevada, Oregon, Rhode Island, Washington, and

48. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

49. An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Acts 13 (Reg. Sess.); N.J. STAT. ANN. § 37:1-28 (West 2007); Oregon Family Fairness Act, 2007 Or. Laws 99. 2007.

50. *Lewis*, 908 A.2d at 220–21.

51. N.J. STAT. ANN. § 37:1-28 (West, 2007).

52. CONN. GEN. STAT. 46b-20a (2009); D.C. CODE § 46-401 (Supp. 2010); *Varnum*, 763 N.W.2d at 906; *Goodridge*, 798 N.E.2d at 968; N.H. REV. STAT. ANN. § 457:1-a (2009); Marriage Equality Act, 2011 N.Y. Laws 95; VT. STAT. ANN. tit. 15, § 8 (2009).

53. DEL. CODE ANN. tit. 13 §§ 201–217 (West 2011) (establishing civil unions and granting members of civil unions the same rights as same-sex couples); S. 232, 26th Legis., Reg. Sess. (Haw. 2011) (allowing for civil unions and giving participants the same rights as married couples); Illinois Religious Freedom Protection and Civil Union Act, 2010 Ill. Legis. Serv. 96-1513 (West 2011) (allowing civil unions between same-sex partners that grant participants the same protections given to married couples and recognizing same-sex marriages from other jurisdictions as civil unions); N.J. STAT. ANN. § 37:1-28 (West 2009) (making civil unions available to same-sex couples as an equivalent to marriage with the same rights, benefits and burdens).

Wisconsin have created domestic partnerships.<sup>54</sup> However, most states do not recognize same-sex unions, which means that the availability of the marital privileges across jurisdictions is unclear.

*C. The Passage and Effect of “Defense of Marriage” Acts*

Not only do many states not recognize same-sex unions, many jurisdictions, including the federal government, have gone so far as to enact legislation to exclude same-sex couples from enjoying the legal benefits of marriage. The federal government passed the Federal Defense of Marriage Act<sup>55</sup> (Federal DOMA) in 1996 to preserve marriage as an institution reserved to opposite-sex couples in the face of efforts to give same-sex couples the right to marry.<sup>56</sup> The Federal DOMA narrowly defines the terms “spouse” and “marriage” in federal legislation so that they exclude same-sex couples:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>57</sup>

The Federal DOMA also permits states not to recognize, or to recognize only partially, the rights that other jurisdictions give to same-sex couples who enter into marriages, civil unions, or domestic partnerships:

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

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54. CAL. FAM. CODE § 297.5 (West 2011); NEV. REV. STAT. §§ 122A.010–.510 (2009); OR. REV. STAT. § 106.340 (2009); An Act Relating to Domestic Relations-Civil Unions, 2011 R.I. Pub. Laws 198; WASH. REV. CODE §§ 26.60.010–.901 (2009); WIS. STAT. §§ 770.001, 770.05 (2010) (stating that domestic partnerships established in Wisconsin are “not substantially similar to . . . marriage” and providing for domestic partnerships); WIS. STAT. § 905.05 (2010) (granting confidential communications privilege to domestic partners).

55. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. §§ 1, 7 (2006); 28 U.S.C. § 1738C (2000)).

56. *Id.*

57. 1 U.S.C. § 7 (2006).

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.<sup>58</sup>

Similarly, forty-one states have statutes or constitutional amendments codifying their refusal to recognize same-sex marriages.<sup>59</sup> Twenty of these states go so far as to give no recognition to civil unions, domestic partnerships, or other relationships that grant benefits and burdens equal to those of marriage, even if they were legally solemnized in another jurisdiction.<sup>60</sup> Two of these states defined

58. 28 U.S.C. § 1738C (2006).

59. ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ALASKA STAT. § 25.05.013 (2009); ARIZ. CONST. art. XXX § 1; ARIZ. REV. STAT. ANN. §§ 25-101, 112 (2010); ARK. CONST. amend. 83; ARK. CODE ANN. § 9-11-109 (2010); CAL. CONST. art. I, § 7.5 (held unconstitutional in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *stay denied*, 702 F. Supp. 2d 1132, *stay granted*, 2010 WL 3212786, *question certified*, 628 F.3d 1191, *certified question accepted*); COLO. CONST. art. II, § 31; COLO. REV. STAT. § 14-2-104 (2010); DEL. CODE ANN. tit. 13 § 101 (2010); FLA. CONST. art. I § 27; FLA. STAT. §§ 741.04, .212 (2010); GA. CONST. art. I, § 4, ¶ 1; GA. CODE ANN. § 19-3-3.1 (2010); HAW. CONST. art. I, § 23 (giving legislature the power to reserve marriage to opposite-sex couples); HAW. REV. STAT. § 572-1 (2009) (reserving marriage to opposite-sex couples); IDAHO CONST. art. III, §28; Idaho Code Ann. § 32-209 (2010); 750 Ill. Comp. Stat. 5/212 (2005); IND. CODE § 31-11-1-1 (2010); KAN. CONST. art. XV, § 16; KAN. STAT. ANN. §§ 23-101, 23-101-115 (2009); KY. CONST. § 233A; KY. REV. STAT. ANN. §§ 402.005, .020, .040, .045 (2009); LA. CONST. art. XII, § 15; LA. CIV. CODE ANN. arts. 89, 96, 3520 (2009); ME. REV. STAT. tit. 19-A, §§ 650, 701 (2009); MD. CODE ANN., FAM. LAW § 2-201 (West 2010); MICH. CONST. art. I, § 25; MICH. COMP. LAWS §§ 551.1, .271, .272 (2010); MINN. STAT. §§ 517.01, .03, 518.01 (2010); MISS. CONST. art. XIV, § 263A; MISS. CODE ANN. § 93-1-1 (2010); MO. CONST. art. I, § 33; MO. REV. STAT. § 451.022 (2009); MONT. CONST. art. XIII, § 7; MONT. CODE ANN. §§ 40-1-103, 40-1-401 (2009); NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. GEN. STAT. §§ 51-1-1.2 (2009); N.D. CONST. art. XI, § 28; N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2009); OHIO CONST. art. XV, § 11 (held unconstitutional by *Phelps v. Johnson*, No. DV05 305642, 2005 WL 4651081 (Ohio C.P. Cuyahoga Cnty. Nov. 28, 2005)); OHIO REV. CODE ANN. § 3101.01 (West 2010); OKLA. CONST. art. II, § 35; OKLA. STAT. tit. 43, § 3.1 (2010); OR. CONST. art. XV, § 5a; 23 PA. CONST. STAT. § 1704 (2010); S.C. CONST. art. XVII, § 15; S.C. CODE ANN. §§ 20-1-10, 20-1-15 (2009); S.D. CONST. art. XXI, § 9; S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38 (2010); TENN. CONST. art. XI, § 18; TENN. CODE ANN. § 36-3-113 (2010); TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. §§ 2.001, 6.204 (2009); UTAH CONST. art. I, § 29; UTAH CODE ANN. §§ 30-1-2, 30-1-4.1 (West 2010); VA. CONST. art. I, § 15-A; VA. CODE ANN. §§ 20-45.2-45.3 (2010); WASH. REV. CODE §§ 26.04.010, 26.04.020 (2009); W. VA. CODE §§ 48-2-104, 48-2-603 (2009); WIS. CONST. art. XIII, § 13; WYO. STAT. ANN. § 20-1-101 (2010).

60. ALA. CONST. art. I, § 36.03; ALASKA STAT. § 25.05.013; ARK. CONST. amend. 83; ARK. CODE ANN. § 9-11-109 (2010); FLA. CONST. art. I § 27; GA. CONST. art. I, § 4; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MONT. CODE ANN. § 40-1-401 (2009); NEB. CONST. art. I, § 29 (held unconstitutional by *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980, 984 (D. Neb. 2005)); N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; S.C. CONST. art.

marriage as between a man and a woman before the passage of the federal DOMA.<sup>61</sup>

Jurisdictions with DOMAs or equivalent laws do not recognize same-sex marriages or their associated benefits and burdens.<sup>62</sup> In these jurisdictions, the policy is to “protect the sanctity” of opposite-sex marriages by deeming same-sex marriages, and sometimes even any same-sex unions, legally void.<sup>63</sup> Therefore, in jurisdictions with DOMAs, same-sex spouses could have difficulty asserting evidentiary privileges intended to help preserve marriages because courts could conclude that allowing them to so invoke a marital privilege would recognize and protect same-sex marriages.<sup>64</sup>

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XVII, § 15; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; W. VA. CODE § 48-2-603.

61. MD. CODE ANN., FAM. LAW § 2-201 (West 2006); WYO. STAT. ANN. § 20-1-101 (2005). New Hampshire also defined marriage as between a man and a woman before the passage of the federal DOMA, N.H. REV. STAT. ANN. §§ 457:1-2 (1992) (repealed 2009), but New Hampshire now grants same-sex marriages. N.H. REV. STAT. ANN. § 547:1-a (2009).

62. See 28 U.S.C. § 1738C (2006); see, e.g., VA. CODE ANN. § 20-45.2 (1997) (“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state of jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”).

63. See, e.g., ALA. CONST. art. I, § 36.03:

(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

....

(g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.

See also *supra* note 60 and accompanying text.

64. See generally RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 139 cmt. b (1971) (“Most privileges are designed to encourage socially desirable confidences. Common examples of such privileges involve communications between husband and wife . . . .”); *People v. Schmidt*, 579 N.W.2d 431, 435 (Mich. Ct. App. 1998) (noting in dicta that, while the legislature explicitly stated a public policy against same-sex marriages, it did not state any public policy against common-law marriages, and therefore spousal privileges must extend to common-law marriages validly contracted in other states).

*In re Marriage of J.B. and H.B.*,<sup>65</sup> a Texas appellate case, is the only reported decision to date that addresses the availability of spousal privileges to same-sex couples in a state with a DOMA.<sup>66</sup> The Texas DOMA prohibits the creation or recognition of any same-sex union that is similar to marriage.<sup>67</sup> In *In re Marriage of J.B. & H.B.*, a man who entered into a same-sex marriage in Massachusetts filed for divorce in a Texas court.<sup>68</sup> He stated that he sought a divorce, rather than a voidance of the marriage, because “benefits, like the spousal-communication privilege and the community-property laws,” would be available to him in a divorce action, but would “not be available to him if he pursue[d] a voidance action.”<sup>69</sup> The State intervened, arguing that the plaintiff was “not a party to a ‘marriage’ under Texas law, that he [was] therefore not eligible for the remedy of divorce, and that the trial court [could] not grant a divorce without violating Texas law.”<sup>70</sup> The appellate court concluded that the trial court lacked subject matter jurisdiction to consider the divorce petition, noting that Texas “may constitutionally treat opposite-sex couples differently from all other social units for purposes of marriage and divorce laws.”<sup>71</sup> It said that the spouse’s “arguments that he should be afforded rights such as the spousal-communications privilege and community-property rights must be addressed to the Texas Legislature.”<sup>72</sup>

Despite this outcome, same-sex spouses in other states with DOMAs may be able to assert the marital privileges successfully. Unlike Texas, some states do not proscribe marriage-like rights for same-sex couples.<sup>73</sup> For example, California, Delaware, Hawaii, Illinois, Nevada, Oregon, Washington, and Wisconsin have state DOMAs, but those states legally recognize same-sex unions.<sup>74</sup> Eleven

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65. 326 S.W.3d 654 (Tex. App. 2010).

66. *Id.* See *infra* notes 109-113 and accompanying text for a discussion of other cases addressing the availability of marital privileges to same-sex couples.

67. TEX. CONST. art. I, § 32 (West 2007) (“(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”).

68. *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 659.

69. *Id.* at 679.

70. *Id.* at 659.

71. *Id.* at 679. *Contra* *Christiansen v. Christiansen*, 253 P.3d 153, 155 (Wyo. 2011) (holding that Wyoming trial court had subject matter jurisdiction over same-sex couple’s divorce action despite state DOMA).

72. *Id.*

73. See *infra* text accompanying notes 74–76; see also *infra* Part V (possible assertions in federal court despite federal DOMA).

74. See *infra* Table 1. Additionally, Maine and Maryland proscribe same-sex marriage but offer limited domestic partnerships to same-sex couples. *Id.*

other states have DOMAs or similar laws that do not explicitly deny recognition or rights to same-sex couples in civil unions or domestic partnerships.<sup>75</sup>

Of the ten jurisdictions without DOMAs or similar laws, Massachusetts, Connecticut, Iowa, New Hampshire, New York, Vermont, and the District of Columbia allow same-sex marriage; Rhode Island and New Jersey recognize civil unions, and Rhode Island's Attorney General stated that Rhode Island would recognize an out-of-state same-sex marriage under principles of comity; and New Mexico is silent on the issue.<sup>76</sup> Given that U.S. jurisdictions do not have a uniform approach to recognizing same-sex unions, predicting whether a jurisdiction will allow couples joined in same-sex unions to assert marital evidentiary privileges would seem to require oracular faculties. Nonetheless, case law addressing the availability of marital privileges to spouses from different-sex unions provides guidance.

### III. AVAILABILITY OF STATE MARITAL PRIVILEGES TO COUPLES IN SAME-SEX MARRIAGES

It is not a novel issue for state courts to determine whether a party or witness can assert a marital evidentiary privilege at trial. As discussed in this part, courts have a method for analyzing this issue, and this procedure helps evaluate the availability of the privileges to couples in same-sex marriages.

Courts apply a two-tiered analysis to determine which marital privileges, if any, a party or witness may assert in a trial.<sup>77</sup> A trial court must first determine whether a spouse could assert a marital privilege.<sup>78</sup> When two states with conflicting marital evidentiary privilege laws have an interest in a state case, the court must address a conflict of laws issue. Then, because only a spouse may assert the privilege, the court determines whether the party or witness qualifies as a spouse.<sup>79</sup> A conflict of laws problem also may arise at this phase if the putative spouse married in another jurisdiction and the marriage is

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75. See ARIZ. CONST. art. XXX § 1; ARIZ. REV. STAT. ANN. §§ 25-101, 25-112 (2010); COLO. CONST. art. II, § 31; IND. CODE § 31-11-1-1 (2008); MINN. STAT. §§ 517.01, 517.03, 518.01 (2006); MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; N.C. GEN. STAT. § 51-1 (2009); OKLA. CONST. art. II, § 35; 23 PA. CONS. STAT. § 1704 (1996); TENN. CONST. art. XI, § 18; WYO. STAT. ANN. § 20-1-101 (1977).

76. See *infra* Table 1; Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, <http://www.nytimes.com/2007/02/22/us/22rhode.html>.

77. See *infra* Part III.A–B.

78. See *infra* Part III.A.

79. See *infra* Part III.B.1.

not recognized in the state in which the case is heard. The court must determine which laws govern the validity of the marriage and whether the marriage is valid.<sup>80</sup>

#### *A. Conflict of Laws Regarding Privileges, Generally*

Two states may have an interest in a state case and not have the same evidentiary privileges, resulting in a conflict of laws regarding privileges. To determine the availability to the privilege, the forum state must consider the evidentiary rules of both states and the relationship of the asserting party to the non-forum state or the forum state's public policy.<sup>81</sup>

For example, if Husband allegedly acted negligently in State A, told Wife about the event in State B, and appeared as a defendant in a negligence action in a State A court, both states have an interest in the case. State A is interested in providing justice for wrongs done within State A, and State B is interested in protecting the confidential communications that happen within State B. If State B recognizes a confidential communications privilege but State A has no confidential communications privilege, then the court must determine whether Husband may assert that privilege successfully in a State A court.

When two states are interested in a case but do not recognize the same privilege, generally no privilege is recognized, and the evidence is admissible.<sup>82</sup> Under this approach, evidence tends to be admitted because one state's recognition of a privilege, even if that state's substantive laws apply to the case, is not sufficient to exclude the evidence.<sup>83</sup>

In exceptional circumstances, a spouse will be able to assert the privilege and exclude evidence even though only one state recognizes a privilege.<sup>84</sup> The court first determines where the communication transpired, typically by looking at which state "has the most significant relationship with [the] communication" (the "significant relationship state").<sup>85</sup> In the hypothetical negligence case where Husband was in State B when he told Wife about his alleged negligence, State B was the significant relationship state. If the significant relationship state recognizes a privilege that the forum state does not and "there is some

80. *See infra* Part III.B.

81. *See infra* text accompanying notes 82-88.

82. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 139 (1971).

83. *Id.* § 139 cmt. d.

84. *Id.*

85. *Id.*



special reason why the forum policy favoring admission should not be given effect,” then the forum state may apply the significant relationship state’s rule of privilege, allow the spouse to assert the privilege, and exclude the evidence.<sup>86</sup>

The court will weigh the following factors to see if a “special reason” exists for excluding the evidence: “(1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties.”<sup>87</sup> If Husband lived in State B and only traveled to State A on the day that the alleged negligence occurred, there is greater reason for allowing Husband to assert State B’s confidential communications privilege than there would be if Husband lived in State A and visited State B briefly, during which time he told Wife about his alleged negligence.

The other circumstance in which a court will allow a marital privilege to be asserted in contravention with another jurisdiction’s privilege laws is when admitting the evidence would be “contrary to the strong public policy of the forum.”<sup>88</sup> This exception could arise when the forum recognizes the privilege, but the significant relationship state does not recognize it.<sup>89</sup> In the hypothetical above, if State A recognized the privilege instead of State B, and State A had a strong policy of protecting confidential communications to preserve certain relationships, such as marriage, then Husband might be able to assert the confidential communications privilege, even though State B did not recognize it and was the significant relationship state.

### *B. Conflict of Laws Regarding Marital Privileges for Couples in Same-Sex Marriages*

The analysis presented in the previous section is relatively straightforward when courts are dealing with different-sex spouses. But what happens when courts are met with same-sex spouses who wish to assert marital evidentiary privileges? As noted, only spouses can assert marital evidentiary privileges,<sup>90</sup> and a same-sex couple may have a valid marriage in one state but not in another state.<sup>91</sup> Therefore,

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86. *Id.* § 139(2).

87. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 139(2) (1971).

88. *Id.* at § 139(1).

89. *Id.* at § 139(2).

90. *See infra* Part III.B.1.

91. *See supra* Part II.B.

courts must determine which state's laws govern the validity of the marriage.<sup>92</sup> The burden of proving the validity of the marriage rests with the person asserting the privilege, who must prove the existence of marriage by a preponderance of the evidence.<sup>93</sup> Then the court must determine whether the person has a valid marriage that justifies assertion of the marital privilege.<sup>94</sup>

### *1. Determining Availability Based on State Marriage Laws*

Unlike privileges that are available under contracts other than marriage, only spouses may assert marital evidentiary privileges, and a party's home-state laws determine whether the party is a spouse.<sup>95</sup> A forum state may recognize a marriage contracted in another jurisdiction even if it could not have been contracted in the forum state.<sup>96</sup> Conversely, the forum state's laws may proscribe such recognition.<sup>97</sup> Andrew Koppelman, Professor of Law and Political Science at Northwestern University, postulates that even when states do not recognize same-sex marriage, they may recognize some of the benefits traditionally associated with marriage based on the potential availability of the privilege by contract apart from marriage.<sup>98</sup> Under this theory, if a same-sex spouse could assert a privilege by virtue of a contract, "such as [one] pertaining to inheritance or to making medical decisions for one's partner," then the court would recognize the privilege because the right would not violate the forum state's public policy regarding marriage.<sup>99</sup> Conversely, privileges that are only "conferred by operation of law, such as the right to file a joint tax return or the right to a homestead exemption," would violate, or at least threaten, public policy.<sup>100</sup>

Marital evidentiary privileges fall into the latter category because a marriage license is the only contract that can grant a marital

92. *See infra* text accompanying notes 104-106.

93. *United States v. Panetta*, 436 F. Supp. 114, 125 (E.D. Pa. 1977) (neither privilege available to defendant who failed to prove valid marriage), *aff'd without op.*, 568 F.2d 771 (3d Cir. 1978); *People v. Suarez*, 560 N.Y.S.2d 68, 70 (N.Y. Sup. Ct. 1990) ("Inasmuch as the defendant is seeking to establish the existence of a valid common law marriage, he has the burden of proving that the marriage existed.").

94. *See infra* text accompanying notes 104-125; *see also infra* Part III.B.2.

95. *See infra* text accompanying notes 104-06.

96. *See infra* text accompanying notes 107-18.

97. *See infra* text accompanying notes 119-25.

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

99. *Id.* at 2158.

100. *Id.*

evidentiary privilege.<sup>101</sup> This classification is reasonable because the very purpose of these privileges is to preserve marriages.<sup>102</sup> Therefore, spouses in same-sex marriages must prove the validity of their marriages before asserting marital evidentiary privileges.<sup>103</sup>

Federal and state courts agree that the law of the couple's state of domicile governs the validity of the marriage.<sup>104</sup> Thus, courts determine whether a party or witness qualifies as a spouse under the law of that person's home state, even when the party or witness seeks to assert a privilege under the laws of a different jurisdiction.<sup>105</sup> A party's or witness's own belief in the validity of the marriage is inconsequential.<sup>106</sup>

For various reasons, such as resolving family law or inheritance disputes, states often will recognize a marriage that is valid in the party's home-state even if the laws of the state whose substantive laws apply to the case would not recognize such a union.<sup>107</sup> The Maryland Court of Special Appeals explained:

As insistent as Maryland continues to be, however, about the solemnizing prerequisite of a marriage ceremony or celebration within the State, it nonetheless looks, largely in the interest of interstate comity, with benign indulgence on common law marriages when they are entered into and recognized beyond our borders . . . . "We accept the general rule *that a*

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101. SALTZBURG, *supra* note 2.

102. *See* Wolfe v. United States, 291 U.S. 7, 14 (1934).

103. *See* *infra* note 105.

104. United States v. White, 545 F.2d 1129, 1130 (8th Cir. 1976) ("The status of marriage had been left to the states"). This article does not explore foreign marriages.

105. United States v. Panetta, 436 F. Supp. 114, 125 (E.D. Pa. 1977).

106. *Panetta*, 436 F. Supp. at 125 (citing United States v. Lewis, 363 F. Supp. 614, 619 (W.D. Pa. 1973)).

107. *See, e.g.*, John Crane, Inc. v. Puller, 899 A.2d 879, 912 (Md. Ct. Spec. App. 2006) (reviewing Maryland's history of recognizing valid out-of-state marriages that would not have been valid if entered into in Maryland); *In re* Toth Estate, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973) (recognizing marriage between first cousins because it was valid in Hungary, where it was contracted). *Compare* People v. Vespucci, 745 N.Y.S.2d 391, 398 (N.Y. Co. Ct. 2002) (no spousal privilege for New York defendant with New York common-law marriage because New York does not recognize common-law marriages) *with* People v. Suarez, 560 N.Y.S.2d 68 (N.Y. Sup. Ct. 1990) (spousal privilege for New York defendant with Ohio common-law marriage).

*marriage valid where contracted or solemnized is valid everywhere.*<sup>108</sup>

Few state courts have considered the validity of a marriage contracted in another state as it pertains to evidentiary marital privileges.<sup>109</sup> In Maryland, where the state constitution defines marriage as between a man and a woman but the Maryland Attorney General has said that same-sex marriages should be recognized as valid within the state, a Washington County trial court ruled that a woman could invoke the right not to testify against her same-sex spouse even though Maryland does not allow same-sex couples to marry.<sup>110</sup> The couple had married in D.C., and the Maryland judge concluded that the principle of reciprocity between the states, also known as comity, demanded that the court recognize the validity of the marriage.<sup>111</sup> Therefore, the spousal privilege extended to the same-sex spouses.<sup>112</sup>

Using similar reasoning, the Michigan Court of Appeals in *People v. Schmidt* affirmed a trial court's decision to allow a defendant to assert the marital communications privilege when the defendant was married to the witness under Alabama common law at the time of the communication, even though Michigan had forbidden common-law marriages for over forty years.<sup>113</sup> The court held that "Michigan follows the general rule that 'a marriage valid where it is contracted is valid everywhere.' Accordingly, this state will recognize the validity of a common-law marriage contracted in another state that would be valid by the laws of that state."<sup>114</sup>

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108. *Puller*, 899 A.2d at 912 (quoting *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952) (considering adultery and illegitimacy)).

109. *E.g.*, *People v. Schmidt*, 579 N.W.2d 431 (Ct. App. Mich. 1998); *People v. Suarez*, 560 N.Y.S.2d 68, 68–70 (N.Y. Sup. Ct. 1990); Don Aines, *Judge: Woman Doesn't Have to Testify Against Same-Sex Spouse*, HERALD-MAIL.COM (June 23, 2011), <http://www.herald-mail.com/news/local/hm-judge-rules-that-samesex-spouse-can-invoke-spousal-privilege-20110623,0,3777097.story>; *cf.* *Greenwald v. H & P 29th St. Assocs.*, 659 N.Y.S.2d 473, 474 (N.Y. App. Div. 1997) (not considering marriage but limiting *Suarez* holding such that "spousal privilege of CPLR 4502(b), which, by its terms, protects confidential communications between a 'husband' and 'wife' 'during marriage', does not extend, in plaintiffs' words, 'to homosexuals in a spousal relationship'"); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. Ct. 2010) (stating that Texas "may constitutionally treat opposite-sex couples differently from all other social units for purposes of marriage and divorce laws").

110. Aines, *supra* note 109.

111. *Id.*

112. *Id.*

113. *Schmidt*, 579 N.W.2d at 434.

114. *Id.* (quoting *In re Toth Estate*, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973)).

In the New York Superior Court, as in *Schmidt*, the defendant in *People v. Suarez* alleged a common-law marriage contracted outside New York when New York forbade common-law marriages.<sup>115</sup> Suarez and the witness lived together in New York, but the couple had spent two to three weeks in Ohio, a state recognizing common-law marriages, and allegedly reaffirmed their vows during that time.<sup>116</sup> The New York court, like the Michigan court in *Schmidt*, was willing to recognize the marriage if the trial court found that the marriage was valid where contracted.<sup>117</sup> The appellate court remanded the case for an evidentiary hearing to determine if the defendant had a valid Ohio common-law marriage.<sup>118</sup>

The law of the forum, however, may render an otherwise valid marriage invalid if recognizing the marriage strongly contravenes the forum state's public policy.<sup>119</sup> Under the Federal DOMA, a state court need not recognize a same-sex marriage, despite its validity where contracted.<sup>120</sup> Many state DOMAs reiterate this power in their own DOMAs or through their state constitutions.<sup>121</sup> The effect of this can be seen in *Schmidt*, in which the Michigan court recognized an out-of-state common-law marriage that was forbidden by common law, but

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115. *People v. Suarez*, 560 N.Y.S.2d 68, 68 (N.Y. Sup. Ct. 1990).

116. *Id.* at 68.

117. *Id.* at 69–70.

118. *Id.* at 71; *cf.* *United States v. Acker*, 52 F.3d 509, 514–15 (4th Cir. 1995) (finding privilege not available due to lack of valid marriage when defendant and witness cohabitated for twenty-five years without marrying in state not recognizing common-law marriage).

119. Contrary to popular belief, Article IV, § 1 of the United States Constitution, which requires that states give full faith and credit to “the public Acts, Records, and judicial Proceedings of every other State,” does not require states to recognize marriages contracted in other states. *Hennefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 187 (2005). (“The Full Faith and Credit Clause does not require a State to apply another State’s law where it violates its own legitimate public policy.”) The topic is beyond the scope of this article but addressed exhaustively in Koppelman, *supra* note 98. Comity is another misconstrued concept. “Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S.D. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Like the Full Faith and Credit Clause, the rule of comity does not require states to recognize marriages in other states. *Sam v. Sam*, 134 P.3d 761, 766 (N.M. 2006). (“In deciding whether to recognize [a foreign] marriage that undoubtedly [sic] went against the public policy of [the forum state] to some degree, ‘the dispositive question is whether the marriage offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity.’”) (quoting *Leszinske v. Poole*, 798 P.2d 1049, 1055 (N.M. Ct. App. 1990)).

120. 28 U.S.C. § 1738C (2006).

121. *E.g.*, VA. CODE ANN. § 20-45.2 (1997) (“A marriage between persons of the same sex is prohibited. Any marriage 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 by such marriage shall be void and unenforceable.”).

not by statute.<sup>122</sup> The court suggested in dicta that it would not recognize a same-sex marriage because the legislature explicitly refused to recognize same-sex marriages.<sup>123</sup> Many state DOMAs specify that the state does not recognize the privileges associated with a marriage that the state deems void.<sup>124</sup> Thus, courts in jurisdictions that have state DOMAS are likely to find same-sex marriages invalid.<sup>125</sup>

## 2. *Categorizing Same-Sex Marriages to Determine Validity*

Commentators have hypothesized that the recognition of same-sex marriages may depend on which of four categories the marriages fall into:<sup>126</sup> “evasive,” “migratory,” “extraterritorial,” or “visitor.”<sup>127</sup> The category of a same-sex marriage therefore suggests whether a same-sex spouse could assert a marital privilege successfully.

“Evasive marriages,” that is, those “in which parties have traveled out of their home state for the express purpose of evading that state’s prohibition of their marriage and returned home immediately after being married,” have the least likelihood of recognition.<sup>128</sup> Strong public policy in the couple’s home state, such as a DOMA, could invalidate the marriage in the home state.<sup>129</sup> But at least one Attorney General, in a state with a constitution explicitly defining marriage as

122. 579 N.W.2d 431 (Mich. Ct. App. 1998).

123. *Id.* at 435 (“The prosecutor argues that extending spousal privileges to common-law marriages is against the public policy of Michigan. This is a question properly left to the Legislature. Presumably, the Legislature could refuse to recognize common-law marriages if it chose to do so, as it has done with same-sex marriages in M.C.L. § 551.271(2); M.S.A. § 25.15(2) and M.C.L. § 551.272; M.S.A. § 25.16.”).

124. *See, e.g., supra* note 121.

125. *But see infra* text accompanying notes 127–35 (discussing circumstances under which even a state with a DOMA should recognize a same-sex marriage). Wyoming has a pre-DOMA statute limiting marriage to different-sex couples. WYO. STAT. ANN. § 20-1-101 (2010). But the state also recognizes the validity of any marriage that is valid in the state where it was contracted. WYO. STAT. ANN. § 20-1-111 (2010). The Wyoming Supreme Court recently held that the latter law gave district courts in Wyoming jurisdiction to grant a divorce to same-sex couples. *Christiansen v. Christiansen*, 253 P.3d 153, 155 (Wyo. 2011).

126. Koppelman, *supra* note 98; *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2038–43 (2003).

127. Koppelman, *supra* note 98, at 2145.

128. *Id.*

129. *Id.*; *see also* *Lane v. Albanese*, No. FA0440021288, 2005 WL 896129, at \*4 (Conn. Super. Ct. 2005) (noting, in a case prior to approval of same-sex marriage in Connecticut, that Connecticut residents’ same-sex marriage contracted in Massachusetts was null and void, and therefore did not give rise to Connecticut jurisdiction for divorce); *Burns v. Burns*, 560 S.E.2d 47, 48–49 (Ga. App. 2002) (Georgia domiciliaries’ same-sex Vermont civil union is not marriage and even if it were a marriage instead of a civil union, Georgia would not recognize it).

between a man and a woman, has issued an advisory opinion recommending that the state recognize out-of-state same-sex marriages.<sup>130</sup> Unless their marriages are recognized, however, same-sex couples in evasive marriages are unlikely to assert the marital evidentiary privileges successfully.

When same-sex couples live and marry in one state and then move out of that state, they have “migratory marriage[s].”<sup>131</sup> These marriages will still be valid if the new home state recognizes same-sex marriages or has not enacted a DOMA or constitutional ban on same-sex marriages.<sup>132</sup> If the new state recognizes marriage-like unions other than marriage, then a same-sex couple likely may assert any privilege provided for under the recognized unions, even if the couple’s union is not recognized as a marriage.<sup>133</sup> Even a state DOMA need not invalidate rights that could have been contracted for independent of marriage but would invalidate rights, such as evidentiary privileges, that only exist as a result of marriage.<sup>134</sup>

Same-sex spouses are most likely to be able to invoke marital evidentiary privileges in extraterritorial and visitor marriages.<sup>135</sup> When same-sex spouses never leave the state in which they legally married but find themselves enmeshed in out-of-state litigation, they have an extraterritorial marriage.<sup>136</sup> Cases involving former anti-miscegenation laws provide precedent for recognizing extraterritorial marriages by holding that the laws voiding interracial marriages only affect interracial couples cohabiting within the state.<sup>137</sup>

“Visitor marriages” are those in which same-sex spouses are “temporarily present in a state that does not recognize their marriages.”<sup>138</sup> Not even a state DOMA should ban recognition of these marriages because “[a]ny other result is inconsistent with the constitutional right of citizens to travel.”<sup>139</sup> In the 1879 case *Ex parte Kinney*, the United States Circuit Court for the Eastern District of Virginia refused to recognize the Washington, D.C. marriage of an

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130. 95 Op. Md. Att’y Gen. 3, *supra* note 7 at 54.

131. Koppelman, *supra* note 98, at 2145.

132. *Id.*

133. *Id.*

134. *Id.*; *see supra* notes 98–100 and accompanying text.

135. *See infra* text accompanying notes 136–142.

136. Koppelman, *supra* note 98, at 2145.

137. *Id.* at 2146, 2162–63 (citing *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948)).

138. *Id.* at 2145.

139. *Id.* *But see supra* notes 59–72 and accompanying text (showing that DOMA legally may establish such a ban).

interracial Virginia couple.<sup>140</sup> The federal court upheld the state court's finding that Kinney, as a Virginia domiciliary, was guilty of miscegenation and related crimes, but also noted:

Virginia could not enforce its law against nondomiciliaries nor exclude altogether interracial couples domiciled in the District of Columbia. "That such a citizen would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because these are privileges following a citizen of the United States . . . ." The reference to "temporary stoppage" clearly implies that Virginia might have to tolerate within its borders sexual intercourse between a black man and a white woman.<sup>141</sup>

Thus, a married, same-sex couple residing in a state that recognizes same-sex marriages should be able to invoke marital evidentiary privileges when they litigate in or temporarily visit a state that does not recognize same-sex marriages.<sup>142</sup>

#### IV. AVAILABILITY OF STATE MARITAL PRIVILEGES TO SAME-SEX COUPLES IN CIVIL UNIONS OR DOMESTIC PARTNERSHIPS

Same-sex couples in civil unions and domestic partnerships face many of the same challenges that same-sex spouses face when trying to assert the marital privileges that are incidental to their unions in their home states.<sup>143</sup> Where applicable state laws explicitly recognize same-sex unions, same-sex couples are more likely to succeed in asserting marital privileges.<sup>144</sup> Where applicable state laws explicitly recognize same-sex marriages, but not marriage-like unions, same-sex couples in marriage-like unions still should be able to assert marital privileges successfully.<sup>145</sup> In contrast, where applicable state

140. 14 F. Cas. 602, 608 (C.C.E.D. Va. 1879) (No. 7825).

141. Koppelman, *supra* note 98, at 2161–62 (quoting Kinney, 14 F. Cas. at 606).

142. *See generally supra* note 141 and accompanying text (discussing case that addressed interracial marriage as today's courts might address same-sex marriage).

143. *See supra* Part III for a discussion of the challenges as they pertain to same-sex spouses.

144. *See infra* text accompanying notes 155–60.

145. *See Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding "that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license," and that there is a



laws explicitly do not recognize same-sex marriages or unions, same-sex couples in marriage-like unions are unlikely to succeed when asserting marital privileges.<sup>146</sup> They face a greater challenge than do same-sex spouses because their unions, despite their equivalence to marriages, are not marriages.<sup>147</sup> Nonetheless, because these unions are supposed to be equivalent to marriages, courts should extend the same evidentiary privileges to same-sex couples in civil unions and partnerships as to married same-sex couples.<sup>148</sup>

Even if some states are reluctant to extend marital privileges to same-sex couples that are not married, partners in same-sex unions or partnerships may assert the marital privileges successfully in some forums.<sup>149</sup> For example, in the state where the partner entered into the civil union or domestic partnership, the partner may assert the privileges because these unions grant all of the rights inherent in marriage.<sup>150</sup> Similarly, in any other state granting civil unions or partnerships,<sup>151</sup> and perhaps in states granting same-sex marriages, the partner should be able to assert the evidentiary privileges because states will recognize each other's unions and these unions include evidentiary spousal privileges.<sup>152</sup> Consider, for example, *Hennefeld v. Twp. of Montclair*, which the New Jersey Tax Court heard when New Jersey offered limited domestic partnerships for same-sex couples but did not offer civil unions.<sup>153</sup> The court held that it would recognize a Vermont civil union under the state's Domestic Partnership Act, but it would not afford the Vermont union more rights than granted under the New Jersey Act.<sup>154</sup>

But some states have DOMAs or constitutional provisions explicitly banning the recognition of any marriage-like union of same-sex partners, and these laws prevent partners in same-sex unions or partnerships from asserting the evidentiary marital privileges in those

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"constitutional obligation to extend to . . . [same sex-couples] the . . . protection . . . that Vermont law provides opposite-sex married couples.").

146. See *infra* text accompanying notes 155–60.

147. See *supra* note 159 and accompanying text.

148. See *infra* notes 161–63 and accompanying text.

149. See *infra* Table 1.

150. See *supra* Part I.B.

151. Some other State laws, such as HAW. REV. STAT. § 572C-4 (1997) and ME. REV. STAT. tit. 22, § 2710 (2009), offer domestic partnerships with more limited rights; this article does not consider these unions because they are not equated with marriage.

152. See *infra* Table 1.

153. 22 N.J. Tax 166, 187 (2005).

154. *Id.* at 185–87.

states.<sup>155</sup> There, the marital privileges are not available to any same-sex partner, regardless of the label on the individual's relationship.<sup>156</sup>

Where state DOMAs only ban recognition of same-sex marriages, a party or witness could argue that the court should recognize a "union" or "partnership."<sup>157</sup> However, the argument may fail for several reasons. First, courts may find that the policy against same-sex marriage supports the denial of marital rights to same-sex partners, no matter how the relationship is labeled.<sup>158</sup> Second, to avoid the DOMA's prohibitions, a party would have to distinguish the union from a marriage.<sup>159</sup> The courts construe the evidentiary privileges strictly, and the "spousal" privileges cannot exist outside marriage.<sup>160</sup> Consequently, if parties or witnesses argue that they are not married, courts are less likely to recognize their right to assert spousal privileges.

In states without civil unions, domestic partnerships, or DOMAs, courts deciding whether to permit the invocation of evidentiary privileges should regard civil unions and partnerships as marriages.<sup>161</sup> Courts have stressed "marital harmony"<sup>162</sup> and considered the marital privileges "so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of the justice which the privilege entails."<sup>163</sup> Civil unions and domestic partnerships also would benefit from the privileges' protection and would suffer from the same strife caused

155. See *infra* Table 1.

156. See *supra* Part II.C.

157. See Koppelman, *supra* note 98, at 2147–48 (“[T]he recent wave of legislation refusing to recognize same-sex marriages is of doubtful relevance here, since most of those statutes specifically refuse recognition only to same-sex marriages. Opposition to legal recognition of same-sex relationships is far weaker than opposition to giving those relationships the label of marriage.”). Koppelman noted, however, that some believe that the tendency to recognize out-of-state marriages diminishes when the relationship is not called a “marriage.” *Id.* at 2147.

158. *Id.* at 2149–50.

159. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

160. *Pierce County v. Guillen*, 537 U.S. 129, 144 (2003); see *supra* Part III.B.1.

161. This proposal runs contrary to the strict construction of evidentiary privileges. See *supra* Part II.A. See also *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 482 (N.Y. App. Div. 2005) (Fisher, J., dissenting) (stating that where a wrongful death statute, requiring the same narrow construction as evidentiary privileges, recognized spouses, not partners, and the use of spouse left “no doubt that it was intended to include only those persons joined together in marriage.”) See also *infra* Part VI (provides an argument for the court that does not accept this proposal).

162. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

163. *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

when one spouse is forced to testify against the other.<sup>164</sup> There may be no national public policy in favor of preserving same-sex unions, but when the public policy reasons for preserving marriages also apply to same-sex unions, the spousal privileges should be available equally in both.<sup>165</sup>

To determine which same-sex unions, in which forums, merit the protection of the privileges under public policy, the courts should consider the couple's ties to the state in which the union was formed and the public policies of the states involved in the litigation.<sup>166</sup> An evasive union, such as where a couple from Idaho enters into a civil union in Nevada or Oregon, lacks public policy support in any forum, because the couple's home state, which has a DOMA, does not recognize the union.<sup>167</sup> Similarly, in a migratory union where the couple moved to a state with a DOMA, the couple's new home state may not recognize the union.<sup>168</sup>

In contrast, extraterritorial and visitor unions have strong policy support in forums without DOMAs for two reasons: the couples reside in states where the public policy favoring equal rights provided for a union with rights equivalent to marriage,<sup>169</sup> and states without DOMAs have a weaker public policy argument against recognizing the union.<sup>170</sup> In these circumstances, the same-sex relationships have little impact on the forum state because the couples do not reside or regularly assert rights in the forum state; the home state's public policy should govern.<sup>171</sup>

#### V. FEDERAL MARITAL PRIVILEGES AVAILABLE TO SAME-SEX COUPLES

In federal court, the federal common-law privileges generally are available to same-sex couples.<sup>172</sup> Although the Federal DOMA

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164. *Lewis v. Harris*, 908 A.2d 196, 215 (N.J. 2006).

165. *Id.* at 200.

166. *See Koppelman*, *supra* note 98, at 2145–46 (describing four categories).

167. *See id.* (couples' intent to circumvent laws not supported by public policy behind laws).

168. *See id.* (statutory ban creates clear public policy against recognition).

169. *See infra* Table 1.

170. *Koppelman*, *supra* note 98, at 2145.

171. *Id.*

172. FED. R. EVID. 501; *see also* LYNN MCLAIN, 6 MARYLAND EVIDENCE—STATE AND FEDERAL § 501:4(b) (2001) (“State privileges do not apply in federal criminal cases.”). One exception is that state privileges apply in cases where federal jurisdiction is based on diversity of citizenship. *See id.* § 501:4 n.1 (“The arguments advanced in favor of recognizing state privileges are: a state privilege is an essential characteristic of a relationship or status created

narrowly defines marriage as between a man and a woman, the statute does not affect the federal evidentiary privileges, federal court proceedings, or the state laws that federal courts use to determine the validity of a marriage.<sup>173</sup> Moreover, the Federal DOMA pertains only to “any Act of Congress, or . . . any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”<sup>174</sup> It does not pertain to court-created common law,<sup>175</sup> the source of the federal privileges.<sup>176</sup> Therefore, the Federal DOMA does not affect the federal marital evidentiary privileges and does not limit their use to opposite-sex spouses.<sup>177</sup> Same-sex couples may have greater success at asserting marital privileges in federal court.<sup>178</sup>

The Federal DOMA also does not define “marriage” for the purposes of state law, and the determination of a marriage’s validity is a matter of state law.<sup>179</sup> The federal DOMA defines “marriage” and “spouse” for any use the words might have in *federal* legislation and documents.<sup>180</sup> Because marriage is a matter of state law, a federal court cannot use the Federal DOMA to invalidate a marriage for evidentiary purposes.<sup>181</sup> Moreover, the Obama administration has announced that it believes that the Federal DOMA is unconstitutional

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by state law and thus is substantive in the *Erie* sense; state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction.”) (quoting 120 Cong. Rec. 2391 (1974) (statements of Rep. Holtzman and Rep. Dennis)); *Id.* § 501:4(b)(iii).

173. *See* 1 U.S.C. § 7 (2006); *see also infra* note 179 and accompanying text.

174. *Id.*

175. *Id.*

176. FED. R. EVID. 501.

177. *See supra* Part III.B.1.

178. *See supra* text accompanying notes 184-87.

179. *United States v. White*, 545 F.2d 1129, 1130 (8th Cir. 1976) (“The status of marriage has been left to the states.”); *Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (“There can be no dispute that the subject of domestic relations is the exclusive province of the states. And the powers to establish eligibility requirements for marriage, as well as to issue determinations of martial [sic] status, lie at the very core of such domestic relations law. . . . Congress does not have the authority to place restrictions on the states’ power to issue marriage licenses. And indeed . . . DOMA refrains from directly doing so. . . . Congress has [no] interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges.”) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)) (other internal citations omitted); *see supra* note 175 and accompanying text.

180. 1 U.S.C. § 7 (2006).

181. *See supra* note 179 and accompanying text.

and that it will not defend the Federal DOMA.<sup>182</sup> Indeed, federal courts have held that the federal DOMA violates “equal protection rights afforded under the Fifth Amendment of the United States Constitution, either under heightened scrutiny or under rational basis review.”<sup>183</sup>

In any event, federal courts are not considered in the Federal DOMA.<sup>184</sup> The Act grants only “[s]tate[s], territor[ies], or possession[s] of the United States, or Indian tribe[s]” the right not to recognize marriage-like unions of people of the same sex.<sup>185</sup> Therefore, the second section of the Federal DOMA, under which such legal bodies “shall [not] be required to give effect to” a same-sex marriage, does not apply to the federal courts.<sup>186</sup> Unless a federal court applies a state law that invalidates the marriage, the court should recognize same-sex marriages for the purpose of determining the availability of the marital evidentiary privileges.<sup>187</sup>

Although the privileges typically are available only to “spouses,” and the courts favor strict construction, the courts have stressed that marriage is a matter of state law.<sup>188</sup> Where the state law provides same-sex couples with equal rights to married couples, the rights incidental to same-sex unions should also be a matter of state law. Because federal courts must recognize marriages that are granted under state laws, the courts also should recognize the same-sex relationships that state laws treat as marriages by imbuing them with equal rights. Therefore, the federal evidentiary privileges should be available to same-sex couples in civil unions or domestic partnerships that afford the couples equivalent rights to marriage.

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182. Press Release, U.S. Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

183. *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011); *In re Levenson (Levenson II)*, 587 F.3d 925, 931–33 (9th Cir. 2009); *Dragovich v. United States Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1191 (N.D. Cal. 2011); *Gill*, 699 F. Supp. 2d at 397.

184. 28 U.S.C. § 1738C (2006).

185. *Id.*

186. *Id.*

187. *See supra* notes 181–82 and accompanying text.

188. *United States v. White*, 545 F.2d 1129, 1130 (8th Cir. 1976).

VI. CHALLENGING EVIDENTIARY RULES WITH AN EQUAL  
PROTECTION ARGUMENT WHEN MARITAL PRIVILEGES ARE NOT  
AVAILABLE

If a trial court does not find that a same-sex spouse or partner is a “spouse” under the applicable rules of evidentiary privilege and the testimony materially affects the outcome of the case, the same-sex spouse or partner should make an equal protection argument on appeal.<sup>189</sup> The structure of the appellate argument would depend on the applicable statutory language.<sup>190</sup> If an evidentiary privilege distinguishes between “spouse” and “partner,” the court should apply a rational basis test and uphold the constitutionality of the privilege only if the distinction bears a rational relationship to a legitimate government purpose.<sup>191</sup> If the evidentiary privilege distinguishes between “spouse” and “same-sex spouse,” the court should adopt one of two approaches: apply strict scrutiny and uphold the constitutionality of the privilege only if the distinction serves a compelling government interest and is narrowly tailored to that interest, or apply heightened scrutiny and uphold the privilege only if the classification serves an important government objective and the classification is substantially related to achieving that objective.<sup>192</sup> The likelihood of success of an equal protection argument therefore will

189. See *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 478 (N.Y. App. Div. 2005) (where plaintiff made equal protection claim after not being found a “spouse”).

190. See *infra* notes 203-05 and accompanying text.

191. See *Romer v. Evans*, 517 U.S. 620, 631–33 (1996) (applying rational basis test to Equal Protection issue concerning homosexuals). Same-sex partners could argue that strict scrutiny should apply because the issue concerns the implied fundamental right of marriage. *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978). As to same-sex partners whom the laws distinguish from spouses, however, the real issue is not the right to marriage, but rather the fact that the partners simply do not have a marriage. The distinction between same-sex partners and opposite-sex spouses is a classification of homosexuals or others who choose to couple with members of their own gender; neither classification rises to the level of strict or even heightened scrutiny. *Romer*, 517 U.S. at 631. Alternatively, same-sex partners could argue that heightened scrutiny should apply because the issue concerns the gender of the same-sex partners. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994). This argument is unlikely to succeed because the classification of “partners” still does not concern their gender.

192. Same-sex spouses also could argue that strict scrutiny should apply because the issue concerns the implied fundamental right of marriage. *Zablocki*, 434 U.S. at 386–87. The argument might succeed as to same-sex spouses because their right to marry involves recognition of the marriage and its privileges. Not all matters concerning marriage merit strict scrutiny. *Id.* “To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” *Id.* Same-sex spouses also could argue, with a greater likelihood of success than same-sex partners, that heightened scrutiny should apply because the issue concerns the gender of the same-sex spouses. *J.E.B.*, 511 U.S. at 135. *Cf. In re Kandu*, 315 B.R. 123, 143–44 (Bankr. W.D. Wash. 2004) (applying rational basis test to constitutional analysis of DOMA).

depend on whether the state has a DOMA or other public policy and whether the same-sex couple is married or in a partnership.<sup>193</sup> Similar arguments apply under a rational basis test and under strict and heightened scrutiny.<sup>194</sup>

Where a state does not recognize any same-sex unions and has a DOMA stating its public policy against recognition of same-sex marriage, to the extent that DOMAs have withstood constitutional challenges, the state's limitation of the marital privileges to opposite-sex couples is likely to withstand a rational basis test.<sup>195</sup> The purpose of making an evidentiary privilege only available to opposite-sex couples is to limit the incidental benefits of marriage to opposite-sex spouses.<sup>196</sup> This is consistent with the legitimate government purpose of the DOMAs: to limit marriage to opposite-sex spouses.<sup>197</sup> There is a rational relation between that purpose and the distinction between spouses and partners because the distinction preserves the DOMA's protection of marriage; marital rights likely will be granted only to those who are party to an opposite-sex marriage.<sup>198</sup>

Even if the court applies heightened or strict scrutiny, the classification still may be valid if the court deems that limiting marriages to opposite-sex spouses is an important or compelling government interest.<sup>199</sup> Under either of the higher-level scrutiny tests, the appellate court may conclude that the distinction between "spouse" and "same-sex spouse" is substantially related and narrowly tailored to the government's interest; it excludes same-sex spouses, and only same-sex spouses, from a privilege that is only available to opposite-sex spouses.<sup>200</sup>

Where the state does not have a DOMA, a same-sex spouse or partner still will have to prove a lack of a legitimate government purpose behind an evidentiary privilege that distinguishes between partners and spouses, or perhaps, the lack of an important or compelling government interest behind an evidentiary privilege that

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193. See *infra* text accompanying notes 195–223.

194. *Id.*

195. See *generally Kandu*, 315 B.R. at 148 (federal DOMA not unconstitutional under rational basis test).

196. See *supra* note 55.

197. See *supra* note 55 and accompanying text.

198. U.S.C. § 7 (2006).

199. See *Conaway v. Deane*, 932 A.2d 571, 666 (Md. 2007) (citing Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 428 (1997) for an example of a state law which required an application of strict scrutiny to assess the governmental classification based solely on sex.).

200. 1 U.S.C. § 7 (2006).

distinguishes between spouses and same-sex spouses.<sup>201</sup> The proof will be easiest in states that offer same-sex unions or partnerships because those states' governments offer same-sex partners in legal unions the same rights as spouses.<sup>202</sup> New Jersey, for example, could not constitutionally limit its evidentiary privileges to different-sex spouses.<sup>203</sup> Indeed, its civil union law explicitly states that the evidentiary privileges apply to same-sex partners in legal unions.<sup>204</sup> Even California, which has a state DOMA, would have to construe its evidentiary privileges to include same-sex spouses and partners from other states because it could not rationally prevent a same-sex spouse or partner from asserting a privilege when such privileges are available to same-sex partners within the state.<sup>205</sup> Same-sex couples in jurisdictions that grant same-sex marriages similarly could prove the lack of a rational basis for distinguishing spouses from partners because those states allow same-sex marriages, and legal partnerships provide the very same privileges.<sup>206</sup>

Without a compelling or even legitimate government purpose, it is not necessary to determine if a privilege law distinguishing between spouses and same-sex spouses is narrowly tailored or rationally related to a government interest, the law already fails to pass constitutional muster.<sup>207</sup> Thus, applying either the rational basis test or strict scrutiny in states offering same-sex unions, same-sex spouses and partners in legal unions should be able to assert spousal privileges.<sup>208</sup>

Similar equal protection analyses would apply in New Mexico, where the legislature has not enacted a DOMA or recognized

201. *See supra* notes 191–92 and accompanying text.

202. *See supra* notes 52, 54 and accompanying text.

203. *See Henefeld v. Twp. of Montclair*, 22 N.J. Tax 166, 183–84 (2005) (even though Canadian marriage not recognized as marriage, privileges available to couples in civil union allowed).

204. N.J. STAT. ANN. § 37:1-28 (West 2009).

205. CAL. FAM. CODE § 297.5(a) (West 2004); CAL. EVID. CODE § 970 (2007) (anti-marital facts); *id.* § 980 (confidential communications). California presents a unique circumstance because the state makes domestic partnerships available not only to same-sex couples but also to opposite-sex couples with one person over the age of 62. *Compare* CAL. FAM. CODE § 297(b)(5)(B) (West 2004) (domestic partners may be of opposite-sex under certain conditions) *with* CONN. GEN. STAT. § 46b-38bb(2) (2006) (civil union available to same-sex couples only); N.J. STAT. ANN. § 37:1-29 (West 2007) (same); VT. STAT. ANN. tit. 15, § 1202(2) (2002) (same). Therefore, preventing same-sex couples from asserting the marital privileges does not preserve traditional marriages because the privileges are available to unmarried, opposite-sex couples in domestic partnerships.

206. *See infra* notes 201-05, 208 and accompanying text.

207. *See supra* notes 184–87 and accompanying text.

208. *See supra* notes 184-87 and accompanying text.



marriage-like unions for same-sex couples explicitly.<sup>209</sup> The difference is that while there is less proof that the state has a clear policy against same-sex unions than there is in states with a DOMA,<sup>210</sup> there is also less proof that the state has no such policy than there is in states where marriage-like unions are expressly permitted.<sup>211</sup> Notably, allowing a same-sex spouse to assert a privilege would not countermand the narrow construction of the evidentiary privileges.<sup>212</sup> But in New Mexico, the evidentiary privilege refers to “husband” and “wife,” so same-sex spouses may not qualify.<sup>213</sup> If a marital privilege uses “spouse” rather than “husband” or “wife”, same-sex couples fit the language of the privilege without need for interpretation, and it is therefore more likely that the couple can prove that the government lacks a compelling or even legitimate reason for denying the couple’s right to assert the privilege.

In an equal protection challenge to a marital evidentiary privilege, same-sex spouses have a greater likelihood of success than same-sex partners, not only because the privilege must withstand strict scrutiny, but also because they are “spouses.”<sup>214</sup> For example, in *Langan v. St. Vincent’s Hosp. of N.Y.*, which was decided before New York legalized same-sex marriage, a plaintiff who entered into a civil union in Vermont, where a civil union “is sanctioned and affords all benefits and obligations of marriage under the laws of Vermont,” asked a New York trial court to recognize him as a spouse under New York’s wrongful death statute.<sup>215</sup> The intermediate appellate court held that the plaintiff did not qualify as a spouse under the statute,<sup>216</sup> but it noted that the holding may have been different if the plaintiff had

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209. See *infra* Table 1; N.M. STAT. ANN. § 38-6-6 (2009).

210. See *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (noting, prior to New York’s recognition of same-sex marriages, that New York did not have a DOMA and concluding that, until the state legislature “decide[s] to prohibit the recognition of same- sex marriages solemnized abroad[,] . . . such marriages are entitled to recognition in New York”).

211. See *supra* Parts II.A & C, Part III.B.1.

212. See *supra* Part II.A. (regarding narrow construction of evidentiary privileges).

213. N.M. STAT. ANN. § 38-6-6(A) (2007) (“No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.”).

214. See *infra* text accompanying notes 215–23.

215. 765 N.Y.S.2d 411, 412 (N.Y. Sup. Ct. 2003).

216. *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005).

married in Massachusetts such that he was a spouse, albeit a same-sex spouse.<sup>217</sup>

*Langan* illustrates how a court might address the availability of the evidentiary privileges to someone who is a partner, rather than a spouse, in states without DOMAs or same-sex unions.<sup>218</sup> The majority held that a wrongful death statute's exclusion of same-sex partners was constitutional under a rational basis test,<sup>219</sup> while the dissent reached the opposite conclusion using the same test.<sup>220</sup> The court held that the exclusion had a rational relationship to a legitimate government purpose because "it has already been established that confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the equal protection clause of either the Federal or State constitutions."<sup>221</sup>

The dissent considered two United States Supreme Court cases holding that no rational relationship existed "between any governmental purpose promoted by a wrongful death law and a classification of wrongful death plaintiffs or victims according to their legitimacy."<sup>222</sup> Applying the United States Supreme Court's analyses of wrongful death statutes, the dissent held that the classification of wrongful death plaintiffs according to their sexual orientation bore no rational relationship to New York's purpose of "fostering and promoting traditional marriage."<sup>223</sup> That purpose probably would support excluding partners from the protections of the evidentiary privileges, because the privileges protect marital relationships, and protecting same-sex marriages contravenes that purpose.<sup>224</sup> Thus, where a same-sex couple cannot show that the government has no purpose, even absent a DOMA, the privileges are likely to withstand a constitutional challenge, whereas the privileges are likely to be held unconstitutional where a state lacks such a purpose.<sup>225</sup>

217. *Id.* at 479. The plaintiff's partner died before same-sex marriage became possible in Massachusetts.

218. *See infra* text accompanying notes 219-223.

219. *Langan*, 802 N.Y.S.2d at 478.

220. *Id.* at 480 (Fisher, J., dissenting).

221. *Id.* at 478 (citing *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), for the proposition that "the denial of marital status to same-sex couples did not violate the Fourteenth Amendment of the United States Constitution" and noting that later United States Supreme Court cases did not overrule that holding).

222. *Id.* at 489-90 (Fisher, J., dissenting) (citing *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968)).

223. *Id.* at 490.

224. *See supra* notes 1-3 and accompanying text.

225. *See generally supra* Part I.

## VII. CONCLUSION

Courts apply a two-tiered analysis to see whether a witness or party may assert a spousal privilege.<sup>226</sup> They consider the availability of the privilege in the forum and whether the person seeking it may assert the privilege.<sup>227</sup> It is crucial to determine whether the laws of the person's domiciliary state classify the person as a spouse or as a person with the rights of a spouse.<sup>228</sup> States have recognized marriages that would not otherwise be valid in their states, such as common-law, and historically, interracial marriages,<sup>229</sup> and states can recognize the validity of same-sex marriages.<sup>230</sup>

Same-sex spouses have strong arguments in favor of asserting spousal privileges in federal courts and in state courts when the spouses are domiciled in states that recognize same-sex marriages.<sup>231</sup> Same-sex couples in legal unions and partnerships should be able to assert the privileges to the same extent as opposite-sex spouses.<sup>232</sup> Applying the rational basis test in states offering same-sex unions and states without DOMAs, same-sex spouses and partners in legal unions should be able to assert spousal privileges or have the privileges struck down as unconstitutional.<sup>233</sup> The limited availability of the privileges in most forums should not limit the availability of the privileges where public policy supports their availability to same-sex spouses and partners.<sup>234</sup> Although same-sex spouses and partners are not treated uniformly across jurisdictions, in the circumstances discussed above, they should be able to avail themselves of the evidentiary privileges enjoyed by different-sex spouses.

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226. See discussion *supra* Part III.

227. See discussion *supra* Part III.

228. See discussion *supra* Part III.B.

229. See discussion *supra* Part III.B.1.

230. See discussion *supra* Part III.

231. See discussion *supra* Parts III.B.2, V.

232. See discussion *supra* Part IV.

233. See discussion *supra* Part VI.

234. See discussion *supra* Part III.B.2, IV.

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Alabama	N	N		ALA. CONST. art. I, § 36.03 (banning recognition of same-sex marriage and similar relationships)	ALA. R. EVID. 504
Alaska	N	N		ALASKA CONST. art. 1, § 25; ALASKA STAT. § 25.05.013 (2009) (banning recognition of same-sex marriage and similar relationships)	ALASKA R. EVID. 505
Arizona	N	N		ARIZ. CONST. art. XXX § 1 (banning recognition of same-sex marriage and similar relationships); ARIZ. REV. STAT. ANN. §§ 25-101, 112 (2010)	ARIZ. REV. STAT. ANN. §§ 12-2231 to 2232 (2010)
Arkansas	N	N		ARK. CONST. amend. 83 (banning recognition of same-sex marriage and similar relationships); ARK. CODE ANN. § 9-11-109 (2010)	ARK. R. EVID. 504
California	DP	N	CAL. FAM. CODE § 297.5 (West 2011)	CAL. CONST. art. 1, § 7.5 (held unconstitutional in <i>Perry v.</i> )	CAL. EVID. CODE §§ 970-73 (2010)

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Colorado	N	N		<i>Schwarzenegger</i> , 704 F. Supp. 2d 921 (N.D. Cal. 2010), <i>stay denied</i> , 702 F. Supp. 2d 1132, <i>stay granted</i> , 2010 WL 3212786, <i>question certified</i> , 628 F.3d 1191, <i>certified question accepted</i>	COLO. REV. STAT. § 13-90-107(1)(a) (2010)
Connecticut	M	Y	CONN. GEN. STAT. § 46b-20a; An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts 13 (Reg. Sess.)	COLO. CONST. art. II, § 31; COLO. REV. STAT. § 14-2-104 (2010)	CONN. GEN. STAT. ANN. § 54-84a (2011)
Delaware	CU	U	DEL. CODE ANN. tit. 13 §§ 201-217 (effective 1/1/2012) (establishing	DEL. CODE ANN. tit. 13 § 101 (2010)	DEL. R. EVID. 504

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
District of Columbia	M, DP		civil unions and granting members of civil unions the same rights as same-sex couples) D.C. CODE § 46-401 (Supp. 2010) (marriage); D.C. CODE § 32-701 (2009) (domestic partnership)		D.C. CODE § 14-306 (2011)
Florida	N	N		FLA. CONST. art. I § 27 (banning recognition of same-sex marriage and similar relationships); FLA. STAT. §§ 741.04, 212 (2010)	FLA. STAT. § 90.504 (2010)
Georgia	N	N		GA. CONST. art. I, § 4, ¶ 1 (banning recognition of same-sex marriage and similar relationships); GA. CODE ANN. § 19-3-3.1 (2010)	GA. CODE ANN. §§ 24-9-21, -23 (2010)
Hawaii	CU (effective 1/1/2012)	N	S. 232, 26th Legis., Reg. Sess. (Haw. 2011) (enacted) (effective	HAW. CONST. art. I, § 23 (giving legislature the power to reserve marriage to	HAW. R. EVID. 505

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Idaho	N	N	1/1/2012) (allowing for civil unions and giving participants the same rights as married couples)	opposite-sex couples); HAW. REV. STAT. § 572-1 (2009) (reserving marriage to opposite-sex couples)	IDAHO R. EVID. 504
Illinois	CU	Y (as civil unions)	Illinois Religious Freedom Protection and Civil Union Act, 2010 Ill. Legis. Serv. 96-1513 (West) (effective 6/1/2011) (allowing civil unions between same-sex partners; granting participants the same protections given to married couples; and recognizing same-sex marriages from other jurisdictions as civil	750 ILL. COMP. STAT. 5/212 (2005)	735 ILL. COMP. STAT. 5/8-801 (2010)

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Indiana	N	N	unions)	IND. CODE § 31-11-1-1 (2010)	IND. CODE § 34-46-3-1(4) (2010)
Iowa	M	Y	<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009) (holding that a statute limiting marriage to opposite-sex couples was unconstitutional)		IOWA CODE § 622.9 (2009)
Kansas	N	N		KAN. CONST. art. XV, § 16 (banning recognition of same-sex marriage and similar relationships)	KAN. STAT. ANN. § 60-428 (2011)
Kentucky	N	N		KY. CONST. § 233A (banning recognition of same-sex marriage and similar relationships); KY. REV. STAT. ANN. §§ 402.005, .020, .040, .045 (2009)	KY. R. EVID. 504
Louisiana	N	N		LA. CONST. art. XII, § 15 (banning recognition of same-sex marriage and similar	LA. CODE EVID. ANN. arts. 504, 505 (2009)



STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Maine	DP	N	ME. REV. STAT. tit. 22, § 2710 (2009) (providing for limited domestic partnerships without clearly granting marital privileges to partners)	relationships); LA. CIV. CODE ANN. arts. 89, 96, 3520 (2009) ME. REV. STAT. tit. 19-A, §§ 650, 701 (2009)	ME. R. EVID. 504
Maryland	DP	N	MD. CODE ANN., HEALTH-GEN. § 6-101 (providing for limited domestic partnerships but not granting the marital privileges to domestic partners)	None, but MD. CODE ANN., FAM. LAW § 2-201 (West 2010) prohibits same-sex marriages	MD. CODE ANN., CTS. & JUD. PROC. §§ 9-105 to 106 (West 2010)
Massachusetts	M	Y	<i>Goodridge v. Dep't of Pub. Health</i> , 798 N.E.2d, 941 (Mass. 2003)		MASS. GEN. LAWS ch. 233 § 20 (2009);
Michigan	N	N		MICH. CONST. art. I, § 25 (banning recognition of same-sex marriage and similar	MICH. COMP. LAWS § 600.2162 (2010)

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Minnesota	N	N		relationships); MICH. COMP. LAWS §§ 551.1, 271, .272 (2010)	
Mississippi	N	N		MINN. STAT. §§ 517.01, .03, 518.01 (2010) MISS. CONST. art. XIV, § 263A; MISS. CODE ANN. § 93-1-1 (2010)	MINN. STAT. § 595.02 (2010) MISS. R. EVID. 504
Missouri	N	N		MO. CONST. art. I, § 33; MO. REV. STAT. § 451.022 (2009)	MO. REV. STAT. § 546.260 (2009)
Montana	N	N		MONT. CONST. art. XIII, § 7; MONT. CODE ANN. §§ 40-1-103, -401 (2009)	MONT. CODE ANN. § 26-1-802 (2009)
Nebraska	N	N		NEB. CONST. art. I, § 29 (banning recognition of same-sex marriage and similar relationships), <i>held unconstitutional</i> by Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980, 984 (D. Neb. May 12, 2005)	NEB. REV. STAT. § 27-505 (2009)
Nevada	DP	N	NEV. REV. STAT. §§	NEV. CONST. art. I, § 21	NEV. REV. STAT. § 49:295

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
			122A:010--510 (2009) (providing for domestic partnerships and granting partners the same rights as married couples)		(2010)
New Hampshire	M	Y	N.H. REV. STAT. ANN. § 457:1-a (2009)		N.H. R. EVID. 504
New Jersey	CU	Y (as civil union)	N.J. STAT. ANN. §§ 37:1-28, -34 (West 2009) (providing for and recognizing civil unions; granting the marital privilege to members of civil unions)		N.J. STAT. ANN. § 2A:84A-22 (2009)
New Mexico			N/A	N/A	N.M. STAT. ANN. § 38-6-6 (2009)
New York	Y	Y	Marriage Equality Act, 2011 N.Y. Laws 95	N/A	N.Y. C.P.L.R. 4502 (2007)
North Carolina	N	N		N.C. GEN. STAT. §§ 51-1, -1.2 (2009)	N.C. GEN. STAT. §§ 8-56 to -57 (2009)
North Dakota	N	N		N.D. CONST. art. XI, § 28	N.D. R. EVID. 504

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Ohio	N	N		(banning recognition of same-sex marriage and similar relationships); N.D. CENT. CODE §§ 14-03-01, -08 (2009) OHIO CONST. art. XV, § 11 (banning recognition of same-sex marriage and similar relationships); OHIO REV. CODE ANN. § 3101.01 (West 2010)	OHIO REV. CODE ANN. §§ 2317.02, 2945.42 (West 2010)
Oklahoma	N	N		OKLA. CONST. art. II, § 35; OKLA. STAT. tit. 43, § 3.1 (2010) (prohibiting the recognition of same-sex marriages performed in other states)	OKLA. STAT. tit. 12, § 2504 (2010)
Oregon	DP	DP	OR. REV. STAT. § 106.310 (2009) (providing for domestic partnerships); § 106.340 (giving domestic partners the same rights	OR. CONST. art. XV, § 5a	OR. REV. STAT. § 40.255 (2009)

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Pennsylvania	N	N	as married couples)	23 PA. CONS. STAT. § 1704 (2010)	42 PA. CONS. STAT. §§ 5913-5915, 5923-5926 (2010)
Rhode Island	DP	N	R.I. GEN. LAWS § 8-3-19 (2009) (domestic partnerships with limited rights, not including marital privileges)		R.I. GEN. LAWS § 9-17-13 (2010)
South Carolina	N	N		S.C. CONST. art. XVII, § 15 (banning recognition of same-sex marriage and similar relationships); S.C. CODE ANN. §§ 20-1-10, -15 (2009)	S.C. CODE ANN. § 19-11-30 (2010)
South Dakota	N	N		S.D. CONST. art. XXI, § 9 (banning recognition of same-sex marriage and similar relationships); S.D. CODIFIED LAWS §§ 25-1-1, -38 (2010)	S.D. CODIFIED LAWS §§ 19-13-12 to 19-13-15 (2010)
Tennessee	N	N		TENN. CONST. art. XI, § 18; TENN. CODE ANN. § 36-3-113 (2010)	TENN. CODE ANN. §24-1-201 (2010)
Texas	N	N		TEX. CONST. art. I, § 32	TEX. R. EVID. 504

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
Utah	N	N		(banning recognition of same-sex marriage and similar relationships); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (2009) UTAH CONST. art. I, § 29 (banning recognition of same-sex marriage and similar relationships); UTAH CODE ANN. §§ 30-1-2, -4.1 (West 2010)	UTAH R. EVID. 502
Vermont	M	Y	Vt. STAT. ANN. tit. 15, § 8 (2009)		Vt. STAT. ANN. tit. 12, § 1605 (2009)
Virginia	N	N		VA. CONST. art. I, § 15-A (banning recognition of same-sex marriage and similar relationships); VA. CODE ANN. §§ 20-45.2, .3 (2010)	VA. CODE ANN. § 8.01-98 (2010)
Washington	DP	N	WASH REV. CODE §§ 26.60.010-.901 (2009) (providing for domestic partnerships and giving	WASH. REV. CODE §§ 26.04.010, .020 (2009)	WASH. REV. CODE ANN. § 5.60.060 (2011)

STATE	SAME-SEX MARRIAGE (M), CIVIL UNION (CU), DOMESTIC PARTNERSHIP (DP), or NONE (N)?	COMITY for SAME-SEX MARRIAGE	LEGAL AUTHORITY FOR RECOGNIZING SAME-SEX RELATIONSHIPS	STATE DOMA	MARITAL PRIVILEGE(S)
West Virginia	N	N	partners the same rights as married couples)	W. VA. CODE §§ 48-2-104, -603 (2009)	W. VA. CODE §§ 57-3-4, 61-8D-8 (2010)
Wisconsin	DP	N	Wis. STAT. § 770.05 (providing for domestic partnerships "not substantially similar to . . . marriage"); Wis. STAT. § 905.05 (granting the confidential communications privilege to domestic partners)	Wis. CONST. art. XIII, § 13 (banning recognition of same-sex marriage and similar relationships); Wis. STAT. §§ 765.001, .01 (2010)	Wis. STAT. ANN. § 905.05 (West 2011)
Wyoming	N	Maybe	WYO. STAT. ANN. § 20-1-111 (2010) ("All marriage contracts which are valid by the laws of the country in which contracted are valid in this state.")	None, but WYO. STAT. ANN. § 20-1-101 (2010) prohibits same-sex marriages	WY. STAT. ANN. § 1-12-101 (2010)

