

Out-of-State Civil Unions in Iowa After *Varnum v. Brien*: Why the State of Iowa Should Recognize Civil Unions as Marriages

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ABSTRACT: One of the issues that arose after the Iowa Supreme Court's decision in Varnum v. Brien, which held that Iowa's Constitution would not permit Iowa to limit the institution of marriage to opposite-sex couples, regards how the state should treat different types of same-sex unions from other states. Some of the most interesting and important concerns center around the status Iowa will give to out-of-state civil unions and domestic partnerships, relationships that receive legal recognition but are not true marriages in their states of origin. Since federal law (the Full Faith and Credit Clause and the Federal Defense of Marriage Act) and choice-of-law principles allow Iowa to recognize out-of-state, same-sex relationships, Iowa courts and legislators must now look to statutory law, common law, and public policy to determine how Iowa should recognize out-of-state, same-sex unions. Statutory and common law ultimately leave the issue to public policy, which permits Iowa to either recognize civil unions as marriages or to require couples with civil unions to obtain a marriage before the state will recognize their status as "married." Iowa should treat civil unions as marriages because of its statutorily implied public-policy arguments and because of the Iowa Supreme Court's arguments in Varnum.

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I. INTRODUCTION

When the Iowa Supreme Court issued its decision in *Varnum v. Brien* invalidating an Iowa statute that restricted marriage to opposite-sex couples,¹ the country reacted with surprise.² For some, the fact that “all-American Iowa” was suddenly a haven for same-sex couples seemed to indicate a genuine shift in the national sentiment toward equal opportunities for same-sex couples.³ In the year since the decision, at least 2020 same-sex couples have married in Iowa.⁴ No matter where one falls on the political spectrum, however, the decision created peripheral issues regarding how to incorporate same-sex couples into a marital system that previously served only opposite-sex couples.⁵

Some scholars have expressed concern about how states like Iowa will treat out-of-state, same-sex marriages, civil unions, and domestic partnerships.⁶ The difficulty in deciding how to recognize same-sex marriage-like institutions from other states is a product of the number of different types of unions.⁷ Debate regarding where the public opinion falls

1. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

2. Monica Davey, *Gay Couples in Iowa Win Right To Wed*, N.Y. TIMES, Apr. 4, 2009, at A1; Amy Lorentzen, *Gay Marriage Wins in All-American Iowa*, SEATTLE TIMES, Apr. 4, 2009, 2009 WLNR 6470617 (discussing the fact that when coastal states legalized same-sex marriage, the decision “could be perceived as extremism on the coasts and not related to core American values,” but that Iowa’s adoption is “an example of broad acceptance” (internal quotation marks omitted)).

3. One person said, “There’s something about that, about it happening in the heartland, that has got to accelerate this process for the whole country.” Davey, *supra* note 2 (internal quotation marks omitted).

4. Monica Davey, *In Iowa, Other Issues Crowd Out Gay Marriage*, N.Y. TIMES, June 8, 2010, at A16.

5. The Iowa Legislature had previously restricted marriage to opposite-sex couples. IOWA CODE § 595.2 (2009), *invalidated in part by Varnum*, 763 N.W.2d at 906.

6. See, e.g., William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 915, 916–17 (2009). Duncan highlights public concern about whether other states would have to honor Hawaii same-sex marriages—this never became an issue, though, because a subsequent Hawaii constitutional amendment empowered the Legislature to restrict marriage to opposite-sex couples); see also Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L.Q. 333, 346–47 (2008) (pointing to the evolution of sentiments regarding same-sex marriage, which went from being unimaginable to becoming the catalyst for a high number of statutes and amendments—both state and federal—that legislatures designed to restrict marriage to opposite-sex relationships); Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC’Y 145, 184–91 (2009) (discussing different possible interpretations of the Full Faith and Credit Clause in relation to the issue of same-sex marriage).

7. David Cray, *For Same-Sex Couples, a Patchwork of Marriage Laws*, DAILY REC. (Morristown, N.J.), May 10, 2010, 2010 WLNR 9730841 (“[G]ay and lesbian couples confront an unprecedented and often confusing patchwork of marriage laws.”).

on the issue of same-sex unions only adds to the complexity.⁸ Every week, politicians at the national and state level are considering adopting same-sex marriage, civil unions, or civil-union-like institutions.⁹ As a result of rapid change across the nation in the area of same-sex-marriage law, Iowa courts might soon have to decide what the U.S. Constitution requires of out-of-state recognition of any marriage, what the Federal Defense of Marriage Act (“DOMA”) requires,¹⁰ and, now, what Iowa law requires after *Varnum*.

The successive parts contextualize the issue of how Iowa should treat out-of-state unions by discussing federal and state law, analyzing *Varnum*, offering the options that other jurisdictions provide, and then suggesting how either Iowa courts or the Iowa Legislature should respond. Part II analyzes the background law to show that the Full Faith and Credit Clause does not require Iowa to recognize policy decisions of other states. Part II also argues that, while DOMA says states do not have to honor out-of-state, same-sex unions, Iowa law—that is, Iowa public policy—is the ultimate arbiter on this issue.

Parts III and IV focus on the more specific issues that Iowa will have to consider in terms of public policy. Part III uses the *Varnum* decision to

8. While many people consider this a debate between opponents and proponents of same-sex marriage, there is a considerable amount of nuance in public opinion on the gay-rights movement. Ashley Surdin, *Benefits for Same-Sex Partners Are Expanding*, WASH. POST, Nov. 27, 2009, § 1, at A4 (“About 57 percent of Americans oppose granting same-sex marriages legal status, compared with 40 percent who support it, according to a May Gallup poll. But 67 percent of Americans say gay and lesbian domestic partners should have access to health insurance and other benefits, the same poll found.”). After a civil-union bill passed in the Hawaii Senate, one Hawaiian man said, “I’m very happy. It’s not marriage, but it gives us an opportunity to be recognized as a couple.” Mark Niesse, *Hawaii Senate Passes Civil Unions Bill*, ABCNEWS.COM, Jan. 22, 2010, <http://abcnews.go.com/US/wireStory?id=9639184>. In a similar vein, some advocates of same-sex rights note that “civil unions—though not marriage quite yet—are within reach.” Joseph Erbenraut, *LGBT Activists Renew Civil Union Campaign*, CHICAGOIST (Jan. 22, 2010, 1:30 PM), http://chicagoist.com/2010/01/22/lgbt_activists_renew_civil_union_ca.php; see also Jennifer Agiesta, *Post-ABC Poll: Views on Gay Marriage Steady, More Back Civil Unions*, WASH. POST (Feb. 12, 2010, 6:00 AM), http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc_poll_views_on_gay_mar.html (presenting poll results that say two-thirds of polled persons support civil unions for same-sex couples).

9. As the issue becomes increasingly salient, many politicians are looking at civil unions or domestic partnerships as a “middle ground” that grants the rights of marriage without actually providing a marriage. See *Getting Hitched in Iowa*, CHI. TRIB., Apr. 29, 2010, at 18 (citing a Pew poll that found that a majority of Americans favor granting equal marriage rights to same-sex couples); Editorial, *Domestic Partner Registry Strengthens Families*, WIS. ST. J., May 11, 2010, 2010 WLNR 9864248 (“Wisconsin voters banned same-sex marriage with a constitutional amendment in 2006. Though public opinion is changing fast in favor of gay marriage and civil unions, the 2006 amendment still stands.”); Nicholas C. Stern, *Poll: Narrow Majority Supports Gay Marriage*, FREDERICK NEWS-POST, May 14, 2010, 2010 WLNR 10029316 (discussing a democratic delegate in Maryland who supports civil unions but not marriages).

10. Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 938, 950–51 (2006) (discussing why DOMA does not bar states, like Iowa, from recognizing valid marriages or civil unions from other states).

illustrate both what Iowa's equal protection clause requires and what constitutional public-policy concerns are at stake when a state is determining how it should recognize out-of-state civil unions and domestic partnerships. Part IV helps contextualize the dilemma, showing that out-of-state recognition of same-sex unions is an issue partly because of the variety of rights and obligations that exist in different states' definitions of same-sex unions.

Parts V and VI focus on this Note's ultimate conclusion. Noting that federal law does not clearly answer the issue of how Iowa should recognize civil unions after *Varnum*, Part V discusses what other states have decided when addressing how to recognize out-of-state, same-sex unions, and then discusses the two options available to Iowa—treat civil unions as marriages or require couples with civil unions to obtain marriages. Part VI argues that Iowa should recognize out-of-state civil unions as marriages because this option most effectively reconciles the philosophies of pre-*Varnum* case law with the realities of modern, unprecedented issues regarding recognizing marriages from different states.

II. BACKGROUND LAW

This Part provides the foundation for understanding why Iowa is basically free to decide how to recognize out-of-state, same-sex unions based on its own equal-protection and public-policy principles, given that federal law, namely the Full Faith and Credit Clause and DOMA, does not purport to limit Iowa's ability to recognize these unions. Additionally, this Part discusses how Iowa recognized out-of-state marriages pre-*Varnum*.

A. THE FULL FAITH AND CREDIT CLAUSE

The U.S. Constitution requires that states give "Full Faith and Credit" to "the public Acts, Records, and judicial Proceedings of every other State."¹¹ It goes on to give Congress power through the "Effects Clause" to define the manner in which states give other states' final judgments and policy decisions full faith and credit.¹²

A constitutional distinction exists between final judgments and public policy. While the Supreme Court construes the Full Faith and Credit Clause to require a state to strictly adhere to a sister state's final judgments, the Court distinguishes state public-policy initiatives and legislative acts from final judgments by providing much more leniency for the former.¹³ A final

11. U.S. CONST. art. IV, § 1.

12. *Id.*

13. See *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998) (stating that to hold otherwise might put a state in the position of having to honor another state's legislation even though the state was capable of legislating on the issue by itself). *But see* McLaughlin, *supra* note 6, at 185–86 (arguing this is not the only interpretation available for the Full Faith and Credit Clause).

judgment occurs when a court decision affects only the parties to a lawsuit; state public-policy initiatives and laws are the statutory enactments that govern citizens outside of litigation.¹⁴

The final judgment–public policy distinction serves an important purpose. It preserves final judgments between individuals without compelling “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”¹⁵ The underlying idea is that while it is vital (for the unification of the several states) for courts to enforce judicial decrees between parties to an individual lawsuit, states are still sovereign and retain the ability—even under the Full Faith and Credit Clause—to decline to recognize foreign states’ statutes or public policies.¹⁶

Marriage is a legislative or policy act, subject to more leniency under state full-faith-and-credit decisions.¹⁷ If one state were free to decide the marital rights or status of all the citizens among the several states, it would incentivize each state to set the national marriage policy by being the first to legislate in the area, which would not respect the sovereignty of other individual states.¹⁸ The Framers did not want to compromise the sovereignty of states in such strict terms,¹⁹ and modern courts continue to respect that philosophy, at least as it applies to marriage.²⁰ Therefore, individual states are free to disregard the other states’ court decisions on marriage notwithstanding the dictates of the U.S. Constitution’s Full Faith and Credit Clause.

B. CHOICE-OF-LAW ISSUES IN RELATION TO FULL FAITH AND CREDIT

The Full Faith and Credit Clause is part of the broader discussion of choice-of-law issues.²¹ While a forum state will usually recognize a marriage

14. *Baker*, 522 U.S. at 232–33 (“Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. . . . For claim and issue preclusion (res judicata) purposes . . . the judgment of the rendering State gains nationwide force.” (footnote omitted) (citations omitted)).

15. *Id.* at 232 (quoting *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)) (internal quotation marks omitted).

16. *Id.*

17. Compare *In re Marriage of Reed*, 226 N.W.2d 795, 796 (Iowa 1975) (deciding to use California’s common-law-marriage law, instead of Iowa’s common-law-marriage law, because California had a greater interest than Iowa in having its laws recognized), with *Lewis v. N.Y. State Dep’t of Civil Serv.*, 872 N.Y.S.2d 578, 582 (App. Div. 2009) (refusing to recognize the marriage laws of another state where the other state’s marriage laws were “abhorrent” to New York’s public policy).

18. See *Baker*, 522 U.S. at 232–33 (noting that the entire national policy would be at stake if the Court strictly applied the Full Faith and Credit Clause to state legislation).

19. See *id.*

20. See *Lewis*, 872 N.Y.S.2d at 582.

21. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 10 (1997) (arguing that choice of law in relation to same-

from another jurisdiction if the marriage was valid in the state of its celebration, choice of law follows full-faith-and-credit analysis by giving state courts the option to decline to recognize a marriage for public-policy reasons.²² Iowa generally follows the Restatement (Second) of Conflict of Laws,²³ which says that a court will determine the validity of a marriage based on the local law of the state with the “most significant relationship to the spouses” and that only a strong public-policy exception will exempt a state from this rule.²⁴

While Iowa has not formally recognized a civil union (it would be unconstitutional to recognize civil unions as civil unions after *Varnum*²⁵), an Iowa district-court judge did recognize—pre-*Varnum*—a Vermont civil union for the purpose of providing one couple with an equitable divorce.²⁶ In an interview after his decision, Judge Neary said that Iowa courts cannot pretend civil unions do not exist: Iowans with civil unions need the opportunity to, at a minimum, “dissolve their civil union[.]” to establish unequivocally—both for their own knowledge and for that of society—that they are legally separated.²⁷ After a political uproar at Judge Neary’s decision, he issued an amended opinion saying that he had the power to dissolve a civil union without officially recognizing a marriage.²⁸ His amended opinion stated that the two female parties to the lawsuit were now

sex marriage “is a common-law conflicts rule rather than an interpretation of full faith and credit”).

22. Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married when We Return Home?*, 1994 WIS. L. REV. 1033, 1041.

23. *Id.* at 1096.

24. *Id.* at 1064 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971)).

25. A civil union provides the same benefits and obligations as marriage, and to deny a status based on sexuality would violate the Iowa Constitution’s equal protection clause. *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009).

26. *See Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 862 (Iowa 2005) (holding that state legislators did not have standing to fight the district court’s decision to dissolve the civil union).

27. *See Kathleen Burge, Iowa Judge Causes Stir in Granting Gay Divorce*, BOS. GLOBE, Dec. 13, 2003, 2003 WLNR 3467633 (“If people have disputes, and they otherwise live here, then they should have access to the judicial system.” (internal quotation marks omitted)). Even though he might not have agreed specifically with respect to civil unions, Justice Story signaled agreement regarding marriage (the only institution available at the time) when he wrote:

Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are celebrated.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 112 (Boston, Hilliard, Gray, & Co. 1834).

28. Frank Santiago, *Judge Revises His Ruling on Lesbians’ Divorce*, DES MOINES REG., Dec. 31, 2003, 2003 WLNR 17770143.

“single individuals with all the rights of an unmarried individual, including but not limited to, the right to marry.”²⁹ This was the first Iowa case to indicate that, at least in equity, the State of Iowa might not have a public-policy objection to recognizing civil unions as marriages.

Thus, both the Full Faith and Credit Clause and choice-of-law principles agree that Iowa has the freedom to decide how to treat out-of-state unions and that Iowa is amenable to pseudo-recognition of out-of-state civil unions, at least in equity. Similarly, DOMA will not affect Iowa’s decision, as the next subpart explains. We now move from constitutional issues to issues of federal statutory law.

C. *THE DEFENSE OF MARRIAGE ACT DOES NOT AFFECT ANY STATE’S DECISION TO RECOGNIZE OUT-OF-STATE, SAME-SEX MARRIAGES*

In 1996, Congress passed DOMA,³⁰ which defines “marriage” as existing between a man and a woman for federal purposes.³¹ DOMA also uses the Effects Clause, which tells Congress how to apply the Full Faith and Credit Clause,³² to say that individual states do not have to recognize same-sex marriages from other states.³³

Ultimately, DOMA leaves states to decide how they will handle full-faith-and-credit issues based on their own law and public-policy prerogatives.³⁴ While the U.S. Supreme Court has not defined the scope of Congress’s powers under the clause,³⁵ one federal court has held that DOMA is constitutional because it does not force states to do anything; DOMA only defines marriage in terms of the parties’ relationship to the federal government.³⁶ Another court similarly held that DOMA does not violate the

29. *Id.* (internal quotation marks omitted).

30. *See Rosen, supra* note 10, at 934 (outlining the history of DOMA).

31. 1 U.S.C. § 7 (2006), *invalidated by* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), and *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). In *Gill*, the court ruled that the federal definition of marriage, which only recognized opposite-sex marriages, violated “equal protection principles embodied in the Due Process Clause of the Fifth Amendment.” 699 F. Supp. 2d at 377. In *Massachusetts*, the court struck down the same section of DOMA for violating the Tenth Amendment and the Spending Clause. 698 F. Supp. 2d at 236.

32. U.S. CONST. art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

33. 28 U.S.C. § 1738C (2006).

34. *Id.*; *see also Rosen, supra* note 10, at 933 (positing that arguments about DOMA may be moot because states have always had the public-policy exception in common law, leaving them the option to pass their own individual state defense-of-marriage acts).

35. *See Rosen, supra* note 10, at 965 (“DOMA is only the fifth congressional enactment pursuant to the Effects Clause, and none of the previous four has been constitutionally challenged on Effects Clause grounds.” (citation omitted)).

36. *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1251–52 (N.D. Okla. 2006), *rev’d on other grounds*, 333 F. App’x 361 (10th Cir. 2009). This was the section of DOMA recently struck down in two decisions by the District Court of Massachusetts. *See supra* note 31.

Constitution because it reflects the principle, in full-faith-and-credit analysis, that the Framers never understood individual states to have the capacity to set national policy goals.³⁷ Scholars have somewhat more varied views but ultimately seem to agree that DOMA will have no effect on a state's ability to recognize an out-of-state marriage if that state's law requires recognition.³⁸

Because the Full Faith and Credit Clause gives Iowa discretion on issues like marriage (as a public-policy matter), and because DOMA does not restrict Iowa's ability to recognize or decline to recognize same-sex marriages, it is Iowa's law that dictates whether Iowa will recognize out-of-state, same-sex marriages and, for the purposes of this Note, civil unions. This is true based both on DOMA and on case law, which supports Iowa's right to elect to recognize any out-of-state marriage laws if there are no public-policy issues that preclude recognition.

D. PRE-VARNUM RECOGNITION OF OUT-OF-STATE MARRIAGES IN IOWA

As a result of this issue's relative novelty, few courts have had the opportunity to consider the issue of how to recognize out-of-state, same-sex unions. For that reason, it is useful to analyze Iowa law as it applies to opposite-sex couples in order to draw out principles that will also apply to same-sex couples post-*Varnum*.

The two primary sources of law on this issue are the *Iowa Code* and the principles of common-law marriage in Iowa. First, *Iowa Code* section 595.20 states that valid marriages from other states are valid in Iowa.³⁹ To illustrate,

The Department of Justice recently filed appeals in those cases. Denise Lavoie, *Feds Appeal Two Mass. Rulings Against U.S. Marriage Law*, TULSA WORLD, Nov. 13, 2010, 2010 WLNR 20540449.

37. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-04 (M.D. Fla. 2005).

38. *Duncan*, *supra* note 6, at 915-17, 926 (a proponent of DOMA); *McLaughlin*, *supra* note 6, at 152-54 (an opponent of DOMA); *Rosen*, *supra* note 10, at 934-35 (arguing, ultimately, that DOMA, right or wrong, is a nonissue here); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 46 (2005) (another opponent of DOMA). To the extent state legislatures reflect public sentiment, proponents of DOMA have generally won; forty-five jurisdictions have their own defense-of-marriage acts, and, of those, thirty jurisdictions have the provisions in their state constitutions. *McLaughlin*, *supra* note 6, at 152-54. A supporter of same-sex marriage would find solace in the fact that, despite the large number of state defense-of-marriage acts, as of winter 2010, five states permit same-sex marriage and ten states allow either civil unions or domestic partnerships. Laura Fitzpatrick, *Spotlight: Same-Sex Marriage*, TIME, Jan. 25, 2010, at 20 (noting, additionally, that Washington, D.C. has passed a law permitting same-sex marriage, but it is still subject to congressional approval).

39. The statute reads:

A marriage which is solemnized in any other state, territory, country, or any foreign jurisdiction which is valid in that state, territory, country, or other foreign jurisdiction, is valid in this state if the parties meet the requirements for validity pursuant to section 595.2, subsection 1, and if the marriage would not otherwise be declared void.

IOWA CODE § 595.20 (2009). Section 595.2 was the provision at issue in *Varnum*, so it is clear that after that case, chapter 595 requires Iowa to honor out-of-state same-sex marriages. *See*

imagine an opposite-sex couple, Sally and Bobby, who are married in a formal ceremony in Montana. As long as Sally and Bobby do not violate the public-policy goals of the *Iowa Code* (prohibitions of incest or polygamy),⁴⁰ their Montana marriage will generally be valid in Iowa.

At common law, Iowa courts determine whether or not a couple is married by analyzing the couple's intent, whether they live together, and whether the couple "holds out" to the public that they are a married couple.⁴¹ In one case, the Iowa Supreme Court decided that a couple had entered into a common-law marriage (even though courts presume against common-law marriage) because the couple intended to marry, exchanged rings, carried themselves in public as a married couple, and lived together.⁴² In a different case, a loss-of-consortium claim, the Iowa Supreme Court declined to recognize the appellant's claim to common-law marriage because, while the alleged wife showed some intent to be married, there was no evidence that she had accepted "the legal responsibilities" of married persons, which are the basis "for defining the fundamental relational rights and responsibilities of persons in organized society."⁴³ Thus, Iowa courts will recognize a common-law marriage so long as the intent and lifestyle of the couple shows, publicly, that they have an understanding that they are accepting the spectrum of legal rights and responsibilities that marriage entails.⁴⁴

Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) ("[T]he exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.").

40. IOWA CODE § 595.19(1)–(2) (declaring void marriages between persons with certain blood relation and between persons who already have a living husband or wife).

41. *In re* Marriage of Martin, 681 N.W.2d 612, 616–17 (Iowa 2004) (noting that common-law marriage has existed congruently with statutory marriage for more than a century).

42. *Estate of Fisher v. Fisher*, 176 N.W.2d 801, 805–06 (Iowa 1970).

43. *Laws v. Griep*, 332 N.W.2d 339, 340–41 (Iowa 1983).

44. *Estate of Fisher*, 176 N.W.2d at 805. The court wrote:

The elements and conditions necessary to establish the existence of a common-law marriage have been outlined by this court as: (1) intent and agreement in praesenti as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife; (2) the burden of proof is on the one asserting the claim; (3) all elements of relationship as to marriage must be shown to exist; (4) a claim of such marriage is regarded with suspicion, and will be closely scrutinized; (5) when one party is dead, the essential elements must be shown by clear, consistent and convincing evidence.

Id. The court notes that a person claiming a common-law marriage must, among the more demonstrative evidence, show she accepts all the rights and responsibilities of common-law marriage. *Griep*, 332 N.W.2d at 340–41 (highlighting the fact that chapters 597 and 598 of the *Iowa Code* demonstrate the legal responsibilities of marriage). These responsibilities relate to companionship, divorce, and child support, among other things. *See* IOWA CODE §§ 597–598 (discussing property rights and responsibilities, rights and responsibilities as to children, and right to contract for a spouse, among other provisions).

So, if Sally and Bobby did not have a formal, ceremonial marriage, but instead lived as a married couple in the common-law-marriage State of Montana,⁴⁵ their marriage might still be valid under Iowa common law. Keep in mind the possibility that, in addition to using traditional evidence to prove their common-law marriage, Sally and Bobby could use their certificate of civil union or domestic partnership as circumstantial support for their intent to accept the rights and responsibilities of marriage.⁴⁶

In summary, the Iowa statute recognizes out-of-state marriages that do not violate public-policy goals, and Iowa's common law recognizes out-of-state relationships that take the form of marriage even if the couple has not previously attained formal recognition of their marriage.

45. *In re Marriage of Swanner-Renner*, 2009 MT 186, ¶ 17, 351 Mont. 62, 209 P.3d 238, 241 (discussing the requirements of a Montana common-law marriage); *see also* MONT. CODE ANN. § 40-1-403 (2009) (noting that Montana's code provisions on marriage do not invalidate an otherwise valid common-law marriage).

46. *See In re Marriage of Martin*, 681 N.W.2d at 617-18 (discussing a variety of facts and circumstances the court can use to decide whether a common-law marriage exists); *see also infra* Part VI (arguing that, while Iowa should not treat civil unions as common-law marriages, common-law marriage serves as a useful analogue to show that a civil union is, in some sense, more reliable proof of statutory marriage than common-law marriage alone).

III. *VARNUM V. BRIEN*'S IMPORTANCE FOR ISSUES REGARDING SAME-SEX MARRIAGES IN IOWA AND IN OTHER STATES⁴⁷

In 2009, the Iowa Supreme Court invalidated an Iowa statute that recognized marriage as existing solely between a man and a woman—Iowa's own version of DOMA.⁴⁸ Twelve “responsible, caring, and productive individuals” brought suit against the Polk County Recorder who, following the state law, refused to issue marriage licenses to these six same-sex couples.⁴⁹

Well aware that same-sex marriage is a highly sensitive issue, the court's opinion introduced the concept of separation of powers before proclaiming its authority to invalidate legislative acts repugnant to the Iowa Constitution. First, the court explained that in this case, the Polk County Recorder—acting as an agent of the executive branch—was following state law that restricted marriage to opposite-sex couples.⁵⁰ At this point the court asserted its authority and its “responsibility to determine if the law enacted by the legislative branch and enforced by the executive branch violates the Iowa Constitution.”⁵¹

47. Other states will likely find themselves in the same position as Iowa on these issues at some point in time. Many states, like Iowa before *Varnum*, have their own state defense-of-marriage acts that strictly define marriage as existing between a man and a woman. McLaughlin, *supra* note 6, at 152–54. As more states open to the idea of legalizing same-sex marriage, Estin, *supra* note 6, at 348 (noting that, in 2008, eight states—some with their own versions of DOMA—had established either civil unions or domestic partnerships), it is fathomable that some states, like Iowa, will experience judicially imposed same-sex marriage based on either their individual state's constitution or the U.S. Constitution. When that happens, as is the case with Iowa, there will be no legislative guidance, at least initially, regarding how to recognize out-of-state same-sex marriages, civil unions, and domestic partnerships.

Also, marriage and civil-union laws are changing rapidly. While Iowa moved from having no recognition of same-sex marriage to unilaterally acknowledging same-sex marriage, *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), other states have moved toward recognizing same-sex unions in other ways. Vermont moved from acknowledging only civil unions, Abby Goodnough & Katie Zezima, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 11, 2009, at A1, to statutorily adopting same-sex marriage, VT. STAT. ANN. tit. 15, § 8 (2009). Compare that with Connecticut, where the legislature passed a same-sex marriage law pursuant to judicial decree. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008). As states alter their definitions of marriage, civil union, or domestic partnership, they create examples for how other states can approach the issues as they arise. As an example, *Varnum* cites *Kerrigan* throughout the decision. See generally *Varnum*, 763 N.W.2d 862 (citing *Kerrigan* liberally). It is reasonable to think that as other states change their laws, they will do the same, making this Note's analysis potentially pertinent to other states that find themselves in situations similar to Iowa's.

48. *Varnum*, 763 N.W.2d at 883–84; see also IOWA CODE § 595.2(1) (the invalidated provision).

49. *Varnum*, 763 N.W.2d at 872.

50. *Id.* at 875.

51. *Id.*

The *Varnum* court then began its equal-protection analysis by announcing that the court's responsibility in relation to the equal protection clause is to check the majority when it occasionally attempts to deprive a class of citizens of the liberties that the Iowa Constitution assures them.⁵² The court then acknowledged that while laws sometimes must classify in ways that will exclude certain groups of individuals, an equal-protection claim arises only when an excluded individual or group is able to convincingly argue that a particular classification violates current ideals of equality.⁵³ Highlighting Iowa's proud history of being at the forefront of national movements regarding equal protection,⁵⁴ the court emphasized that each time Iowa has faced controversy involving equal-protection issues, it has "reaffirmed the 'absolute equality of all' persons before the law as 'the very foundation principle of our government.'"⁵⁵ The court stated that same-sex marriage is just one controversial issue in the long line of similarly controversial issues the state has encountered.⁵⁶

The court ultimately held that the Iowa Defense of Marriage Act is unconstitutional.⁵⁷ It first decided that same-sex couples are similarly situated to their opposite-sex counterparts because same-sex couples have the same claim to an institutional status that acknowledges their interest in loving family relationships and that defines their "fundamental relational rights and responsibilities."⁵⁸ The court next determined that *Iowa Code* section 595.2 had classified based on sexual orientation.⁵⁹ While the statute did not say same-sex individuals cannot marry, it did say that those individuals could marry only people of the opposite sex—a hollow victory considering their desire for an institutionally recognized legal and social relationship status is based in their attraction to members of the same sex.⁶⁰

52. *Id.* at 876.

53. *Id.* at 877.

54. *See id.* (noting that Iowa declined to treat an escaped slave as property seventeen years before the infamous *Dred Scott* case, fought against segregation "long before" *Brown v. Board of Education*, and in 1869 was the first state "to admit a woman to the practice of law").

55. *Id.* (quoting *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 153 (1873)).

56. *Id.* at 878.

57. *Id.* at 883–84. *See generally* IOWA CODE § 595.2(1) (2009) (the invalidated statutory provision).

58. *Varnum*, 763 N.W.2d at 883.

59. The court writes:

It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. . . . [A] gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation.

Id. at 885.

60. *Id.*

After establishing that same-sex couples are similarly situated to opposite-sex couples and that *Iowa Code* section 595.2 discriminates based on sexual orientation, the court defined the level of scrutiny that classifications based on sexual orientation deserve. The court held that discrimination based on sexual orientation deserves some level of scrutiny higher than rational basis because the legislature's discrimination was based on factors irrelevant to the Iowa Constitution.⁶¹ The court ultimately reviewed the case with heightened scrutiny, noting that it did not have to decide whether to subject distinctions based on sexual orientation to strict scrutiny since the Iowa ban on same-sex marriage fails heightened scrutiny.⁶²

Varnum held that denying same-sex couples the right to marry is unconstitutional because *Iowa Code* section 595.2 does not substantially further any important governmental interest.⁶³ The court first reasoned that protecting the "traditional" concept of marriage is an insufficient governmental interest because it amounts to arguing that *Iowa Code* section 595.2 exhibits an important state interest merely because that is the way people have always defined marriage.⁶⁴ Next, the court decided that even though promoting an optimal environment for raising children is an important interest, furthering that interest via *Iowa Code* section 595.2 is underinclusive because child abusers, sexual predators, and other insufficient parents may still marry.⁶⁵ It is also overinclusive since many same-sex couples choose not to have children.⁶⁶ Third, the court held that encouraging procreation does not substantially further an important interest because same-sex couples can still have children and, even if they could not, there is no evidence that by limiting marriage to opposite-sex couples the state is able to encourage opposite-sex couples to increase their rate of procreation.⁶⁷ The court then said that *Iowa Code* section 595.2 fails to substantially further the state's important interest in conserving resources because, while it is true that denying marriage to same-sex couples would clearly conserve resources, so would other unacceptable methods that

61. The court ruled heightened scrutiny was necessary because (1) same-sex couples have a "history of discrimination" that calls into question legislation that discriminates based on sexuality; (2) same-sex couples "contribute to society" in ways equal to their opposite-sex counterparts; (3) sexual orientation is a part so vital to a person's identity that the state could not expect a person to change it for the purposes of equal-protection analysis; and (4) although same-sex organizations have gained some "political power," it has not been so much as to negate the importance of their rights as a quasi-suspect class. *Id.* at 889-96.

62. *Id.* at 896.

63. *Id.* at 906.

64. *Id.* at 898.

65. *Id.* at 900.

66. *Id.* Additionally, many same-sex couples have the right to raise children without marriage so the statute has little effect in relation to its purpose no matter how the court decided. *Id.* at 901.

67. *Id.* at 902.

“offend our society’s collective sense of equality,” like not allowing “African-Americans, illegitimates, aliens,” or other groups to obtain a marriage.⁶⁸ The mere fact that an option would conserve resources does not make the option acceptable.⁶⁹

In the final paragraphs of the *Varnum* decision, the court acknowledged that other states have tried to honor equal protection by creating “parallel civil institutions for same-sex couples.”⁷⁰ The court states it is choosing to declare *Iowa Code* section 595.2 unconstitutional partially because a “new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”⁷¹ Thus, Iowa does not have the option to create civil unions for same-sex couples.

IV. THE RELATIONSHIP OPTIONS NATIONALLY AVAILABLE TO SAME-SEX COUPLES

The number of relationship options available to same-sex couples in different states contributes to the complexity of this issue. Same-sex couples, depending on where they live, have the option of obtaining a marriage, civil union, or domestic partnership.⁷² On the spectrum between the rights and responsibilities of a full, recognized marriage and the absence of those rights and responsibilities, marriages and civil unions are the most similar, while the rights and obligations of domestic partnerships vary among the states that recognize them.⁷³

A. MARRIAGES AND CIVIL UNIONS

Marriage is the rarest option available to same-sex couples,⁷⁴ but it also requires the least explanation since the point of a state allowing same-sex

68. *Id.* at 902-03.

69. *Id.*

70. *Id.* at 906.

71. *Id.*

72. In addition to those options, some states offer “reciprocal beneficiary relationships.” Jennifer Ritschel-Smith, Comment, *United States Survey on Domestic Partnerships*, 22 J. AM. ACAD. MATRIM. LAW. 125, 147 (2009). Available in Vermont and Hawaii, “reciprocal beneficiaries” may be close relatives, as well as same-sex couples, who receive limited rights, often just the right to make medical and death decisions regarding the other partner. *Id.*

73. See generally *id.* at 140-49 (analyzing the different relationship statuses that states have implemented for opposite- and same-sex couples).

74. Currently, only five states grant same-sex marriages: Iowa, *Varnum*, 763 N.W.2d 862; Connecticut, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Massachusetts, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); New Hampshire, N.H. REV. STAT. ANN. § 457:2 (2009) (outlining prohibited marriages and making no mention of restricting marriage to opposite-sex couples); and Vermont, VT. STAT. ANN. tit. 15, §§ 1a, 8 (2009) (defining marriage and not restricting it to opposite-sex couples). See also Maria Godoy, *State by State: The Legal Battle over Gay Marriage*, NPR, <http://www.npr.org/templates/story/story.php?storyId=112448663> (last updated Dec. 15, 2009) (providing the same information).

marriage is to give same-sex couples the same benefits as the state provides to opposite-sex couples.⁷⁵ In Iowa, marriage serves the purpose of “providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.”⁷⁶ Additionally, it creates a way for the state to help the spouses achieve financial benefits and recognize their commitment to one another, and to provide a state-approved status that is as important as the contract itself.⁷⁷ Marriage generally includes other rights; among them, the right to visit a spouse in the hospital and make medical decisions and the right to inherit the other spouse’s property when that spouse passes away.⁷⁸ Furthermore, marriage requires love and support, dictates care of the children who are products of the marriage, and imposes obligations such as the requirement that the relationship is divisible only in divorce.⁷⁹

Post-*Varnum*, Iowa must honor valid out-of-state, same-sex marriages. Given both DOMA’s and the Full Faith and Credit Clause’s leniency regarding public-policy issues, Iowa’s obligations regarding out-of-state, same-sex marriages will stem from the *Iowa Code* and *Varnum*. Since Iowa has traditionally accepted valid opposite-sex marriages from other states,⁸⁰ and because the Iowa courts will almost surely strike down any legislative distinction based on sexual orientation given *Varnum*’s holding that distinctions based on sexual orientation are not meaningful for similarly situated individuals,⁸¹ Iowa must honor valid out-of-state marriages.

Civil unions provide all the rights and responsibilities of marriage, except they do not extend the title of “marriage” to the relationship.⁸² For example, same-sex couples that are party to a New Jersey civil union have “the same benefits, protections, and responsibilities . . . as are granted to

75. See, e.g., *Kerrigan*, 957 A.2d at 482 (“[G]ay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others.”); *Varnum*, 763 N.W.2d at 907 (“[R]emaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”); *Goodridge*, 798 N.E.2d at 969 (“We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”).

76. *Varnum*, 763 N.W.2d at 883 (quoting *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983)) (internal quotation marks omitted).

77. *Id.*

78. Singer, *supra* note 38, at 4–5.

79. *Id.* at 5.

80. *In re Marriage of Reed*, 226 N.W.2d 795, 796 (Iowa 1975); see also IOWA CODE § 595.20 (2009) (declaring valid in Iowa any marriages performed in any other state unless the marriage would “otherwise be declared void”).

81. *Varnum*, 763 N.W.2d at 883–84.

82. Compare *id.* at 906 (noting that some states have tried to form “parallel civil institutions”), with N.J. STAT. ANN. § 37:1-31 (West 2010) (declaring that parties to a civil union receive all the benefits of a marriage without actually being party to a marriage).

spouses in a . . . marriage.”⁸³ While most states generally follow this definition of civil unions, the states that recognize civil unions change regularly.⁸⁴ Although the rights and obligations marriage provides are generally the same as the rights and obligations a civil union provides, Iowa’s obligations as to out-of-state civil unions are much less clear than Iowa’s obligations as to out-of-state, same-sex marriages, given that the *Iowa Code* only requires Iowa to recognize valid out-of-state *marriages*.⁸⁵

B. DOMESTIC PARTNERSHIPS

While a civil union provides the same rights and obligations as a marriage, the rights and obligations of domestic partnerships are materially different amongst many of the states that offer them.⁸⁶ In one state, a domestic partnership might offer similar rights to marriage in regard to probate, inheriting joint property, and domestic-abuse protection but deny rights like tax exemptions.⁸⁷ Another state might recognize the right of parties to a domestic partnership to visit a sick partner in the hospital and add the ability to enjoy the benefits of their partner’s state health insurance policy.⁸⁸ Domestic partnerships in California grant nearly all the same benefits and burdens of marriage, essentially serving the same function as civil unions.⁸⁹

83. N.J. STAT. ANN. § 37:1-31; see Ritschel-Smith, *supra* note 72, at 143 (describing the rights and responsibilities associated with New Jersey civil unions).

84. For example, one source says that New Jersey, Washington, Nevada, and Oregon have either civil unions or domestic partnerships that give all the rights and responsibilities of marriage. Godoy, *supra* note 74 (providing a map that categorizes states with different forms of same-sex unions). However, a *New York Times* article says the states that grant civil unions are New Jersey, Connecticut, and Vermont, Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a ‘Veto’*, N.Y. TIMES, May 7, 2009, at A21, while another source says the states are New Jersey, Vermont, and New Hampshire, Ritschel-Smith, *supra* note 72, at 142. States’ positions toward same-sex marriage are currently changing so fast that it is difficult to keep track of all the developments. While that article says Maine was moving toward same-sex marriage, the state began a debate over whether or not to uphold the law shortly thereafter. Sarah Schweitzer, *Same-Sex Marriage Fight Roils Maine*, BOS. GLOBE, Oct. 20, 2009, 2009 WLNR 20698503 (“Just six months after Governor John Baldacci signed a law legalizing gay marriage in Maine, voters will decide whether to preserve it, making the state the latest battleground in the national fight over same-sex marriage.”). That debate ended when Maine “became the 31st state to block same-sex marriage through a public referendum.” Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25.

85. See IOWA CODE § 595.20 (discussing recognition of “marriage”—not unions involving the rights and responsibilities of marriage); see also *infra* Part V.B (weighing the two options Iowa faces in deciding the status of out-of-state same-sex unions).

86. See Ritschel-Smith, *supra* note 72, at 144–46 (showing that states such as California, Maine, and Washington all offer different rights for domestic partnerships).

87. *Id.* at 145.

88. *Id.* at 146.

89. *Id.* at 144–45.

Given the differences between civil unions and domestic partnerships, and the various rights given to same-sex couples in domestic partnerships in different states, Iowa must now decide how to treat these same-sex unions post-*Varnum*. The following part discusses Iowa's options and then suggests an answer.

V. HOW IOWA COULD TREAT SAME-SEX UNIONS FROM OTHER STATES

When other states have considered the available options regarding how to treat out-of-state, same-sex unions, regardless of whether the state ultimately expanded or restricted options for same-sex couples, public policy has determined the outcome. Iowa law provides for a public policy that would be amenable to broadening interpretations of same-sex marriage where the interpretations are feasible and realistic.

A. GUIDANCE

While the Iowa courts have not yet considered how to recognize out-of-state, same-sex unions, a few other courts have. Those cases, along with the decisions of various attorneys general in other states, serve as persuasive authority to the Iowa courts. Additionally, Iowa public policy regarding homosexual individuals and same-sex couples provides guidance on the course of action the Iowa courts should take.

1. Case Law Is Sparse

While Iowa courts have not decided how to treat out-of-state, same-sex unions,⁹⁰ other states considering the issue have used their own public-policy considerations on same-sex unions to guide their analysis when full-faith-and-credit issues undoubtedly arise.⁹¹ One Vermont court held that, even though the same-sex couple at issue maintained strong ties to Virginia when they obtained their Vermont civil union, Vermont law would govern—thus invalidating a Virginia order that would not have recognized the civil union.⁹² The court noted that legislators had a policy interest in allowing

90. No Iowa court has directly addressed whether to allow a civil union, but at least one Iowa district court has dissolved a civil union in equity. See *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 862 (Iowa 2005) (holding state legislators did not have standing to fight the district court's decision to dissolve the civil union). This case represents what Mark Johnson says is "the clearest example of unintended consequences"—the issue of how to dissolve a civil union in a state that does not permit the institution. Mark Johnson, *Formal Recognition of Gay and Lesbian Relationships: Marriage, Civil Union, and Reciprocal Beneficiary Laws*, MATRIMONIAL STRATEGIST (Law Journal Newsletters, Philadelphia, Pa.), Mar. 2008, 26 No. 3 MATRIMST 1 (Westlaw).

91. Compare *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956–57, 962 (Vt. 2006) (discussing whether to honor an out-of-state marriage using public-policy analysis), with *Rosengarten v. Downes*, 802 A.2d 170, 179–80 (Conn. App. Ct. 2002) (using the same analysis as the *Miller-Jenkins* court but coming to a different conclusion).

92. *Miller-Jenkins*, 912 A.2d at 956–57, 962.

nonresident, same-sex couples to obtain civil unions within the State of Vermont.⁹³ One way to look at this case is to note that Vermont gave a status to citizens that Virginia would have denied.

Conversely, a Connecticut court in one case acknowledged the existence of the parties' Vermont civil union but declined to dissolve the union because Connecticut law did not recognize same-sex unions, and nondiscrimination statutes explicitly point out that Connecticut did not mean for its laws to "condone[] homosexuality or bisexuality or any equivalent lifestyle."⁹⁴

2. The Decisions of Different Attorneys General

The decisions of the offices of different attorneys general show similar considerations. For the most part, the determinations of attorneys general depend largely on the variety of classifications available within the state and the different obligations the state's legislation and courts impose. The following examples show the different directions the attorneys general have taken.

The Illinois Attorney General used DOMA, case law, and public-policy rationale to decline to recognize civil unions from different states.⁹⁵ The opinion began with the argument that Illinois did not have to recognize civil unions by noting the public-policy exceptions to the Full Faith and Credit Clause and analogizing civil union to marriage (DOMA uses the word "marriage"⁹⁶).⁹⁷ The opinion then highlighted Illinois's statutory public policy against recognizing civil unions.⁹⁸ Through these arguments, the Illinois Attorney General concluded that Illinois should not recognize civil unions.⁹⁹

The New Jersey Attorney General declared that New Jersey would treat same-sex marriages, civil unions, and civil-union-like institutions as civil unions and that, alternatively, the state would treat as domestic partnerships those institutions that granted limited rights to a same-sex couple.¹⁰⁰ The

93. *Id.* at 963–64.

94. *Rosengarten*, 802 A.2d at 179.

95. Recognition of Vermont Same-Sex Civil Unions by Illinois, Op. Ill. Att'y Gen., No. 00-017 (Dec. 29, 2000), <http://www.illinoisattorneygeneral.gov/opinions/2000/00-017.pdf>.

96. 28 U.S.C. § 1738C (2006).

97. Op. Ill. Att'y Gen., *supra* note 95, at 4.

98. *Id.* at 8.

99. *Id.* As yet another illustration of how fast these laws are changing, some people in Illinois are currently gearing up to try to introduce civil unions in the state. See Erbenbraut, *supra* note 8 (suggesting that Illinois may be becoming more amenable to civil unions, though same-sex marriage is likely a long shot).

100. Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, Op. N.J. Att'y Gen., No. 3-2007, at 1–2 (Feb. 16, 2007), <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

opinion states, “The name of the relationship selected by other jurisdictions will not control Rather, it is the nature of the rights conferred by another jurisdiction that will determine how a relationship will be treated under New Jersey law.”¹⁰¹ The opinion references states like Vermont and Connecticut that have civil unions, and also references California domestic partnerships, which, unlike most domestic partnerships, grant basically the same rights as civil unions.¹⁰² The decision concludes that New Jersey will recognize out-of-state civil unions and California domestic partnerships as the equivalent to in-state civil unions because the rights are materially equal,¹⁰³ while deciding not to recognize out-of-state, same-sex marriages as marriages because, in creating civil unions, the New Jersey legislature illustrated an obvious legislative intent to prohibit same-sex marriage.¹⁰⁴

Similar to the attorneys general opinions from Illinois and New Jersey, the Connecticut opinion uses the state’s existing classifications as the basis for recognizing out-of-state, same-sex unions.¹⁰⁵ The opinion states that Connecticut will treat the same-sex marriages and civil unions from other states as valid due to a recent Connecticut case mandating equal protection for same-sex couples.¹⁰⁶ The opinion notes that while the case requires Connecticut to open marriage to same-sex couples, it does not invalidate the state’s provision for civil unions.¹⁰⁷ The opinion finally notes that the *Connecticut General Statutes* does not prohibit persons who have entered into civil unions from lawfully marrying because, while a married person could not enter into a civil union, there is no prohibition of marriage when a person is united in civil union.¹⁰⁸

3. Iowa Public Policy

Several considerations support the Iowa Legislature and the Iowa Supreme Court honoring the equal-protection rights of same-sex couples with out-of-state, institutionally recognized, nonmarriage relationships. The most obvious is the Iowa Supreme Court’s decision in *Varnum*, which

101. *Id.* at 1.

102. *Id.* at 2.

103. *Id.* Regarding domestic partnerships, the opinion says that since New Jersey has its own system of domestic partnerships, it will recognize the domestic partnerships of other states as domestic partnerships. *Id.* at 2–3. The exception is California, whose domestic-partnership statute gives essentially the same rights as a civil union, which is why the opinion decides to treat California domestic partnerships as civil unions. *Id.* at 5.

104. *Id.* at 6.

105. Op. Conn. Att’y Gen., No. 2008-019 (Oct. 28, 2008), <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=425984>.

106. *Id.*

107. *Id.* See generally *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding Connecticut had to give same-sex couples the right to marry).

108. Op. Conn. Att’y Gen., *supra* note 105; see CONN. GEN. STAT. § 46b-38bb (2007) (repealed 2009) (the statute in question).

describes Iowa's history of being at the forefront of civil-rights issues and explains that the state's equal protection clause requires equality for same-sex couples.¹⁰⁹ Just as important are indications that show a trend of increasing public tolerance of equality for same-sex couples. First, several provisions of the Iowa Civil Rights Act of 1965 protect members of the lesbian, gay, bisexual, and transgender community.¹¹⁰ Popular acceptance of same-sex relationships has progressed in recent years—while Iowans in 2003 were more generally interested in equal legal rights for same-sex couples (maybe civil union instead of marriage),¹¹¹ a subsequent poll showed that most Iowans were either supportive of or ambivalent to same-sex marriage.¹¹² The most recent poll available says that 53% of Iowans support same-sex marriage.¹¹³ Finally, another recent poll says 62% of Iowans think a constitutional amendment making same-sex marriage illegal would not be worth the Iowa Legislature's time.¹¹⁴ These public-policy considerations must be kept in mind when analyzing the options for how to treat out-of-state, same-sex unions discussed in the next Subpart.

109. See *supra* Part III (discussing the *Varnum* decision and the reasons why the Iowa Supreme Court invalidated Iowa's defense-of-marriage provision). In his Note on how the Iowa Supreme Court could decide *Varnum* in a way that would promote future goodwill among the general population, Steven P. Wieland also highlights the Iowa Supreme Court's historical "willingness to keep up with evolving social conventions," such as striking down a state anti-sodomy law and upholding liberal rules related to child visitation and other gender and sexuality issues. Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test To Address Varnum v. Brien*, 94 IOWA L. REV. 413, 426–27 (2008).

110. See IOWA CODE § 216.6(1)(c) (2009) (private and public employment); *id.* § 216.7(1) (public accommodations); *id.* § 216.8(1) (housing and real property); *id.* § 216.9(1) (educational institutions); *id.* § 216.10(1) (credit practices); *id.* § 216.11(1)–(2) (prohibiting retaliation or assistance in retaliation based on sexual orientation or gender identity); *id.* § 216.11A (prohibiting interference with individuals engaged in activities that are protected with regards to sexual orientation).

111. Editorial, *Just Don't Call It Marriage: The Terminology Obscures the Question of Equal Rights for Gays*, DES MOINES REG., Oct. 20, 2003, 2003 WLNR 17776163.

112. *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, DES MOINES REG., Sept. 21, 2009, 2009 WLNR 18591722 (showing that, post-*Varnum*, 41% of Iowans would vote against a constitutional amendment to ban same-sex marriage, 41% would vote in favor of such an amendment, and the remaining 19% are ambivalent or would not vote). Iowa is slightly ahead of the curve with this trend; a 2009 Pew poll shows that about 57% of Americans support giving equal rights to same-sex couples without giving full support to same-sex marriage. PEW RESEARCH CTR., MOST STILL OPPOSE SAME-SEX MARRIAGE: MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS 1 (2009), available at <http://pewforum.org/newassets/images/reports/samesexmarriage09/samesexmarriage09.pdf>.

113. Jason Hancock, *Poll: Majority of Iowans Support Marriage Rights for Same-Sex Couples*, IOWA INDEP. (June 4, 2010, 8:18 AM), <http://iowaindependent.com/35713/poll-majority-of-iowans-support-marriage-rights-for-same-sex-couples>.

114. *Iowans Rate Drivers' Texting as More Urgent than Gay Marriage*, DES MOINES REG., Feb. 8, 2010, 2010 WLNR 2639047.

B. IOWA'S TWO OPTIONS FOR OUT-OF-STATE, SAME-SEX UNIONS

Iowa courts will likely consider any legal relationship for same-sex couples short of marriage invalid because the only difference between same-sex and opposite-sex couples is their sexuality, which is not a meaningful distinction to Iowa courts post-*Varnum*.¹¹⁵ Additionally, courts hold classifications clearly directed at homosexual behavior invalid.¹¹⁶ As a final point, the court in *Varnum* emphasized, after noting that some state supreme courts had approved of civil unions, that “[a] new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”¹¹⁷

Thus, Iowa courts will not recognize civil unions as civil unions because of the same equal-protection rights at issue in *Varnum*. If Iowa is going to recognize out-of-state civil unions, it must recognize them as marriages, not civil unions, since the *Iowa Code* does not allow for recognition of civil unions.¹¹⁸ Because the *Code* recognizes only out-of-state marriages,¹¹⁹ the issue that now arises is whether Iowa courts should elect not to recognize civil unions at all or to recognize them as marriages. If Iowa declines to recognize civil unions as marriages—since the *Iowa Code* does not recognize any sort of civil union—it will have to require same-sex couples to marry to receive the legal and social benefits of marriage.

The central issue Iowa faces regarding out-of-state, same-sex civil unions is how to honor out-of-state institutions that are not marriages—but provide equal or similar rights and responsibilities—where the *Iowa Code* recognizes only out-of-state marriages. This Part considers two options. Option one, the Recognition Option, is to treat civil unions as marriages, which, while

115. *Varnum v. Brien*, 763 N.W.2d 862, 883–85 (Iowa 2009) (discussing any potential validity of Iowa’s defense-of-marriage provision and ultimately rejecting the State’s arguments).

116. *Id.* at 885 (discussing the U.S. Supreme Court’s *Lawrence* and *Romer* decisions within the context of Iowa’s equal-protection law).

117. *Id.* at 906.

118. *Id.* at 883–85. It is also possible that the Iowa Legislature would create its own version of civil unions, leaving both marriage and civil union open to both same-sex and opposite-sex couples. It is unclear how viable this option is. There is also the possibility that this issue would become moot if the Iowa Legislature passed an amendment to the Iowa Constitution that prohibited same-sex marriage, created civil unions, or otherwise superseded the Iowa Supreme Court’s decision in *Varnum*. That option is unlikely, at least for the foreseeable future, because Iowa is in the midst of election season where it appears many candidates have other priorities, and it would be difficult to garner support to pass an amendment to the Iowa Constitution. See IOWA CONST. art. X, § 1 (explaining the complex procedure necessary to amend the Iowa Constitution); *Iowa Poll: Iowans Evenly Divided on Gay Marriage Ban*, *supra* note 112 (providing a statistical breakdown of Iowans’ support for same-sex marriage and reporting that most Iowans do not see overturning the *Varnum* decision as one of the most important issues for the 2010 gubernatorial and legislative elections).

119. See IOWA CODE § 595.20 (2009) (accepting only “a marriage which is solemnized in any other state”).

honoring the intentions of same-sex couples,¹²⁰ suffers from the fact that the *Iowa Code* recognizes only an out-of-state “marriage.” Option two, the Nonrecognition Option, requires couples with civil unions or domestic partnerships to obtain a marriage in a state that allows same-sex marriage before Iowa would recognize their union as a marriage.

1. Option I: Treat Civil Unions as Marriages, or “The Recognition Option”

If Iowa treats civil unions as marriages, it would permit couples with civil unions to enter the State of Iowa as married people and to receive the benefits married persons receive in Iowa.¹²¹ In one sense, this would honor the purpose of the granting state that issued the civil union (giving a marriage-like institution) while simultaneously honoring Iowa’s public-policy principle of equality between sexual orientations. It would also likely honor the wishes of same-sex couples with civil unions whose states forced them to enter into civil unions because the couple wanted the most marriage-like union possible in their state.¹²² Also, Iowa would not be alone; the *New Hampshire Revised Statutes Annotated* now authorizes a couple with a civil union to enter New Hampshire as a married couple.¹²³

Treating civil unions as marriages would not be unconstitutional, and DOMA does not prohibit it.¹²⁴ First, since Iowa has leeway to determine its own marriage policies under the public-policy exception to the Full Faith and Credit Clause,¹²⁵ Iowa would not be violating the U.S. Constitution. Next, DOMA does not keep states from recognizing same-sex marriages; it says only that they do not have to recognize them.¹²⁶ When a state grants civil unions to same-sex couples while denying them the right to marriage, the state’s public-policy statement is that it wants to deny same-sex couples

120. The potential desirability of a same-sex alternative to marriage that carries the same social significance and recognition is not within the scope of this Note.

121. See IOWA CODE § 595.20. To do this, the Iowa Supreme Court would have to construe “marriage” to include civil union. The Iowa Legislature could also rewrite the statute to include both “civil union” and “marriage.”

122. That said, Vermont is at least one state where, after the legislature passed VT. STAT. ANN. tit. 15, § 8 (2009), allowing same-sex marriage without eliminating civil union, both marriage and civil union are available to both same-sex and opposite-sex couples. If a couple in Vermont chose to enter into a civil union, it is harder to say the couple’s intention was to obtain a marriage. However, this is likely a rare situation.

123. N.H. REV. STAT. ANN. § 457:45 (2009) (“A civil union legally contracted outside of New Hampshire shall be recognized as a marriage in this state, provided that the relationship does not violate the prohibitions of this chapter.”). Just a year before, the *New Hampshire Revised Statutes Annotated* provided that the state would treat same-sex couples with civil unions or marriages from out of state as having a civil union. N.H. REV. STAT. ANN. § 457-A:8 (2008) (repealed 2009).

124. See *supra* Part II (summarizing federal and state law that gives Iowa considerable leeway to set its own marriage policy).

125. See *supra* Part II.A (discussing the Full Faith and Credit Clause).

126. See *supra* Part II.C (discussing DOMA).

the tradition and societal significance of marriage, but not the rights and obligations that come along with marriage.¹²⁷ Thus, a civil union conveys the same rights and responsibilities as a marriage. If a state's public policy requires it to recognize an out-of-state civil union as a marriage instead of a civil union, it is not altering the rights and responsibilities. It is altering the social, extra-legal significance of how society chooses to categorize those rights and responsibilities; Iowa would be choosing to categorize the same rights and responsibilities as "marriage," rather than as "civil union."

The Recognition Option has considerable legal support in Iowa Supreme Court decisions and in the opinions of other attorneys general. First, recall the case where the Vermont Supreme Court decided to recognize a Vermont civil union that would have been invalid under a Virginia court order because of Vermont's strong public-policy interest.¹²⁸ Making sure that the rights and obligations sufficiently match, Iowa could use similar public-policy reasoning to recognize another state's civil union as a marriage since Iowa public policy on this issue likely overrides that of the foreign state.¹²⁹ Next, the New Jersey Attorney General's office noted that it was treating California domestic partnerships as civil unions because, unlike in most states with domestic partnerships, the rights those partnerships gave were effectively the same as a civil union.¹³⁰ The opinions of the Connecticut and New Jersey attorneys general show that states have found that their own public-policy interests override other states' differences in both public policy (giving extra status to a relationship) and with nomenclature (recognizing a domestic partnership as a civil union even though the "name" does not match). As applied to Iowa, the state's strong public-policy interest in favor of equality between same-sex and opposite-sex couples¹³¹ would dictate that Iowa should treat civil unions as marriages because the state's interest outweighs the relatively minor difference in nomenclature where the rights and obligations are the same.

While the Recognition Option seems attractive, it is subject to two problems that relate to the above discussion of the ways different jurisdictions have handled this issue.¹³² First, there is little Iowa case law to

127. See *supra* text accompanying notes 82–85 (describing the general definition of civil unions and their effect on the rights and responsibilities of the couples who enter into them).

128. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956, 962–63 (Vt. 2006).

129. While it does not follow directly from the opinion, it is likely that an Iowa court would value Iowa's equal-protection interest in recognizing all marriage-like institutions as marriages, after *Varnum*, more than it values the interest in other states of having their civil unions recognized as such. See IOWA CODE § 595.20 (2009). This would follow past Iowa Supreme Court decisions that analyze the contacts the parties have to the states in conflict of laws issues. *In re Marriage of Reed*, 226 N.W.2d 795, 796 (Iowa 1975).

130. Op. N.J. Att'y Gen., *supra* note 100, at 3.

131. See *supra* Part V.A.3 (discussing Iowa public policy).

132. See *supra* Part V.A.1–2 (analyzing the decisions of different attorneys general and of different state courts).

support it, meaning that courts will ultimately have to determine Iowa's public policy based on circumstantial statutory evidence and other case law. That said, this Note has shown the variety of ways, in case law and in the decisions of attorneys general, that public policy can be determined.¹³³ Thus, the fact that the Recognition Option has issues is not an insurmountable obstacle considering Iowa's obligations after *Varnum* and the example other states have set.

The second problem is that Iowa recognizes only valid marriages from other states,¹³⁴ and a "civil union" is, by definition, not a "marriage."¹³⁵ Considering the rationale of *Varnum*, it seems clear that a civil union is substantially a marriage and that Iowa public policy permits the court to consider a civil union a marriage.¹³⁶

2. Option II: Couples with Civil Unions Must Obtain Marriages, or "The Nonrecognition Option"

The Nonrecognition Option would require same-sex couples with nonmarriage unions to obtain a marriage if they were to want to be treated as married within the State of Iowa. The Nonrecognition Option's benefits are that it addresses the problems with the Recognition Option. First, the public policies of states that allow only civil unions are irrelevant if Iowa requires parties to a civil union to obtain a marriage license. Second, on statutory analysis, Iowa would not have to worry about the fact that a civil union is not a marriage for the purposes of recognizing valid marriages from other states.¹³⁷ This option is valid under federal law for the same reasons that option one was valid.¹³⁸

The potential problems associated with the Nonrecognition Option are those that would come in the future if a state decides to follow Iowa in validating same-sex marriage, potentially turning existing civil unions into marriages. For example, Connecticut passed a law that automatically merged

133. See *supra* Part V.A.1-2; see also *Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105, 107-08 (App. Div. 2007) (holding that, though Vermont civil union gave joint access to workers' compensation benefits as "spouses," New York could give full faith and credit to the union without granting the same rights declared in the Vermont statute).

134. IOWA CODE § 595.20.

135. Compare N.J. STAT. ANN. § 37:1-30 (West 2010) (declaring that parties to a civil union must be of the same sex), with *id.* § 37:1-31 (declaring that parties to a civil union receive all the benefits of a marriage without actually being party to a marriage).

136. While legislative action is a potential answer to the issue this Note addresses, the variety of ways in which this situation can arise, the number of different rights and obligations, and the constant national change in same-sex unions may make these issues more amenable to a decision at common law. This Note shows that the legal framework is there and, where a legislature must create a rule that will work prospectively, a court may be better able to craft a workable answer over time.

137. IOWA CODE § 595.20.

138. See *supra* Part V.B.1 (discussing the federal law in relation to option one).

existing civil unions into marriages, effective October 1, 2010.¹³⁹ On that date, the state acknowledged couples with a Connecticut civil union as married.¹⁴⁰

Imagine three scenarios. In scenario one, Brian and Jeff have a civil union in state *X* and move to Iowa to get married. If the state *X* legislature decides to unilaterally change the civil union to a marriage, then Brian and Jeff technically have two marriages. In scenario two, Brian and a prior partner had a civil union in state *X*. Later, Brian meets Clarence and marries him in Iowa without dissolving his state *X* civil union. Again, in scenario two, imagine that state *X* decides to unilaterally change civil unions to marriages. Brian now has two marriages with two partners. For scenario three, imagine the same facts as in scenario two except that state *X* leaves civil unions in place. Brian still has two partners, but one is in a civil union and the other is in a marriage.

Iowa does not want couples who have a good-faith desire to follow the law to have engaged in bigamy, which occurs in Iowa when someone marries while they have a living husband or wife, thus invalidating the second marriage¹⁴¹ and potentially exposing them to criminal charges.¹⁴² Though bigamy prosecution in Iowa seems generally rare,¹⁴³ the concern is not completely unfounded with any of our three scenarios, considering the fact that—as far as rights and responsibilities are concerned—marriage and civil union create similar bigamy issues.¹⁴⁴ This likely explains why Vermont has passed legislation excluding couples with both a civil union and a marriage from bigamy prosecution.¹⁴⁵ In essence, a person with either two marriages, or a marriage and a civil union, still has two state-issued certificates. The

139. CONN. GEN. STAT. § 46b-381r (2009). (“Two persons who are parties to a civil union . . . that has not been dissolved or annulled . . . as of October 1, 2010, shall be deemed to be married . . . on said date and such civil union shall be merged into such marriage by operation of law on said date.”); see GAY & LESBIAN ADVOCATES & DEFENDERS, QUESTIONS AND ANSWERS ABOUT CONNECTICUT’S TRANSITION FROM CIVIL UNIONS TO MARRIAGE 1 (2009), <http://www.glad.org/uploads/docs/publications/ct-cu-to-marriage.pdf> (emphasizing that the status of a same-sex couple will change from civil union to marriage without changing their legal rights and responsibilities).

140. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 139, at 3.

141. IOWA CODE § 595.19(2).

142. *Id.* § 726.1.

143. There has not been a recorded appellate case interpreting Iowa’s criminal bigamy statute since the early 1900s.

144. See VT. STAT. ANN. tit. 15, § 4 (2009) (“Civil marriages contracted while either party is legally married or joined in civil union to a living person other than the party to that marriage shall be void.”); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 289–91 (2004) (highlighting the fact that, even as the country moves toward a progressive attitude in relation to same-sex marriage, courts and the public are still tied to the idea of “exclusivity”).

145. See VT. STAT. ANN. tit. 15, § 4 (“Civil marriages contracted while either party is legally married or joined in civil union to a living person *other than the party to that marriage* shall be void.” (emphasis added)).

concern for prosecution in scenario one, however, seems much less realistic than the concern for prosecution in scenarios two and three.

As long as “[n]orms strongly urge people toward monogamy,”¹⁴⁶ there is a legitimate concern that a creative law-enforcement agent or citizen could successfully advocate for the prosecution of someone who has both a civil union and a marriage. Other states will almost certainly follow Connecticut’s footsteps in converting civil unions to marriages, considering it is very likely that more states, over time, will continue the trend of permitting same-sex marriage. The conversion of civil unions to marriages is less concerning if the same-sex couples know that their civil unions will be changing to marriages, as was the case in Connecticut. That is not the case in states that currently have civil unions—or that will have them in the future—because same-sex couples do not know if or when their state might do something similar to what Connecticut has done.

To remedy the potential for bigamy issues, Iowa could require same-sex couples with civil unions to dissolve the union and then obtain a marriage in a state that allows the institution of same-sex marriage.¹⁴⁷ The problem in many states, though, is that dissolving a union in equity results in recognizing the institution of civil union,¹⁴⁸ a point that has led some courts to decline to dissolve civil unions.¹⁴⁹ Thus, there may be an issue with adopting the Nonrecognition Option if a couple were to want to dissolve its civil union in another state. It would not satisfy *Varnum*’s equality principles to require a couple to travel to a state that would allow them to dissolve a civil union, only to have Iowa’s law force them to travel to another state to obtain a marriage. Opposite-sex couples would not find themselves in such difficult circumstances.

The Vermont legislature recently passed legislation legalizing same-sex marriage; before it had been requiring same-sex couples to obtain civil unions instead.¹⁵⁰ To deal with existing civil unions, the legislature added a notation on its marriage registration form under the heading “Last Relationship Ended By.” That notation did not automatically change civil

146. Emens, *supra* note 144, at 284.

147. To do that, an Iowa court might be able to use its jurisdiction in equity to dissolve a civil union, leaving the parties free to marry without risk of bigamy issues, which one Iowa judge has done. *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 862 (Iowa 2005) (holding, though the court was not specifically reviewing this Note’s issue, that state legislators did not have standing to challenge the district-court judge’s decision).

148. *Id.* at 862–63.

149. *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002).

150. An Act To Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009 Vt. Acts & Resolves 33, available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT003.pdf>. The amended definition of “marriage” modified language that had read, “Marriage is the legally recognized union of one man and one woman,” to read, “Marriage is the legally recognized union of two people.” *Id.* The change was ultimately codified in title 15 of the Vermont Statutes at section 8. VT. STAT. ANN. tit. 15, § 8.

unions to marriages; rather, it allows same-sex couples to check a box that reads, "Previous Civil Union did not end. Marrying Civil Union Partner."¹⁵¹ Thus, Vermont treats existing civil unions as such but allows couples to change their civil union to a marriage without bigamy issues.

Through maintaining civil unions, rather than unilaterally converting them to marriages, Vermont (even if it was just an accident) helped states like Iowa avoid potential issues with bigamy. This means that for the time being,¹⁵² at least between Iowa and Vermont, the decision to require same-sex couples to obtain marriages might be a feasible solution, though Iowa could still decide to exercise the Recognition Option.

It is unclear, though, how other states will address the transition from civil union to marriage. While Vermont chose an option that is beneficial for the reasons this Part discusses, it is conceivable that a state might unilaterally turn civil unions to marriages for reasons of constitutionality or facility, like in the Connecticut example. If a state chooses the latter, as some almost certainly will, Iowa courts may have to deal with issues of bigamy.

3. Domestic Partnerships

For the same reasons the New Jersey Attorney General connected California domestic partnerships to the issue of whether and how to recognize civil unions, this Note must briefly consider domestic partnerships.¹⁵³ Domestic partnerships mean different things to different states. While a Nevada domestic partnership grants essentially the same rights as marriage, in Washington, parties to a domestic partnership receive benefits regarding patient visitation and community property without receiving many of the other standard marriage-like benefits.¹⁵⁴ Considering

151. VT. STAT. ANN. tit. 18, § 5131(a)(2).

152. There is nothing preventing Vermont from electing to eliminate civil unions in the future.

153. Iowa's options for whether or how to recognize domestic partnerships are difficult compared to civil-union law due to constitutional principles that say a state may prioritize its public-policy considerations over those of another state. *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998). Same-sex relationships are varied, and as definitions give fewer rights and obligations in relation to marriage, the argument that courts should treat a particular relationship as a marriage becomes progressively weaker. See Ritschel-Smith, *supra* note 72, at 140–49 (outlining the general rights and obligations associated with marriages, civil unions, domestic partnerships, reciprocal beneficiaries, and other, less common forms of relationships).

154. Compare Nevada Domestic Partnership Act, NEV. REV. STAT. § 122A.200 (2009) (stating that "[d]omestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties . . . as are granted to and imposed upon spouses," except that Nevada does not require employers to give benefits to spouses in a domestic partnership), with WASH. REV. CODE § 26.60.010 (2008) ("The legislature finds that same sex couples . . . do not automatically have the same access that married couples have to certain rights and benefits [including] hospital visitation, health care decision-making, [and] organ donation decisions . . .").

the differences between rights conferred in traditional domestic partnerships and marriage (or civil unions), there is no obvious case law on Iowa's options regarding whether or how to recognize domestic partnerships.

That said, Iowa courts could certainly use New Jersey's method as a starting place when determining how to recognize out-of-state domestic unions in Iowa. In deciding how to recognize different kinds of unions, including domestic partnerships, New Jersey looks to the amount and nature of the rights the out-of-state institution grants.¹⁵⁵ This is how New Jersey decided to grant civil-union status to California domestic partnerships; even though they are not called civil unions, they convey rights that are fundamentally the same.¹⁵⁶

The next Part discusses the better of these two options, the Recognition Option. The answer for domestic partnerships is not so clear. The variety of types of domestic partnerships available makes that kind of union a difficult one to interpret on a general level.

VI. IOWA SHOULD TREAT OUT-OF-STATE CIVIL UNIONS AS MARRIAGES BECAUSE THIS BEST SUPPORTS IOWA'S OBLIGATIONS AFTER *VARNUM* AND BEST REFLECTS THE INTENTIONS OF THE COUPLES AT ISSUE

Iowa should not recognize civil unions as civil unions. Rather, Iowa should recognize civil unions as marriages because this reflects the likely direction of court decisions after *Varnum*, and there are solid analogues in out-of-state case law and in the opinions of attorneys general. This decision would not fit squarely within Iowa precedent, but it would fit within the principles of *Varnum* and within the decisions of other states who are trying to find reasonable solutions for modern problems in the absence of established legal principles.¹⁵⁷ To mold language from the New Jersey Attorney General's opinion on how to recognize out-of-state, same-sex unions, "[t]he name of the relationship selected by other jurisdictions . . . [should] not control."¹⁵⁸ Discussing many of the same concepts that this Note addresses, Professor Cox wrote: "[W]hen considering these cases, courts should remember that countless cases exist recognizing out-of-state marriages by opposite-sex couples despite defects or problems that would have permitted the courts to refuse to honor those marriages."¹⁵⁹ In 2004,

155. Op. N.J. Att'y Gen., *supra* note 100, at 1.

156. *Id.* at 3-4. To view the California provision, see CAL. FAM. CODE §§ 297-297.5 (West 2005).

157. See *supra* Part V.A.2-3 (discussing the decisions of different attorneys general and the requirements of Iowa public policy).

158. See Op. N.J. Att'y Gen., *supra* note 100, at 1. (I exchange "will" for "should," for the purposes of my argument.)

159. Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J.

when Professor Cox wrote those words, she foresaw a concern that has increasingly become a reality for modern same-sex couples.¹⁶⁰

While this Note does not advocate calling a civil union a common-law marriage, that law serves as a useful analogue to this issue. In choosing to recognize a common-law marriage, courts consider the intent of the couples and the circumstantial evidence that shows the validity of the marriage.¹⁶¹ Based on the laws and statutes that define civil unions, same-sex couples with civil unions have a stronger claim of intent to be married than couples with common-law marriages. Couples with civil unions also have an easier time showing that they are known in their communities as being married (at least in the sense of having equal rights and responsibilities). While it is possible that some couples obtain a civil union embracing the concept of civil union and not marriage, the essence of civil unions is that they were originally designed to give same-sex couples a marriage-like institution without nominally giving them a marriage.¹⁶² Also, if a couple has all the rights and responsibilities of marriage, the circumstantial evidence of a marriage will probably be stronger than that of any common-law marriage (they will be living together, presenting themselves to society as an established couple, sharing the responsibilities of marriage, etc.). So far, states have adopted civil unions with the idea that they are giving “equal” rights and obligations to same-sex couples, but still restricting “marriage” to opposite-sex couples.¹⁶³ This distinction violates the Iowa Constitution,¹⁶⁴ but it also makes clear that civil unions are essentially “marriages” and this is how Iowa should treat them.

Iowa’s statutory law says that Iowa will accept a valid out-of-state marriage.¹⁶⁵ In addition, Iowa’s laws on common-law marriage and the public-policy concerns that *Varnum* addresses argue in favor of either the Iowa courts or legislature treating civil unions as marriages. The statutory language is the hardest fit for this option because it says that “[a] marriage

699, 757 (2004). For examples of Iowa cases dealing with opposite-sex couples, see *supra* Part II.D (analyzing pre-*Varnum* Iowa statutory and case law on this issue).

160. When Professor Cox wrote the article, she discussed four cases from different states; two that chose to decline to recognize the civil union for the issue the parties presented and two that chose to recognize the civil union. Cox, *supra* note 159, at 745–46. One was an Iowa court that recognized a civil union for the purpose of dissolving it for the couple. *Id.*

161. *Laws v. Griep*, 332 N.W.2d 339, 340–41 (Iowa 1983).

162. See *supra* text accompanying notes 82–85 (describing the characteristics of a civil union). Thus, while it is possible that a couple would fail in a common-law marriage claim if they were to actively want a civil union and not a marriage, the history and effect of civil unions makes a pretty convincing case that courts and legislatures created civil unions against a backdrop that denied marriage to same-sex couples who actually wanted a marriage. *Id.*

163. See *supra* Part IV (discussing relationship options and the reasons states have chosen one or another option).

164. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

165. IOWA CODE § 595.20 (2009).

which is solemnized in any other state, territory, country, or any foreign jurisdiction which is valid in that state, territory, country, or other foreign jurisdiction, is valid in this state.”¹⁶⁶ Despite the literal word “marriage” in the *Iowa Code*, civil unions are materially marriages that a state calls a civil union explicitly to prohibit same-sex couples from entering into the institution of civil marriage.¹⁶⁷ Iowa’s public-policy priorities of equality between couples of different sexual orientations should outweigh the semantic impediment that *Iowa Code* section 595.20 presents. Additionally, everything a civil union represents is compatible with the requirements of a common-law marriage.¹⁶⁸

Treating civil unions as marriages is the superior option, compared with requiring couples with civil unions to obtain a marriage (or dissolve their civil union and then obtain a marriage). While requiring same-sex couples to obtain a marriage might be the safest option in terms of rigidly following the *Iowa Code*, it is not the best option. The State of Iowa has no interest in putting well-intentioned same-sex couples in the position of having committed bigamy,¹⁶⁹ because this surely would not reflect any state’s public-policy interest in the institution of marriage. It would also work against *Varnum*’s principles of equality in sexual orientation¹⁷⁰ to require same-sex couples to disregard the ceremony of their civil union to obtain a marriage—something married couples (both same- and opposite-sex) do not have to do.

Perhaps the strongest argument in favor of the Recognition Option comes from the final thoughts of *Varnum*. The court noted that other states have designed “parallel civil institutions for same-sex couples” but warned the legislature that “[a] new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”¹⁷¹ The court here discussed civil unions and told the legislature that civil unions are unconstitutional

166. *Id.* (emphasis added).

167. *See Singer, supra* note 38, at 2 (saying that after Massachusetts legalized same-sex marriage, legislators passed a constitutional amendment “that would ban same sex marriages while enshrining civil unions . . . with all the legal incidents of civil marriage except the right to call such relationships ‘marriages’”); *see also* N.J. STAT. ANN. § 37:1-31 (West 2009) (using civil unions to give same-sex couples all the rights and responsibilities of marriage without giving them the title of marriage).

168. *Compare supra* Part II (examining Iowa’s requirements for common-law marriage), *with supra* Part IV (defining the different kinds of same-sex relationships available, civil union among them).

169. *See supra* Part V.B.2 (examining the potential consequences of requiring same-sex couples to obtain marriages instead of recognizing civil unions as marriages).

170. *See supra* Part III (discussing *Varnum* and the methods through which the Iowa Supreme Court decided that the state’s defense-of-marriage act was unconstitutional under Iowa’s equal protection clause).

171. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

under Iowa law.¹⁷² When the issue of how to recognize out-of-state civil unions reaches the court, it should use the same language to find that Iowa must recognize out-of-state civil unions as marriages.

The Recognition Option should not be used for out-of-state domestic partnerships, however. Iowa should require couples currently in a domestic partnership to obtain a marriage (or civil union) for the State of Iowa to recognize them as married within Iowa. Iowa could make exceptions for the domestic-partnership statutes of states like California and Nevada, where the rights conveyed in the partnership are essentially the same as those conveyed in a marriage or civil union.¹⁷³

While the principles of *Varnum* prioritize equality, the difference between domestic partnerships and marriages is much greater than the difference between marriages and civil unions, which are materially equal.¹⁷⁴ As much as Iowa has an interest in the public-policy aims of *Varnum*, it also has an important statutory interest in assuring that the couples who are party to marriages really wanted marriages.¹⁷⁵ With that fact in mind, compared to civil unions, it is less likely that the parties to an average domestic partnership specifically had marriage in mind when they made the decision to form their partnership. Since there does not seem to be any basis in Iowa law for recognizing relationships like domestic partnerships that grant limited rights and responsibilities, the legislature should decide whether or not to recognize domestic partnerships.

VII. CONCLUSION

Iowa should recognize civil unions as marriages. Iowa cannot recognize civil unions as civil unions because of the state's public policy of full marriage equality for same-sex couples after *Varnum*. Iowa should prioritize its principles of equality and use common-law marriage as an analogue to recognize valid out-of-state civil unions as marriages—as *Iowa Code* section 595.20 requires—thus following the lead of other jurisdictions that have given equal status to same-sex couples where the jurisdictions had the option to decline to do so. If the Iowa Constitution prohibits Iowa from adopting civil unions,¹⁷⁶ it would be minimally counterintuitive, and potentially

172. *Id.* at 906–07.

173. *See* CAL. FAM. CODE §§ 297(b)(5)(A), 297.5 (West 2005) (defining the rights of a domestic partnership between same-sex persons as being the same “as are granted to and imposed upon spouses”); NEV. REV. STAT. § 122A.200 (2009) (granting rights similar to marriage).

174. *See supra* text accompanying notes 82–83 (emphasizing the similarities between civil unions and marriages).

175. *See* IOWA CODE § 595.1A (2009) (“Marriage is a civil contract, requiring the consent of the parties capable of entering into other contracts . . .”).

176. *See Varnum*, 763 N.W.2d at 906 (“A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”).

unconstitutional, for Iowa courts or the Iowa Legislature to adopt a position that “recognized” civil unions for the sole purpose of declining to recognize them as marriages, especially when, based on the parties’ intent, rights, and obligations, a civil union would be a marriage in Iowa if the parties had entered into it here.