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Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*

Ralph U. Whitten**

I. INTRODUCTION

The American Law Institute's (ALI) approval of domestic partnerships in its *Principles of the Law of Family Dissolution*¹ virtually assures that some states will recognize such partnerships as part of their law of domestic relations. However, unless all states approve identical domestic partnership rules, one may also expect frequent conflict-of-laws problems to occur as a byproduct of the ALI action. The purpose of this article is to describe some of the conflicts issues that will arise when parties to domestic partnerships have, or develop, contacts with more than one state. Although a full exposition of conflicts issues affecting domestic partnerships must, of necessity, await real-world experience, it is possible now to anticipate a number of the problems that such partnerships will generate in our federal system. The uncertainty for domestic partners created by these conflicts problems will be significant. However, the uncertainty can be substantially mitigated by private contractual arrangements between the parties.

Generally, conflicts issues concerning domestic partnerships will arise in two broad areas: (1) judgment enforcement (and its complementary area of personal jurisdiction) and (2) choice of law. Judgment enforcement issues will arise when a state judgment embodies rights derived from a domestic partnership relationship and the judgment creditor attempts to enforce the judgment in another state that does not recognize domestic partnerships. When this occurs, the judgment debtor may try to resist enforcement of the

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1. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) §§ 6.01–6.06 [hereinafter PRINCIPLES (Tentative Draft No. 4)].

judgment on the grounds that the law of the judgment-enforcing state is not compatible with that of the judgment-rendering state. Such issues will also arise when a plaintiff attempts to enforce rights arising out of a domestic partnership against a defendant in another state through the exercise of long-arm jurisdiction by a court of the state in which the plaintiff resides. In some, but not all, of the latter cases, the attempted exercise of long-arm jurisdiction will encounter constitutional problems. When constitutional problems with long-arm jurisdiction exist, they will generate corresponding judgment-enforcement issues in other states.

Part II will discuss some common situations in which judgment-enforcement and jurisdictional issues concerning domestic partnerships may be expected to arise. As explained there, with the exception of judgments embodying rights derived from same-sex domestic partnerships,² the states will, with few exceptions, be bound by the general implementing statute³ to the Full Faith and Credit Clause of the United States Constitution⁴ to enforce jurisdictionally valid judgments of other states derived from domestic partnerships. Under existing United States Supreme Court authorities, it will not be possible, in cases of domestic partnerships between persons of the opposite sex, for a judgment creditor to resist the enforcement of a valid judgment of another state on the grounds that it violates the public policy of the judgment-enforcing state. In cases involving judgments based on same-sex relationships, however, the outcome of enforcement proceedings in another state is less clear because of a special implementing statute (the Defense of Marriage Act) enacted by Congress that may extend to same-sex domestic partnerships.⁵

Conflicts issues other than those concerning judgment-enforcement or jurisdiction will occur in cases where persons in a domestic partnership relationship move from state to state. In this situation, one of the partners may ask a state court to recognize the existence of the domestic partnership under the state's own law or the law of another state. The other partner, in turn, may resist rec-

2. The American Law Institute's proposal defines domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(1).

3. See 28 U.S.C. § 1738 (1994).

4. U.S. CONST. art. IV, § 1.

5. See The Defense of Marriage Act, 28 U.S.C. § 1738C (1994).

ognition of the partnership on the ground that the forum should apply the law of a state that does not recognize domestic partnerships. These issues may arise in two situations. First, a conflicts issue may arise when one of the partners brings a proceeding in a state that does not recognize domestic partnerships, but the partners have previously resided in a state that does recognize such partnerships. Second, a conflicts question may also arise when the plaintiff brings a proceeding in a state that recognizes domestic partnerships, but the partners have previously resided, perhaps for the most significant portion of their relationship, in a state that does not recognize domestic partnerships. Additional conflicts problems may also arise when multiple states with which the parties have had contacts recognize domestic partnerships but regulate the details of such partnerships differently.

Part III will discuss some common situations in which conflicts problems may be expected to occur in cases of peripatetic domestic partners. In these situations, whether the partners are in a same-sex or a different-sex relationship, there is a substantial likelihood that the state asked to recognize the partnership can refuse to do so in a constitutionally legitimate fashion. Existing United States Supreme Court decisions under the Due Process Clause of the Fourteenth Amendment⁶ and the Full Faith and Credit Clause impose only minimal restrictions on the power of states to apply their own law rather than the law of other states. This means that the states will generally be able to decide conflict-of-laws questions concerning domestic partnerships under their individual choice-of-law systems without fear of federal constitutional restraint. Therefore, the recognition of rights under a domestic partnership will depend heavily on the kind of choice-of-law system employed by a state and the way in which the state applies the system to the facts of a particular case. However, as in the case of judgments, same-sex domestic partners may also expect greater problems than different-sex partners in obtaining recognition of their partnerships under state choice-of-law doctrines.

Part IV will conclude with some general remarks about the avoidance of both judgment-enforcement questions and conflict-of-laws questions concerning domestic partnerships. The ALI proposals recognize the propriety of agreements between domestic partners to

6. U.S. CONST. amend. XIV.

settle their affairs in advance.⁷ Furthermore, American courts, acting under diverse conflict-of-laws systems, generally recognize and enforce contractual agreements between parties governed by the law of other states, even when such agreements could not validly have been formed under the law of the state where enforcement is sought.⁸ In addition, American courts generally recognize the ability of contracting parties to choose the law that will govern their agreement by a valid choice-of-law clause in a contract,⁹ as well as the ability of contracting parties to limit litigation over their contractual obligations to a particular state through a valid choice-of-forum clause. These widely recognized principles offer domestic partners the opportunity to stabilize their property arrangements through contract rather than subjecting their relational obligations to the vagaries of general conflicts law in the several states.

II. ENFORCING JUDGMENTS EMBODYING DOMESTIC PARTNERSHIP RIGHTS

A. *The General Rules of Judgment Enforcement*

The enforcement of state judgments in the United States has been controlled since 1790 by the general implementing statute to the Full Faith and Credit Clause of the United States Constitution.¹⁰ In 1813, the United States Supreme Court interpreted this statute to require that state judgments must be given the same effect in other states as those judgments would receive in the courts of the state where they were rendered.¹¹ This “same effect” rule essentially re-

7. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01(2); see also *id.* §§ 7.01–7.18 (governing agreements between domestic partners and others entering into domestic relationships).

8. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (stating that the “most significant relationship” approach to the rules governs a contracts choice-of-law decision in the absence of an effective choice by the parties).

9. See, e.g., *id.* § 187.

10. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)).

11. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813). Commentators on the Full Faith and Credit Clause sometimes state that the *Mills* decision interpreted the Constitution as opposed to the implementing statute. See, e.g., Julie L. B. Johnson, Comment, *The Meaning of “General Laws”: The Extent of Congress’s Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1619 (1997); Thomas M. Keane, *Aloha, Marriage? Constitutional and Choice of Law Arguments for*

quires a reference to the res judicata law of the judgment-rendering state in order to determine the proper scope of that state's judgment.¹² Subject to a few well-recognized exceptions, the Court has steadily adhered to the "same effect" rule to the present day. The exceptions include judgments rendered without personal or subject-matter jurisdiction in the judgment-rendering court,¹³ judgments procured by extrinsic fraud,¹⁴ judgments barred by the limitations period of the judgment-enforcing state applicable to foreign judgments,¹⁵ nonfinal and modifiable judgments of other states,¹⁶ and

Recognition of Same-Sex Marriages, 47 STAN. L. REV. 499, 501 (1995). This is flatly incorrect. See Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 66-67 (1957) (observing that *Mills* only interpreted the statute); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 379-80 (1998) [hereinafter Whitten, *Original Understanding and DOMA*]. Thus, the "same effect" rule is a byproduct of congressional action, not a constitutional rule.

12. See LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 172-73 (2d ed. 2000) [hereinafter TEPLY & WHITTEN] (discussing *Mills*). See also *id.* at 949-63 (discussing the modern issues involved in the enforcement of state judgments in other state and federal courts); LUTHER L. MCDUGAL III ET AL., AMERICAN CONFLICTS LAW §§ 65-75 (5th ed. 2001) (forthcoming Fall 2001) [hereinafter MCDUGAL ET AL.] (discussing in detail the historical and modern issues concerning the enforcement of state judgments).

13. Lack of personal and subject matter jurisdiction ordinarily constitute specific applications of the "same effect" rule of the general implementing statute rather than true exceptions to the rule. This is because normally lack of personal or subject matter jurisdiction in the judgment-rendering court will render a judgment void in the state that rendered the judgment and thus unenforceable there in a separate proceeding. This, in turn, renders the judgment unenforceable in another state under the "same effect" rule. See TEPLY & WHITTEN, *supra* note 12, at 945-48 (discussing the rules pertaining to the res judicata effect of a determination of personal or subject matter jurisdiction in detail). See also MCDUGAL ET AL., *supra* note 12, § 70 (discussing jurisdictional exceptions to the "same effect" rule comprehensively). Lack of personal and subject matter jurisdiction are referred to as exceptions to the general rule in this article because it has become commonplace to do so in the law and literature of conflicts.

14. Extrinsic fraud is actually a specific application of the "same effect" rule rather than an exception to it. Extrinsic fraud in the procurement of a judgment normally renders a judgment invalid in the state where it is rendered and thus unenforceable there. This, in turn, makes the judgment unenforceable in other states under the "same effect" rule of the general implementing statute. See MCDUGAL ET AL., *supra* note 12, § 70 (discussing extrinsic fraud as well as other "exceptions" to the "same effect" rule). Fraud is nevertheless referred to as an "exception" to the general rule in the text because it has become commonplace to do so in the law and literature of conflict of laws.

15. The ability to apply a statute of limitations of the judgment-enforcing state to another state's judgment is a "true" exception to the general "same effect" rule of the implementing statute because there is no question that a judgment to which the forum's limitations period applies is valid and enforceable in the state where it is rendered. See *id.* § 72 (discussing the limitations exception).

16. The degree to which a state may refuse to enforce a nonfinal judgment of another

other state's penal judgments.¹⁷ Significantly for domestic partnership judgments, however, there is no general "public policy" exception to the "same effect" rule of the general implementing statute.¹⁸

B. Judgment Issues Involving Different-Sex Domestic Partnerships

1. Judgments based on personal service within the state

Judgments embodying rights derived from domestic partnerships between persons of different sexes will be controlled by the "same effect" rule of the general implementing statute to the Full Faith and Credit Clause and the exceptions to that rule. A few examples of the kinds of cases that may arise will be useful in illustrating how judgment-enforcement issues may arise in domestic partnership situations.

Assume that *A* and *B* are persons of different sexes residing in State *X*, which recognizes domestic partnerships under conditions identical to the ALI proposals. Under the law of State *X*, *A* and *B* qualify as domestic partners. *A* and *B* decide to separate, and *A* sues *B* in a court of State *X* with proper subject matter jurisdiction to obtain recognition of the partnership and obtain an equitable division of the partnership property under the law of State *X*. *B* is properly served in this action and appears to contest *A*'s claims. The court finds that *A* and *B* qualify as domestic partners and enters a judgment making a property award to *A*. *B* leaves State *X* with the bulk of the partnership property and relocates in State *Y* before *A* can ex-

state depends on the law of the judgment-rendering state. If the judgment is sufficiently final where rendered to have a res judicata effect, then it must be given such an effect in the state where its enforcement is sought. See *id.* § 70 (discussing this exception). Thus, the "non-final judgment" rule is really an example of the application of the "same effect" rule rather than a true exception to the rule. It is referred to as an exception in the text because it has become customary in the law and literature of conflicts to do so. The status of modifiable judgments is more confused, as well as more complex to explain. For a full discussion, see *id.* (discussing the modifiable judgment rule).

17. The penal judgment rule is a true exception to the "same effect" rule of the implementing statute, because there is no question that penal judgments of other states are valid and enforceable where rendered, even though they may be denied enforcement in other states. See *id.* § 73 (Judgments and Public Acts: State Judgments: Judgments Based on Penal Statutes and Governmental Claims) (discussing the penal judgment exception in detail).

18. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 239 (1998) (indicating that a state may not refuse to enforce another state's judgment based on the enforcing states' conflict-of-laws rules or policy preferences).

cute the judgment in State *X*. *A* brings an appropriate proceeding in a State *Y* court to enforce the State *X* judgment. State *Y* is obligated by the implementing statute to the Full Faith and Credit Clause to give the same effect to the State *X* judgment that it would receive in State *X*. Normally, this will be a *res judicata* effect, which will preclude *B* from contesting *A*'s claims under the doctrine of claim preclusion and will also preclude *B* from contesting issues litigated and determined against *B* in the State *X* action if the issues supported and were essential to the judgment.¹⁹ The State *X* court possessed personal jurisdiction over *B* and subject matter jurisdiction over the action, and there is no apparent basis on the facts given for State *Y* to apply any nonjurisdictional exception to the "same effect" rule. Even if State *Y* does not recognize domestic partnerships under its own law and considers them contrary to its strong public policy, it may not refuse to enforce the State *X* judgment on that ground because no general public policy exception exists to the command of the implementing statute.²⁰

2. *Judgments based on long-arm service*

More complicated cases will occur when one of the domestic partners abandons the state where the partners have been residing for a substantial period and establishes a new domicile in another state. If the stay-behind partner commences litigation to obtain an equitable property division or compensation based on the domestic partnership, a court in the state where the partners formerly cohabited will undoubtedly be able to exercise long-arm jurisdiction over the defendant partner even though he or she has moved to another state. The plaintiff's claim arises under the forum's domestic partnership

19. See TEPLY & WHITTEN, *supra* note 12, at 900–38 (discussing the doctrines of claim and issue preclusion).

20. The only doubt that might exist about the enforceability of the judgment in another state is if the judgment is one for periodic support payments and the judgment is modifiable. The ALI envisions that such judgments for periodic payments will be proper under its proposals. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft, Part I, February 14, 1997) §§ 5.01(3), 5.05(3) & (5), 5.06(4), 5.07, 5.08, 5.09, 5.10(1), 5.11. However, under existing Supreme Court precedent, there is doubt about the extent to which judgments modifiable in the state where rendered can be refused enforcement in other states. See MCDUGAL ET AL., *supra* note 12, § 70. The better interpretation of the case law is, however, that judgments subject to retroactive or future modification should have to be enforced by other states until actually modified by the judgment-rendering state or the judgment-enforcing state. See *id.*

law and is based on a relationship with a close connection to the forum. This will provide an adequate basis for the State constitutionally to assert “specific jurisdiction” over the defendant under an appropriate long-arm statute.²¹ Once the state renders a constitutionally valid judgment based on the domestic partnership, that judgment will be enforceable in every other state under the implementing statute.

3. *Judgments based on property within the state*

A more difficult case under present law would occur if the peripatetic partner were to establish a domicile in a new state, take property accumulated during the partnership in the state where the partners formerly cohabited, and commence an action in the new domicile to obtain a judgment for the property. For example, assume that domestic partners *A* and *B* reside in State *X*, which recognizes domestic partnerships. *A* changes domiciles to State *Y*, which also recognizes domestic partnerships under a law identical to that of State *X*.²² *A* takes the bulk of the property accumulated during the partnership to State *Y* and there commences a proceeding to obtain recognition of the partnership and a judgment awarding the property to *A*. *A* serves *B* with long-arm process in this action under the State *Y* long-arm statute, which extends the jurisdiction of the State *Y* courts to any case in which it is not inconsistent with the Constitution of the United States for those courts to exercise personal jurisdiction over nonresidents.²³ State *Y*, however, is a state with which *B*

21. A state asserts specific jurisdiction when it asserts jurisdiction based on a claim arising out of or related to the defendant’s contacts with the state. A state asserts general jurisdiction when its assertion of jurisdiction is based on a claim that does not arise out of and is not related to the defendant’s contacts with the state. An assertion of specific jurisdiction is valid under the Due Process Clause if the defendant has purposeful contacts with the state and the assertion of jurisdiction is otherwise reasonable. An assertion of general jurisdiction is valid under the Due Process Clause if the defendant has systematic and continuous contacts with the state, but it is not clear if the assertion of jurisdiction must also pass a reasonableness test, as in the case of specific jurisdiction. See TEPLY & WHITTEN, *supra* note 12, at 202–278 (discussing the modern due process restrictions on state-court jurisdiction); see also *id.* at 222–48 (discussing the modern due process concepts of “general” and “specific” jurisdiction); MCDUGAL ET AL., *supra* note 12, §§ 22–24 (discussing the traditional and modern bases for asserting personal jurisdiction consistent with the Due Process Clause, including the concepts of specific and general jurisdiction).

22. This assumption is made in order to simplify the conflict-of-laws context of the adjudication. The reasons for this will be clear from the later discussion. See *infra* Part III.

23. See TEPLY & WHITTEN, *supra* note 12, at 216–20 (discussing modern state long-

has no contacts, ties, or relations.

The problem with *A*'s action is that, under the minimum contacts test of *International Shoe v. Washington*²⁴ and its progeny,²⁵ State *Y*'s assertion of personal jurisdiction over *B* would appear to violate the Due Process Clause of the Fourteenth Amendment. If this is so, State *Y* could not enter a judgment binding on *B*. Thus, *B* would be free to litigate any matters relevant to the parties' relationship, including the existence of the domestic partnership, the proper division of the property, and so forth, in State *X* (or elsewhere), free from the usual *res judicata* effects that would have to be given to a jurisdictionally valid judgment under the compulsion of the general implementing statute. Nevertheless, the case described is more complicated than this simple analysis suggests.

If *A* and *B* were a married couple, there is no question that State *Y* would have the power to divorce them based on *A*'s domicile alone.²⁶ However, under the concept of "divisible divorce" prevailing in the United States today, State *Y* would not have the power to enter a personal judgment against *B*, such as a judgment for alimony, assuming that *B* does not have minimum contacts with State *Y*.²⁷ Domestic partnerships, however, are not completely analogous to marriages. As conceptualized by the ALI proposals, domestic part-

arm statutes); MCDUGAL ET AL., *supra* note 12, § 27 (same).

24. 326 U.S. 310 (1945).

25. See TEPLY & WHITTEN, *supra* note 12, at 202–86 (discussing the development and application of the minimum contacts test); MCDUGAL ET AL., *supra* note 12, §§ 20–24 (discussing *International Shoe* and its progeny).

26. This curious result is the byproduct of the rule of the *Williams* decisions. See *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*); *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*). In these cases, the United States Supreme Court recognized the power of states to divorce based on the domicile of the plaintiff alone, even though the defendant has never been anywhere near the state. The theory was that the marital status of the plaintiff was a "thing," or *res*, that followed the plaintiff to the new domicile. The presence of the thing in the state was like the presence of property, which allowed the state to exercise power over it. With the advent of the minimum contacts test of *International Shoe*, it might have been reasoned that this theory was no longer sound. However, in *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977), the Supreme Court went out of its way to preserve the *ex parte* divorce jurisdiction from invalidation under the minimum contacts test, though it did so cryptically. See TEPLY & WHITTEN, *supra* note 12, at 205–07 (discussing the impact of *Shaffer* on *ex parte* divorce); MCDUGAL ET AL., *supra* note 12, §§ 204, 207 (discussing, *inter alia*, marriage as a status and divorce jurisdiction based on the *in rem* theory).

27. See, e.g., *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948); TEPLY & WHITTEN, *supra* note 12, at 207–08 (discussing divisible divorce); MCDUGAL ET AL., *supra* note 12, § 211 (discussing divisible divorce).

nerships do not create a status that is the equivalent of marriage.²⁸ But the presence of the status created by marriage in a state is what gives the state the right to divorce based on the domicile of the plaintiff alone.²⁹ In the absence of the special status that marriage gives, therefore, State *Y* does not have the power under currently prevailing jurisdictional theory to declare the existence of a domestic partnership based on the domicile of the plaintiff alone. The state must have sufficient contacts between the state and the defendant to satisfy due process in the way that would be necessary in a non-domestic relations case.

Curiously, however, there is authority suggesting that if *A* and *B* were married, although State *Y* would not have the power to enter an “in personam”³⁰ judgment against *B*, it would have the power to determine the ownership of the property brought to State *Y* by spouse *A*. For example, in *Abernathy v. Abernathy*,³¹ a husband and wife married in Florida and resided in Louisiana. They separated, and the husband moved to Georgia and purchased real property in Georgia, using assets accumulated during the marriage and taken from Louisiana without his wife’s consent. The husband then commenced an action in Georgia to obtain a divorce and an award of the property. The wife challenged the ability of the Georgia court to exercise personal jurisdiction over her, but the trial court sustained jurisdiction over the *res* of the marital relationship for purposes of granting the divorce and also exercised “in rem” jurisdiction over the property based on its presence in Georgia.

The Supreme Court of Georgia affirmed. As described above, the plaintiff’s domicile in Georgia was sufficient to sustain jurisdiction to divorce,³² but the power of the Georgia courts to make a property award presented a more difficult issue. The Supreme Court of the United States had previously held that the presence of property unre-

28. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.01 cmt. a (discussing how both ceremonial and common law marriages result in rights and obligations not only between the parties, but also create a legal status that encompasses rights and responsibilities in relation to third parties and the state; domestic partnerships, in contrast, create rights only between the parties, not the special status-based relationships of marriage).

29. See *supra* note 26 and authorities therein cited and discussed.

30. An in personam judgment is one based on the court’s power over the defendant, as opposed to an in rem judgment, which is based on the court’s power over a thing such as property or a status. See *supra* note 26 and the authorities cited therein.

31. 482 S.E.2d 265 (Ga. 1997).

32. See *supra* note 26 and accompanying text.

lated to the plaintiff's claim against the defendant—so-called “quasi in rem jurisdiction”—was an unconstitutional basis for an assertion of state-court jurisdiction under the Due Process Clause of the Fourteenth Amendment.³³ However, the Court's opinion contained language that carefully preserved the ability of a state to adjudicate claims directly concerning the property itself when the property is located in the forum state.³⁴ The Georgia Supreme Court relied on this language to sustain the ability of Georgia to adjudicate the ownership of the marital property in *Abernathy*.³⁵

Abernathy raises the possibility that, even though State *Y* might not have status-based jurisdiction to declare the existence of a domestic partnership, State *Y* might nevertheless have power to determine that the partnership exists as an incident of its power to adjudicate the ownership of the property brought into the state by *A*. It is far from clear, however, that the United States Supreme Court would approve of the *Abernathy* result on the property issue.³⁶ If not, the presence of the property alone in State *Y* would not be a sufficient basis for determining ownership of the property as against *B*, even if both States *X* and *Y* would agree that a domestic partnership exists on the facts of the case. In the absence of the ability to adjudicate the ownership of the property, the court would not have power under existing authority to adjudicate the existence of the domestic partnership as an incident of its power over the property. In addition, *B* may be able to short-circuit *A*'s attempt to have State *Y* adjudicate the ownership of the property by commencing an action against *A* in State *X*. As noted earlier,³⁷ State *X* could validly assert long-arm jurisdiction over *A* to adjudicate the existence of the domestic partnership and make appropriate property and compensatory awards. As noted, such an in personam judgment would be entitled to enforcement in State *Y* under the general implementing statute, even though the judgment is based on a domestic partnership.

33. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

34. See *id.* at 207–08.

35. As the dissent in *Abernathy* pointed out, however, the Supreme Court had also indicated that the location of property in the state might not support jurisdiction to adjudicate claims to the property itself if the property had been brought into the state without the owner's consent. See *Abernathy*, 482 S.E.2d at 272 (Sears, J., dissenting). See also *Shaffer*, 433 U.S. at 208 n.25.

36. See *supra* text accompanying note 35.

37. See *supra* text accompanying note 21.

C. Judgments Derived from Same-Sex Partnerships

As observed above, the ALI proposes to extend domestic partnership recognition to persons in same-sex relationships.³⁸ The enforceability in other states of judgments based on same-sex domestic partnerships is more problematic than the enforceability of judgments based on different-sex partnerships because of a special implementing statute enacted by Congress in 1996. Known as the Defense of Marriage Act (DOMA),³⁹ the statute provides that “[n]o State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”⁴⁰ At the time of this writing, no court has yet interpreted the statute. As it is pertinent to same-sex domestic partnerships, the issue will be whether judgments derived from such partnerships are based on “relationship[s] . . . treated as a marriage.” As noted in the preceding subsection, the ALI proposals do not treat domestic partnerships as the full equivalent of marriage.⁴¹ Nevertheless, domestic partnerships are designed to create financial rights between domestic partners at the termination of their relationship that are the equivalent of the financial rights possessed by married persons upon the dissolution of marriage.⁴² Thus, it is conceivable that a court might hold DOMA applicable to a judgment derived from a domestic partnership because it is based on a relationship “treated as a marriage” in this financial sense.

The consequence of including same-sex domestic partnerships within DOMA would be that judgments derived from such partnerships would no longer be subject to the “same effect” command of the general implementing statute discussed in the preceding subsec-

38. See *supra* note 2.

39. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. IV 1998)).

40. *Id.*

41. See *supra* note 28 and accompanying text.

42. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, §§ 6.04 (stating that property is domestic partnership property if it would have been marital property had the domestic partners been married during the period of the domestic partnership), 6.05 (stating that domestic partnership property should be divided according to the *Principles* for the division of marital property), 6.06(1)(a) (stating that a domestic partner is entitled to compensatory payments on the same basis as a spouse).

tion.⁴³ Instead, DOMA, as the controlling implementing statute, would permit, but not require, states other than the judgment-rendering state to refuse to enforce such judgments. Thus, even though the Supreme Court's interpretation of the general implementing statute does not recognize a general public policy exception to the "same effect" command, under DOMA, a state could choose to apply such an exception under its own choice-of-law system to judgments based on same-sex partnerships. This would make judgments based on same-sex domestic partnerships relatively valueless in situations in which one of the partners moves to another state that is hostile to same-sex partnerships and the peripatetic partner takes to the other state assets that the judgment awarded to the stay-behind partner.

It is, however, possible to interpret DOMA in a manner that does not remove judgments based on same-sex domestic partnerships from the command of the general implementing statute. Congress enacted DOMA during a recent controversy over the potential legalization of same-sex marriages by the State of Hawaii.⁴⁴ The fear was that after legalization of such marriages in one state, other states would be compelled to recognize the marriages under the first sentence of the Full Faith and Credit Clause.⁴⁵ As discussed in the next section, this fear was misplaced because the United States Supreme Court has interpreted the first sentence of the Full Faith and Credit Clause in a minimalist fashion, thus posing little or no danger that states will be forced to recognize the validity of marriages performed

43. It should be noted that similar problems may exist with child custody and support awards made in favor of one same-sex partner and against another when the same-sex partner receiving the award has been awarded custody of and support for a child who was formerly a common child of the partners. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, §§ 6.03(5) (defining common child for purposes of the domestic partnership provisions), 2.03 (defining parent for purposes of the ALI *Principles*). Custody and support awards are controlled by special implementing statutes under current law. See Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994 & Supp. IV 1998); Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (1994 & Supp. IV 1998). DOMA may create exceptions to these statutes as well as to the general implementing statute in cases where same-sex partners dissolve their relationship and one of the partners is awarded custody of a common child of the former relationship and support for the child. Concededly, however, this is less likely than in the case of a property or compensatory award directly to one of the partners and against the other. The child was not in a relationship with the defendant that is treated as a marriage, even though the custodial parent was.

44. See generally, *e.g.*, Whitten, *Original Understanding and DOMA*, *supra* note 11.

45. See *id.*

elsewhere that violate their strong public policy.⁴⁶ Therefore, under current Supreme Court authorities, DOMA is largely unnecessary as applied to state choice-of-law decisions.

The inclusion of court judgments within the statute is another matter, however. As noted above, the effect of including within the Act judgments (judicial proceedings) derived from same-sex relationships treated as marriages is to remove such judgments from the “same effect” command of the general implementing statute. Certain arguments made by the proponents of same-sex marriage apparently motivated Congress to have DOMA apply to judgments derived from same-sex relationships treated as marriages. In a nutshell, the arguments were that same-sex partners could get married in a state where same-sex nuptials are permitted and solidify their marriages by obtaining declaratory judgments that they are married from courts in the same state.⁴⁷ These arguments, however, were always preposterous. In addition to the (perhaps overwhelming) problem of presenting a justiciable controversy to a court of the state where the marriage was performed, it is impossible to see how a court in that state would have the jurisdiction to bind officials or private parties in other states with a judgment rendered in an action to which they were not, and could not be made, parties.⁴⁸ Nevertheless, Congress responded to the arguments by including judgments derived from same-sex marriages within DOMA.⁴⁹

46. See *infra* notes 52–71 and accompanying text. See also Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. U. L. REV. 1 (1981).

47. See Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 404–05 (1995); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 LOUISVILLE J. FAM. L. 551 (1993–94). The notion that a judgment would “solidify” the marriage is based on the fact that states have been required to enforce the judgments of other states stringently under the “same effect” command of the general implementing statute, but have been subject to far less stringent control when determining whether to apply another state’s statutes under the first sentence of the Full Faith and Credit Clause. The reasons for this difference in treatment are historical and include the fact that the text of the first implementing statute applied the “same effect” command to judgments, but not to state statutes. See generally Whitten, *Original Understanding and DOMA*, *supra* note 11 (explaining the history of the Full Faith and Credit Clause and implementing statute as applied to state judgments and public acts).

48. See Whitten, *Original Understanding and DOMA*, *supra* note 11, at 390–91.

49. See H.R. REP. NO. 104-664, at 30 n.77 (1996), reprinted in 1996 U.S.C.A.N. 2905 (describing the possibility that the proponents of same-sex marriages would adopt a

In the process, however, Congress may have included more within the Act than is desirable. For example, assume that in the future a same-sex couple is married in a state permitting such unions, and one of the spouses is later killed in the same state by a nonresident. A wrongful death action brought by the surviving spouse subsequently results in a valid judgment against the tortfeasor in the state. Enforcement of the judgment where the tortfeasor has assets, presumably in the tortfeasor's home state, may no longer be a matter of right under the "same effect" command of the implementing statute because the judgment might be removed from that command by a broad interpretation of DOMA as applied to judgments.⁵⁰ Nevertheless, it is difficult to see why Congress would want to reach such a result,⁵¹ and the better construction of DOMA would limit its inclusion of judgments to the kind of evil at which Congress was aiming: a bogus declaratory judgment action in the state where the same-sex partners are wedded that is designed to force other states to accept the same-sex marriage contrary to their laws. If the interpretation of DOMA is so limited, legitimate judgments obtained in the same-sex domestic partnership context would, like those derived from same-sex marriages, still fall within the "same effect" command of the general implementing statute. If the courts ultimately adopt a broader interpretation of DOMA, however, the effect of a judgment derived from a same-sex domestic partnership will depend on a permissive conflict-of-laws decision of the state asked to enforce the judgment.

strategy of obtaining declaratory judgments of marriage).

50. See Whitten, *Original Understanding and DOMA*, *supra* note 11, at 391 n.465. See also Patrick J. Borchers, *Baker v. General Motors: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 180–82 (1998); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 973–74 (1998).

51. The inclusion of this kind of judgment within the Act would not prevent a wrongful death action against the defendant. It would simply prevent the surviving same-sex partner from bringing, or perhaps benefiting from, the action. While there may be good reasons for preventing states or their residents from being forced by the laws of other states to accept marriages they find morally offensive, there is no apparent interest on the part of a state such as the one described in the text to determine which of a number of nonresidents have the right to bring a wrongful death action under the law of another state or to benefit from it. That should be a matter for the state whose wrongful death law governs the controversy to decide. In this case, that state is the state of the decedent's domicile, where the decedent was killed.

III. CHOICE-OF-LAW ISSUES CONCERNING DOMESTIC PARTNERSHIPS

A. *The Constitutional Context*

1. *Existing standards*

The principal constitutional limitations on a state's power to apply its own law to a case containing multi-state elements are contained in the Full Faith and Credit Clause and the Due Process Clause of the Fourteenth Amendment. In *Allstate Insurance Co. v. Hague*,⁵² a majority of the United States Supreme Court agreed that the test was the same under both clauses for determining whether a state could constitutionally apply its own law to a case. The test is whether the state has a sufficient contact or aggregation of contacts creating state interests that would make the application of its law neither arbitrary nor fundamentally unfair.⁵³ In *Sun Oil Co. v. Wortman*,⁵⁴ however, the Court held that the *Allstate* test only applied to "nontraditional" choice-of-law decisions. When a state is applying a traditional choice-of-law rule—i.e., one that was accepted at the time the Full Faith and Credit and Due Process Clauses were ratified and whose acceptance has continued into the present—the choice-of-law rule is constitutionally valid without regard to the *Allstate* test.

It is apparent that *Allstate* and *Sun Oil* place only modest restrictions on a state's ability to apply its law to a case rather than the law of another state.⁵⁵ The end result is that in most cases in which conflict-of-laws issues concerning domestic partnerships arise, the states will be free to give or refuse effect to the laws of other states in accord with their own conflict-of-laws systems without constitutional restraint. Thus, if two people cohabit in a state that would recognize them as domestic partners but move to a state that does not recognize such partnerships, it is unlikely that the Due Process or Full Faith and Credit Clauses will require their new domicile to recognize any rights accruing under the law of their former domicile. The contacts created by the parties' establishment of a new domicile in an-

52. 449 U.S. 302 (1981).

53. See *id.* at 312–13, 332.

54. 486 U.S. 717 (1988).

55. See *Allstate*, 449 U.S. at 332 (Powell, J., dissenting).

other state will provide that state with a sufficient interest to apply its own law to their relationship rather than the law of the previous domicile. This, in turn, will allow their new domicile to reject financial claims by one of the parties against the other based on the domestic partnership law of the former domicile.

2. Potentially more restrictive standards

Despite the minimalist approach the Supreme Court has taken to constitutional restrictions on state choice of law in *Allstate* and *Sun Oil*, it is important to recognize that further development of the *Allstate* standard is possible and may result in greater constitutional restrictions on state choice-of-law authority. In *Allstate*, a plurality of four justices applied the “significant contacts creating state interests” standard in a very general way to sustain Minnesota’s choice of its own law to govern an insurance issue.⁵⁶ The plurality did not separately examine the policies supporting the Due Process and Full Faith and Credit Clauses to determine whether those policies restricted state choice-of-law authority in different ways. Nor did the plurality analyze Minnesota’s contacts closely to determine how they produced a governmental interest on the part of the state in applying its law to the particular issue.⁵⁷

A fifth Justice, John Paul Stevens, concurred in *Allstate*, but argued that the Full Faith and Credit Clause and the Due Process Clause of the Fourteenth Amendment protected different interests and should be analyzed differently.⁵⁸ To Justice Stevens, the Full

56. See *id.* at 302–20 (Brennan, J., concurring). The issue in the case was whether the uninsured motorist coverage under three automobile insurance policies of \$15,000 per policy could be “stacked” to produce a total recovery of \$45,000. The policies were issued in Wisconsin, to a Wisconsin resident, and the accident in question occurred in Wisconsin and was entirely between Wisconsin residents. The action was brought in Minnesota after the widow of the decedent-owner of the policies moved there. The Minnesota Supreme Court held that Minnesota law, which permitted stacking, should be applied rather than Wisconsin law, and the Supreme Court of the United States affirmed this result.

57. See *id.* at 313–20. The contacts with Minnesota were (1) that the decedent, although a Wisconsin resident who was killed in Wisconsin and to whom the automobile insurance in question was issued in Wisconsin, worked in Minnesota; (2) Allstate did business in Minnesota; and (3) the decedent’s widow, who was the plaintiff in the action, moved to Minnesota after the accident. The majority simply counted these contacts without matching them carefully to the legal issue in the case to determine whether they produced a legitimate state interest on the part of Minnesota in controlling the issue with its law.

58. See *id.* at 320–32 (Stevens, J., concurring). Justice Stewart did not participate in the decision of the case. See *id.* at 320.

Faith and Credit Clause was designed to transform the states from independent sovereigns into a single unified nation. The Clause does this by protecting the sovereign interests of the states from illegitimate encroachment by other states.⁵⁹ The Due Process Clause is designed to protect individuals from choice-of-law decisions that result in unfair surprise by producing the application of a law to the individuals that could not have been anticipated at the time they engaged in the conduct that is the subject of the litigation.⁶⁰

Three other justices dissented in *Allstate*.⁶¹ These justices agreed with the plurality that the “significant contacts creating state interests” standard governed state choice-of-law decisions under both the Full Faith and Credit and Due Process Clauses. However, in applying the standard, the dissenters separated their analysis under each clause and applied it more rigorously than did the plurality. This was done in an attempt to measure whether the contacts with Minnesota were sufficient to create interests in applying its law to the particular issue under each constitutional clause. Taking this approach, the dissenters concluded that the contacts between a state and the litigation must be assessed in light of the policy of the Due Process Clause to prevent defeat of the expectations of the parties (or unfair surprise)⁶² and the policy of the Full Faith and Credit Clause to assure that a state must have sufficient connection with the facts giving rise to the litigation to implicate the legitimate scope of its lawmaking jurisdiction.⁶³ Under this approach, the dissenters found that the application of Minnesota law did not violate the Due Process Clause,⁶⁴ but that

59. See *id.* at 322–26 (Stevens, J., concurring). Justice Stevens, although viewing Minnesota’s decision to apply its own law unsound as a matter of choice of law, opined that the Full Faith and Credit Clause was not violated because the insurance contract in question obviously envisioned that the law of other states might be applied to the contract. Thus, the application of Minnesota law did not threaten Wisconsin’s sovereignty.

60. See *id.* at 326–31. Justice Stevens felt that due process was not violated by the application of Minnesota’s law because the rule followed was the majority rule throughout the United States and the parties could have envisioned that a law other than that of Wisconsin, where the policy was issued, might be applied to the insurance policy. See *id.* at 327–29.

61. See *id.* at 332–40 (Powell, J., dissenting).

62. See *id.* at 333–34.

63. See *id.* at 334.

64. See *id.* at 336. In essence, the dissenters found that there could be no unfair surprise to the parties for the same reason as found by Justice Stevens: the risk insured by the defendant was not geographically limited; therefore, the defendant could have anticipated that the law of some state other than Wisconsin, where the policy was issued, could eventually be applied to determine its liabilities under the policy.

the contacts between Minnesota and the litigation were insufficient to give it an interest in applying its public policies. In drawing the latter conclusion, the dissenters examined the contacts between Minnesota and the litigation and concluded that none of them justified application of the state's substantive law to the particular issue in question.⁶⁵

The approach of Justice Stevens, when combined with that of the dissenters, belies the apparent agreement of a majority of the Court on a uniform standard under the Full Faith and Credit and Due Process Clauses. There is obviously a possibility that a majority of the Court may at some future date separate the policies supporting the two clauses and insist that they be separately satisfied in each case by a close matching of the forum's contacts with the legal issues involved in the action. That is, the Court may insist on an analysis of the contacts between a state and the litigation that would both prevent unfair surprise to the defendant and provide a realistic connection between the state's lawmaking prerogatives and the substantive issues in the action. If this is so, the *Allstate* standard may result in greater restrictions on state choice-of-law decisions than exist presently. At least one subsequent Supreme Court decision seems to confirm this, emphasizing especially the need to prevent defeat of the expectations of the parties under the Due Process Clause.⁶⁶

Although it is difficult to determine how an expanded *Allstate*⁶⁷

65. See *id.* at 337–40. The only contact that might have created a state interest in applying a law permitting stacking, and therefore, a higher recovery to the plaintiff, was the plaintiff's residence in Minnesota. However, in the dissenters' view, this contact was not relevant, because the plaintiff had moved to Minnesota after the events giving rise to suit. The other contacts were that Allstate did business in the state and that the decedent worked in the state. However, while the dissenters agreed that these contacts would be relevant to the application of some of the state's laws, they were not relevant to the particular issue—stacking—that was the subject of the litigation.

66. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court applied the *Allstate* test to invalidate the application of Kansas law to the claims of plaintiff class members that had arisen outside Kansas and had no contacts with Kansas. The Court's analysis was not entirely illuminating, but in holding the application of Kansas law invalid, the Court did emphasize the expectations portion of Justice Powell's dissent. See *id.* at 822.

67. As discussed below, there is no "traditional" conflict-of-laws rule—i.e., one accepted at the time the Full Faith and Credit and Due Process Clauses were ratified and whose acceptance has continued into the present—that the states might apply to domestic partnerships, because such partnerships were unknown at the time the clauses were created. Thus, while there are analogies that may be drawn under a traditional conflict-of-laws system to assist a state court in determining how to evaluate domestic partnerships, the *Sun Oil* case would appear to be largely irrelevant to such partnerships.

standard might impact on domestic partnerships cases, it seems unlikely that the standard will be expanded sufficiently to create major restrictions on the power of the states either to apply or to disregard such partnerships. As noted above, the domicile of one or both of the parties will ordinarily be sufficient, even under an expanded standard, to provide a contact necessary to satisfy the Full Faith and Credit and Due Process Clauses, whether the state is applying or refusing to apply the domestic partnership law of another state. The situation will be rare in which application of forum law would either infringe upon the sovereign interests of another state or would defeat the expectations of the defendant. The problem case will be one in which, like *Allstate*, the plaintiff moves to a state having domestic partnership legislation after the events have occurred that would give rise to the partnership.⁶⁸

Thus, assume that State *X* does not recognize domestic partnerships. *A* and *B* are domiciled in State *X* and cohabit there under circumstances that would make them domestic partners under the ALI domestic partnership proposals. The parties then separate, and *A* moves to State *Y*, which recognizes domestic partnerships under the circumstances proposed by the ALI. While on a temporary visit to State *Y*, a state to which she has never been before, *B* is served with process in an action by *A* in State *Y* to obtain recognition that *A* and *B* are domestic partners under State *Y* law and to obtain a money judgment against *B*. Although the personal service on *B* while *B* is physically present in State *Y* validly subjects *B* to the jurisdiction of the State *Y* courts under the Due Process Clause,⁶⁹ substantial doubt exists whether the contacts between State *Y*, the parties, and the events giving rise to suit would be sufficient to satisfy the constitutional restrictions on State *Y*'s ability to apply its domestic partnership law to *B* under an expanded *Allstate* standard.

A's newly acquired domicile in State *Y* may or may not give the state an adequate interest to satisfy the Full Faith and Credit Clause. Under the approach taken by Justice Stevens, the change of domicile might or might not be sufficient to satisfy the Constitution,⁷⁰ but

68. *Allstate*, 449 U.S. at 336 (Powell, J., dissenting).

69. See *Burnham v. Superior Court*, 495 U.S. 604 (1990).

70. See *Allstate*, 449 U.S. at 324 n.11 (Stevens, J., concurring). Justice Stevens seemed in the cited footnote to merge the expectational interests under the Due Process Clause and the sovereign interests under the Full Faith and Credit Clause on the facts of the case. The case involved a contract, however, and Justice Stevens equated expectational party interests with

under the approach taken by the dissenters it surely would not be.⁷¹ Nevertheless, even if the Full Faith and Credit Clause would be satisfied by *A*'s domicile in State *Y*, it is difficult to see how the application of State *Y* domestic partnership law could not, under an unfair surprise standard, violate the Due Process Clause. The parties resided in State *X* when the events necessary to give rise to the domestic partnership occurred. All other things being equal, it is not reasonable to suppose that *B* could fairly have contemplated that she would be held liable to *A* under the law of a state other than State *X*, especially one with which she then had no contact whatsoever.

Of course, one must keep in mind that the scenario described above, or anything resembling it, will be rare. In other cases, even an expanded *Allstate* standard will not limit the power of a state to apply its law to domestic partnership cases with which it has more substantial contacts. In such cases, the original conclusion, drawn above,⁷² will hold true: state choice-of-law doctrine, unrestricted by the United States Constitution, will be the major determinant of the recognition of domestic partnerships in multi-state situations.

3. Other constitutional problems

In addition to the constitutional limits recognized in the *Sun Oil* and *Allstate* cases, courts have sometimes identified constitutional restrictions on the power of states to deprive a party of property rights based simply on a change of domicile from one state to another. For example, a state may not, consistent with due process, change the separate property of one spouse into community property solely on the basis that it has been brought into the state.⁷³ Similarly, spouses may not be deprived of their undivided one-half ownership of community property merely by moving with it from one state to another.⁷⁴ However, events occurring after removal of the property from one state to another, such as divorce of the spouses, can pro-

state interests in having the contract interpreted according to Wisconsin law by observing that the contract covered events that might occur in other states. This might not be possible in a case involving a domestic partnership.

71. *Allstate*, 449 U.S. at 337–40.

72. See *supra* text accompanying note 55.

73. See *In re Thornton's Estate*, 33 P.2d 1 (Cal. 1934); MCDUGAL ET AL., *supra* note 12, § 219 (Marital Property: Removal of Goods or Change of Domicile).

74. See MCDUGAL ET AL., *supra* note 12, § 219 (Marital Property: Removal of Goods or Change of Domicile).

vide a basis upon which a state may make an award of one spouse's property to the other spouse.⁷⁵

Thus, assume that spouses move from a separate to a community property state, with the husband owning property classified as his separate property in the former state of residence. After the move, the wife commences a divorce proceeding against the husband. The fact of the move itself does not allow the community state automatically to convert the husband's separate property into community, with the wife owning an undivided one-half interest in the property. However, the divorce does allow the community property state to take one-half of the husband's property and award it to the wife as part of the divorce judgment.⁷⁶

The property rules described above impose few restrictions on the power of states to apply their own law to unmarried persons in domestic partnership situations. The existence of a domestic partnership, unaided by contract, only becomes relevant upon the dissolution of the relationship. Thus, under traditional theory no property rights would vest in either of the partners under domestic partnership law until a court allocates the property between them pursuant to a judgment brought in a proceeding to recognize the partnership.

For example, assume that two persons cohabit in a state that would recognize them as domestic partners, with one of them accumulating substantial property that would be classified as that person's separate property if the parties were married. The partners move to a state that does not recognize domestic partnerships. No property rights were vested in the non-owning partner before the move, and the move in and of itself changes nothing. Upon dissolution of the relationship, there is, under current precedent, no constitutional requirement that the new state of residence must recognize financial rights that would have existed under the law of the former domicile. Of course, a new domicile could, under a domestic partnership law of its own, provide for a property award that resulted in one of the partner's property being taken and distributed to the other, but this would be done as a matter of the state's own choice-of-law discretion, not as a matter of constitutional compulsion. Thus, if the parties move from a state that does not recognize domestic partnerships to one that does, the domicile of the parties in the new

75. See *id.* § 220 (Marital Property: New Events After Removal (Incidents of Title)).

76. See *id.*

state coupled with the dissolution of the parties' relationship would be sufficient to allow a court of the state to apply its own law to the dissolution and allocate the property of one partner to the other, just as in the case of a married couple that moved to the state and then divorced.⁷⁷

*B. Opposite-Sex Domestic Partnerships and
State Choice-of-Law Doctrine*

In making judgments about the conflicts problems that will arise from domestic partnerships, it is important to keep in mind the similarities and differences between domestic partnerships and marriage. Marriage has a rich conflict-of-laws history, but domestic partnership has none. The normal approach to selecting the applicable law in a domestic partnership case would be to analogize a domestic partnership to a marriage. However, because the analogies are not complete, courts making choice-of-law decisions in domestic partnership cases may not always be able to rely entirely on marriage conflicts principles. Thus, the analogy to marriage will be more or less useful depending upon the conflict-of-laws system being used by a state.

There are a number of conflict-of-laws systems in current use in the United States. In addition, within each system, there are significant variations in how the courts apply the system. Space limitations prevent an exhaustive application of all the systems to domestic partnerships in this article. Instead, the examination below will be limited to the principal systems in use today. These are: (1) the "vested rights" or territorial system of the first *Restatement of Conflict of Laws*; (2) the "most significant relationship" analysis of the *Restatement (Second) of Conflict of Laws*; (3) existing variations of the system of "interest analysis" created by Professor Brainerd Currie; and (4) the system of choice-influencing considerations created by Professor Robert Leflar.

77. Other constitutional limits on choice of law, such as the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, which is designed to prevent states from discriminating against citizens of other states, and the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, which is designed to protect against discrimination against persons within a state's jurisdiction, would not, as currently interpreted, place greater constitutional limits on a state's power to apply its law than the Full Faith and Credit and Due Process Clauses, at least not in the situations described. See MCDUGAL ET AL., *supra* note 12, §§ 50–54 (discussing the constitutional framework generally).

1. The “vested rights” system

When parties dissolve a marriage by divorce, the traditional approach in the United States has been for the divorcing forum to apply its own substantive law of divorce rather than the divorce law of any other state.⁷⁸ However, for a divorce to be granted, the parties being divorced must be validly married. Whether they are validly married is not automatically determined by the substantive marriage law of the divorcing state. Rather, the traditional approach has been to determine the validity of a marriage by reference to the law of the state where the marriage was performed.⁷⁹ Even under the traditional rule, a marriage valid where performed but contrary to the strong public policy of the state of the parties' domicile would be considered invalid everywhere.⁸⁰ In addition, the “state of contracting” rule only applies in cases of marriages that are formally performed in a state. Common law marriages arise from the cohabitation of two persons who hold themselves out as man and wife, but such marriages are not recognized everywhere. Nevertheless, under traditional conflicts doctrine, common law marriages were treated as valid everywhere if the acts that created the marriage occurred in a state that recognizes such marriages as valid.⁸¹ A public policy exception to the general conflicts rule governing common law marriages also exists,

78. See MCDUGAL ET AL., *supra* note 12, § 203 (Divorce: Grounds). Some states are attempting to make divorce more difficult by providing for so-called “covenant marriages,” under which parties essentially agree at the time they are married that they may not be divorced except under more restrictive standards than those applied to non-covenant marriages. It is not clear at this time whether other states will honor such laws when one or both of the parties to the marriage migrate to the other states and then seek divorce under the more permissive divorce laws of the other states. See *id.* (discussing Louisiana and Arizona covenant marriage laws); Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085 (1999); Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 64 (1998); Melissa S. LaBauve, Comment, *Covenant Marriages: A Guise for Lasting Commitment?*, 43 LOY. L. REV. 421 (1997).

79. See RESTATEMENT OF CONFLICT OF LAWS § 121 (1934); MCDUGAL ET AL., *supra* note 12, § 204 (General Validity of Marriages). Some states have dealt with the problem of marriage recognition by statute. Under the Uniform Marriage and Divorce Act, § 210, 9A (pt. 1) U.L.A. 159, 194 (1998), marriages contracted in the state adopting the act or outside the state that were either valid “at the time of the contract” or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in the contracting state.

80. See RESTATEMENT OF CONFLICT OF LAWS § 132 (1934).

81. See *id.* § 123; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmts. f & g (1971).

although, in the nature of the institution, it is far less likely that a situation would arise in which a common law marriage could be validly formed by a relationship in one state that would violate the strong policy of another. Nevertheless, presumably a common law marriage that is, for example, incestuous under the law of the forum would be considered invalid.⁸²

Domestic partnerships, unlike marriages, do not have to be formally dissolved by divorce. Indeed, the question of whether a non-contractually aided domestic partnership exists only becomes relevant when the parties themselves have decided to end their cohabitation. At that time, one of the partners may assert a claim for financial relief against another, and the court asked to grant relief will determine whether the domestic partnership exists as part of determining whether the claim for relief is valid. It is at that time that the court will be faced with a choice-of-law question when the parties to the suit have, or have had, contacts with multiple states during their relationship.

Under the “vested rights” system of the first *Restatement*, the closest conflicts analogy for domestic partnerships is the rule dealing with common law marriages. Thus, a state following the first *Restatement* system might analogize a domestic partnership to a common law marriage and recognize it as valid if “the acts alleged to have created it took place in a state in which such a [domestic partnership] is valid.”⁸³ Assume that *A* and *B* reside in State *X*, which recognizes domestic partnerships. They cohabit there under circumstances in which they would be recognized as domestic partners but later move to State *Y*, which does not recognize domestic partnerships. By analogy to the traditional rule governing common law marriages, State *Y* might recognize *A* and *B* as domestic partners under the law of State *X*, as long as such recognition does not violate the strong public policy of State *Y*.

The two points of doubt in the preceding discussion involve the initial determination to recognize the domestic partnership by analogy to common law marriages and the application of the public policy exception. Once a common law marriage is formed, it creates a marriage status for all purposes, just like a formally performed marriage. The common law marriage thus generates not only rights be-

82. See RESTATEMENT OF CONFLICT OF LAWS § 132(b) (1934).

83. See *id.* § 123.

tween the parties, but also rights and obligations with reference to third persons and public officials. Domestic partnerships create no similar status. Consequently, a court might determine that, because domestic partnerships only become relevant when the parties terminate their relationship, the law of the state where the parties are domiciled at the time they seek recognition of the partnership, or perhaps even the law of the forum where such recognition is sought, should always govern the validity of the partnership. Alternatively, a court might determine that the length of time that the partners reside in State *Y* is relevant to determining whether their partnership should be recognized. If they seek recognition of the partnership shortly after moving to State *Y*, having spent the bulk of their relationship in State *X*, the court might be willing to recognize the partnership. However, if the parties spend several years in State *Y* before seeking recognition of the partnership, the court might be less willing to hold that their relationship should be governed by the law of a state other than State *Y* merely because it originated in that other state.

As far as the public policy exception is concerned, its application in State *Y* to a domestic partnership formed in State *X* is difficult to predict. If the State *Y* court conceptualizes State *Y*'s refusal to recognize domestic partnerships as based on a policy of preserving the integrity of traditional marriage, it might hold a domestic partnership invalid because it violates the *Y* policy, even though it was valid under State *X* law. On the other hand, if the court simply views the absence of domestic partnerships in State *Y* as the byproduct of legislative or other lawmaking inertia, it might not view the partnership as violating any strong public policy of *Y*.

It should also be noted that, in cases of traditional marriage, the application of the strong public policy exception varies depending on the issue involved in the action. Thus, assume *A* and *B* are two sixteen-year-olds who live in State *X*, which forbids marriage before the age of eighteen. They travel to State *Y*, which allows marriages between sixteen-year-olds, and there marry, returning to State *X* to live thereafter. Whether a court in State *X* would void the marriage under a strong public policy exception might well depend on whether one of the parties is seeking an annulment or is claiming a spouse's share of the other party's estate. A court is much more likely to apply a strong public policy exception to the issue of annulment than to

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the case of the spouse's share.⁸⁴ Because recognition of a domestic partnership is always undertaken in the context of determining financial claims by one partner against the other, including both equitable property division and compensation issues, it could be that the strong public policy exception will less often be applied to prevent such claims.⁸⁵

2. The most significant relationship test

Under the approach of the *Restatement (Second) of Conflict of Laws*, marriages are valid if they are valid under the law of the state that has the most significant relationship to the spouses and the marriage.⁸⁶ This latter approach will normally validate a marriage that satisfies the law of the state where the marriage is contracted, unless the marriage violates the strong public policy of another state that has the most significant relationship to the spouses and the marriage at the time it is performed.⁸⁷ The significant relationship test involves the identification of the contacts of the relevant states with the parties and events giving rise to suit and the determination of the state of the most significant relationship to the issue involved in the case by matching those contacts with a set of factors listed in section 6 of

84. See MCDUGAL ET AL., *supra* note 12, § 205 (Marriages: Strong Local Public Policy).

85. See *id.* Other problems that may occur under the vested rights system include the problem of characterizing issues under the ALI *Principles* as substantive or procedural. For example, § 6.03(3) of the *Principles* establishes a rebuttable presumption that persons are domestic partners if they maintain a common household for a cohabitation period set forth in a uniform rule of statewide application. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(3); see also *id.* §§ 6.03(6) (burden of proof when other provisions not satisfied), 6.03(7) (factors determining whether persons have shared a life together as a couple). Even if a forum that does not recognize domestic partnerships is willing to apply the law of a state that does recognize such partnerships, the forum might characterize such provisions as “procedural” and thus governed by forum law under the vested rights system. See MCDUGAL ET AL., *supra* note 12, § 110 (discussing characterization). This problem can also occur in the other systems discussed below. A forum court operating under any modern system can evaluate certain rules as primarily concerned with judicial administration and thus controlled by forum law rather than the rules of the state of the otherwise applicable substantive law. Similarly, a forum can, even while recognizing that certain procedural rules of the state of the otherwise applicable law have outcome determinative effects, consider it too burdensome to import such rules into adjudications in the forum's courts, or consider that the forum's own procedural policies would be undermined by importing the outcome determinative procedural rules of another state into forum adjudications. See *id.* §§ 110–119 (discussing the problems of evaluating conflict-of-laws questions concerning a variety of procedural matters).

86. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971).

87. See *id.* § 283(2).

the *Restatement (Second)*.⁸⁸ Like the “vested rights” system, the *Restatement (Second)* approach would also recognize the validity of common law marriages “[i]f the acts relied upon to create the marriage meet the requirements of the state where the acts took place.”⁸⁹ However, a common law marriage is invalid under the *Restatement (Second)* if the strong public policy of a state that had the most significant relationship between the spouses and the marriage at the time of the marriage requires certain formalities to create a valid marriage.⁹⁰

Assume that *A* and *B* are domiciled in State *X*, which treats as incestuous and void marriages between persons standing in their kinship relationship. *A* and *B* travel to State *Y*, which recognizes marriages between persons related as they are, and there marry, returning to State *X* to live thereafter. Under the *Restatement (Second)* approach, State *X* might hold the marriage between *A* and *B* void under its strong public policy because it is clearly the state of the most significant relationship to the spouses and the marriage at the time of the marriage. However, under the *Restatement (Second)*, as under the “vested rights” approach, the application of the public policy exception may depend on the issue involved in the action in which marriage validity is questioned. If the issue is whether the marriage should be annulled, there would be a great likelihood that the public policy exception would be invoked to invalidate the

88. The *Restatement (Second)* system is somewhat more complicated than this. The *Restatement (Second)*, in most of its chapters, actually contains certain black-letter rules, generally referred to as containing “presumptive choices.” In applying the most significant relationship approach, these rules of presumptive choice are supposed to be identified first, and the court is then supposed to determine whether the section 6 factors, given the contacts of the involved states with the case, indicate that some other state’s law should be applied instead of that of the state of presumptive choice. See, e.g., *Martineau v. Guertin*, 751 A.2d 776 (Vt. 2000) (stating that “the first step [under the *Restatement (Second)*] is to ascertain whether a specific section governs what law should ordinarily apply to the particular action or legal issue,” and “[i]f such a section exists, generally the law of [that] state is presumed to be the correct forum unless another state has a more significant interest in the litigation.”) *Id.* at 778; LUTHER L. MCDUGAL ET AL., *AMERICAN CONFLICTS LAW: CASES AND MATERIALS* 48–49 (3d ed. 1998). In the marriage area, section 283 of the *Restatement (Second)* contains the presumptively applicable jurisdiction-selecting rule, and that rule incorporates by reference the most significant relationship test of section 6.

89. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 cmt. g (1971).

90. See *id.* cmt. f. Presumably, also, the strong public policy of a state that has the most significant relationship with the parties and the marriage could also invalidate the marriage on other grounds, such as incest.

marriage.⁹¹ On the other hand, if the issue is whether *A* is entitled to letters of administration upon the death of *B* as *B*'s surviving spouse (as opposed to a child of the marriage being entitled to the letters), it seems less likely that the public policy exception would be applied to void the marriage.⁹²

In applying the *Restatement (Second)* system to domestic partnerships, the first thing to note is that, as with the “vested rights” system, common law marriage seems to be the most pertinent analogy in determining validity. Both common law marriage and domestic partnerships are the product of extended relationships. Thus, no equivalent of an act of formal marriage occurs within a state to govern the validity of a domestic partnership. Consequently, validity must be governed by reference to the state where the acts alleged to give rise to the domestic partnership occur, just as in cases of common law marriage. Assuming that such acts occur in a state where domestic partnerships are recognized and the partners are domiciled, a domestic partnership exists in an objective sense, even though it has yet to be declared by a court. If the partners then move to another state that does not recognize domestic partnerships, it would be difficult to hold that the new state could void the partnership on the grounds that some other state had a more significant relationship to the partners and the partnership at the time it was formed. Given the extended nature of the relationship required to form a domestic partnership,⁹³ it seems unlikely in the extreme that such a partnership could be created in any state but the state of the most significant relationship with the partners and the partnership at the time of the creation.

Nevertheless, as with the “vested rights” approach, questions exist about whether courts in *Restatement (Second)* states would agree

91. See *supra* text accompanying note 82.

92. Cf. *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (refusing to void the marriage under circumstances similar to those described in the text, though not under the “most significant contacts” analysis).

93. The ALI envisions that the partners will have to share a primary residence and a life together as a couple for a significant period. This will either be a continuous period under a uniform rule of statewide application called (1) the *cohabitation parenting period* during which the parties maintain a household with their common child for a period of time set out in a uniform rule of statewide application, or (2) the *cohabitation period*, during which they maintain a common household for a period of time set in a uniform rule of statewide application. Alternatively, the couple will have to share a primary residence and a life together for a significant period of time. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(2), (3) & (6).

that marriage, even common law marriage, is an apt analogy to domestic partnerships. Because domestic partnerships, unlike marriages, become relevant only when the partners dissolve their relationship, it is conceivable that courts will apply the law of the state of the most significant relationship to the partners at the time of the dissolution, rather than that of some state where the partners formerly resided. As under the “vested rights” system, it also may be relevant under the *Restatement (Second)* how long the partners have resided in the forum and, concomitantly, how long they have been absent from the state where the acts giving rise to the partnership occurred.

It is also conceivable that courts in *Restatement (Second)* states will not apply the public policy exception in quite the way envisioned by the *Restatement (Second's)* drafters. They might instead simply apply a strong public policy exception of the forum to void a domestic partnership, even if the forum was *not* the state of the most significant relationship to the partners and the partnership at the time of the acts giving rise to the partnership.⁹⁴ Diverse application of the *Restatement (Second's)* requirements is commonplace,⁹⁵ and one should not expect uniform application of the requirements in the domestic partnership context. The public policy exception itself is a notorious “escape device,” which has been used unpredictably by courts to avoid results they find unpalatable.⁹⁶ There is no reason to

94. It should also be noted that more complex situations than the simple situations set out in the text can occur and complicate the choice-of-law inquiry. For example, the parties may reside for a time in a non-domestic partnership state. They may then take up residence in a domestic partnership state for an additional period. This would give rise to a question whether the latter state would allow tacking of the two periods to meet its requirements for a sufficiently significant period of time. But what if this question arises in still a third, non-domestic partnership state, or in a domestic partnership state with different time requirements than the original domestic partnership state? Gratefully, there is not space enough or time to take up all these questions in this article.

95. One commentator has observed that most courts following the *Restatement (Second)* seem to ignore the presumptive jurisdiction-selecting rules in favor of the more fluid general provisions of section 6. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997). However, it is clear that some courts simply count contacts with the involved states rather than engaging in the more “sophisticated, dialectical process of evaluating the policies listed in section 6 in light of the pertinent factual contacts.” Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1272 (1997). This fluid and varied approach indicates that the courts do not apply the *Restatement (Second)* in precisely the way envisioned by its drafters.

96. See MCDUGAL ET AL., *supra* note 12, § 80 (Characterization and Other Escape Devices).

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expect its application to be uniform and predictable under the *Restatement (Second)*.

3. *Governmental interest analysis*

Unlike the “vested rights” system of the *Restatement of Conflicts* and the “most significant relationship” analysis of the *Restatement (Second) of Conflicts*, the system of governmental interest analysis devised by the late Professor Brainerd Currie⁹⁷ is a “unilateral” conflict-of-laws system.⁹⁸ Under unilateral conflict-of-laws systems, courts examine the laws of the potentially concerned states to determine whether their scope is sufficiently broad to call for their application to the case. Unlike multilateral systems (such as those of the *Restatement* and *Restatement (Second)*), unilateral systems acknowledge that it may be justifiable for more than one state’s law to apply to a case.⁹⁹ If two states both apply the same unilateral system in the same way, they could each wind up applying their own law to a case.¹⁰⁰

Thus, under governmental interest analysis, a court examines the policies supporting the laws of the involved states to determine whether those policies would be furthered by their application to the case before the court. If the court determines that only one state’s policies would be furthered by applying its law, only that state has a governmental interest in having its law applied. This is a “false conflict,” which requires the application of the law of the only interested state. If more than one of the involved states would have the policies of its law furthered, and if the laws point to different results, then there is a “true conflict.” Subject to certain exceptions not important here, when the forum is faced with a true conflict, it is to apply its own law to the case.¹⁰¹ It is important to note that no state currently

97. See generally BRAINERD CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* (1963); see also MCDUGAL ET AL., *supra* note 12, § 85 (Governmental Interest Analysis).

98. See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1316–17 (1999).

99. See LEA BRILMAYER, *CONFLICT OF LAWS* § 1.12, at 17 (1995) [hereinafter BRILMAYER]; FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 13 (1993).

100. See Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 265–66 (2001).

101. See MCDUGAL ET AL., *supra* note 12, § 85 (Governmental Interest Analysis).

follows this pure form of interest analysis. However, some states do follow variations of interest analysis that seek to resolve true conflicts by use of balancing tests or other methodologies.¹⁰²

Applying governmental interest analysis to domestic partnerships, consider again the situation in which *A* and *B* cohabit in State *X*, which recognizes domestic partnerships, and later move to State *Y*, which rejects such partnerships. The parties then separate, and *A* sues *B* in a State *Y* court, seeking recognition of the partnership under the law of State *X* and a division of the partnership property and compensation from *B*. Under these circumstances, the court in State *Y* would have to determine whether the policies of State *X*'s domestic partnership law would be furthered by applying them to *A* and *B*, even though the parties have now reestablished their domicile in State *Y*. Assuming that State *Y* determines that State *X* has an interest in having its law applied to the case, it would then have to determine whether its own failure to recognize domestic partnerships gave rise to a policy that would also be furthered by applying it to the case. If either State *X* or *Y* does not have a policy that would be furthered on the facts of the case, but the other state does, a false conflict exists, and the State *Y* court should apply the law of the only interested state. If both states have policies that would be furthered by applying them to the case, and if the policies point to different results, a true conflict exists that would, in a pure system of interest analysis, require State *Y* to apply its own law. In a system of interest analysis that requires resolution of true conflicts, say by a balancing of the interests of the two states, State *Y* would have to assign weight to its own interests and those of State *X* in order to resolve the conflict.

Although it may seem clear that State *X* has a policy that would be furthered on the facts given, this may not be so under conventional interest analysis. Interest analysis tends to be domiciliary oriented. That is, the policies supporting a state's law are generally assumed to be aimed at benefiting the state's citizens. Applied narrowly, this can mean that a state will consider its policies furthered by the application of its law only when one or both of the parties are domiciled within the state.¹⁰³ If interest analysis is applied

102. See Whitten, *supra* note 100, at 274 nn.43–44 (describing New Jersey's system of interest analysis and California's system of comparative impairment analysis).

103. Cf. BRILMAYER, *supra* note 99, § 2.1.2, at 58–60 (1991) (discussing the general effect of domicile in producing true and false conflicts, as well as other cases that can arise un-

in this manner, State *X* would not be deemed to have an interest in applying its domestic partnership law because *A* and *B* are not domiciled there at the time of the suit, even though they were domiciled there for a sufficient period of time, and under proper circumstances, to qualify as domestic partners if they had remained in the state. State *X* would, therefore, not have an interest in applying its law to partners no longer domiciled in the state.

Even if State *X* would recognize an “altruistic” interest in applying its law to *A* and *B*,¹⁰⁴ there exists a separate problem of how to characterize State *Y*’s interest. Does the mere absence of a domestic partnership law in State *Y* give rise to a policy *against* such partnerships in order, e.g., to protect State *Y* defendants such as *B*?¹⁰⁵ Alternatively, should a State *Y* court conclude that the mere absence of a domestic partnership law does not reflect any particular policy, but perhaps only legislative inertia?¹⁰⁶ If the court in State *Y* is—or has been—asked to recognize domestic partnerships as part of the state’s common law and has refused to do so on the grounds that such recognition is more appropriate for legislative action, should this separation of powers concern translate into a policy *against* domestic partnerships, thus creating a true conflict with the altruistic law of state *X*?

These questions are difficult enough to answer as applied to even the simple hypothetical set out in the text above, but there are numerous other difficulties that will exist in determining how interest analysis will be applied to domestic partnership cases. For instance, as indicated above,¹⁰⁷ in no existing system of interest analysis do courts

der interest analysis).

104. See *id.* § 2.4.1 (discussing altruism in interest analysis). More accurately, since State *Y* is the forum, it would have to conclude that State *X*’s policies extend to non-domiciliaries and that State *X* has an altruistic interest, a potentially difficult problem of interpretation for a State *Y* court, especially if State *X* has never decided a case on all fours with the one under litigation.

105. Courts employing interest analysis have sometimes deduced policies and corresponding interests from the absence of laws in particular states on little if any evidence. See, e.g., *Offshore Rental Co. v. Cont’l Oil Co.*, 583 P.2d 721 (Cal. 1978) (finding the absence of a law in Louisiana providing for recovery by a corporation for an injury to a key employee to be based in part on a policy of encouraging corporations to do business in Louisiana free from fear that they could be held liable for injuries they inflict on the key employees of others).

106. Of course, if the State *Y* legislature has refused to enact a domestic partnership law in statutory form, it is conceivable, despite the dangers of drawing conclusions from legislative inaction, that State *Y* might derive a policy against such partnerships from the refusal.

107. See *supra* note 102 and accompanying text.

simply apply forum law when faced with true conflicts. All existing systems seek to resolve true conflicts by some device such as a balancing test.¹⁰⁸ Because courts applying such tests seldom give instructions about how to attach weight to their own or another state's interests, even greater uncertainty exists about how domestic partnerships will be treated in real-life interest analysis systems than under theoretical, but "pure," interest analysis. At least in the latter kind of system, once a court identifies a true conflict, one knows that forum law will apply. Admitting the uncertainty, however, the important point to make here is that there is ample room for courts operating under existing schemes of interest analysis either to accept or reject the law of other states providing for domestic partnerships.

4. *Choice-influencing considerations*

The late Professor Robert A. Leflar identified five choice-influencing considerations that courts might employ in either of two ways.¹⁰⁹ The courts might specifically apply the considerations to the facts of a case to produce a decision, or they might use the choice-influencing considerations as a check list against which to test whether other approaches to choice of law were operating properly in the case.¹¹⁰ However, the courts have generally ignored the checklist approach and employed the choice-influencing considerations as specific determinants of decision.¹¹¹

The considerations are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law.¹¹² Leflar intended no priority among the considerations. Rather, in his view, their relative

108. See, e.g., *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996) (weighing New Jersey's interests in applying its law against Georgia's interests in applying its law and holding that New Jersey's interests were weightier).

109. See MCDUGAL ET AL., *supra* note 12, §§ 93-99 (Leflar's Choice-Influencing Considerations).

110. See Ralph U. Whitten, *Improving the "Better Law" System: Some Impudent Suggestions for Reordering and Reformulating Leflar's Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 181 (1999).

111. See *id.* at 182 n.11 and accompanying text. At least five states use Leflar's system in at least certain types of cases. See *id.* at 179.

112. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966); see also MCDUGAL ET AL., *supra* note 12, §§ 93-99.

importance varies according to the kind of case involved.¹¹³ Thus, the first consideration, predictability of results, is unimportant in unplanned situations, such as those represented in tort cases, but is very important in cases involving planned transactions, such as contracts.¹¹⁴ Essentially, this consideration involves selection of the applicable substantive law that will, if possible, allow parties to know at the time of a consensual transaction what law will be applied to the transaction.¹¹⁵

The maintenance of interstate order consideration is directed at assuring appropriate deference to another state's law when the other state has a substantial interest in having its law applied, even when the forum also has an interest.¹¹⁶ Thus, this consideration exhorts the forum's courts not to engage in raw preference for forum law regardless of the interests of other states. Simplification of the judicial task most often applies when the forum is asked to apply the procedural law of another state. It weighs most heavily when the forum is asked to import substantial parts of the procedural machinery of another state when resolving a controversy under the other state's law. It weighs less heavily when simpler "outcome determinative" procedural rules of the other state are at issue.¹¹⁷ Advancement of the forum's governmental interest consideration focuses on whether the forum has sufficient contacts with the parties and event to produce "real reasons" for applying forum law.¹¹⁸ This consideration may seem to be identical to the inquiry conducted under governmental interest analysis to determine whether the forum's law is supported by policies that would be furthered if the law were applied to the case.¹¹⁹ However, Leflar envisioned a somewhat broader inquiry into governmental interests than did Professor Currie. Leflar stated that we should think of governmental interests in terms of the "total governmental concerns of a justice-dispensing court in a modern American state."¹²⁰ This broadened inquiry was clearly designed to expand the examination of the forum's interests beyond the policies support-

113. See Leflar, *supra* note 112, at 282.

114. See *id.* at 300-01.

115. See *id.* at 283.

116. See *id.* at 286-87.

117. *Id.* at 288-89.

118. *Id.* at 290-95.

119. See *supra* text accompanying notes 97-102.

120. See Leflar, *supra* note 112, at 295.

ing the specific forum law at issue in the case and into more ethereal matters.¹²¹

The “better law” consideration is the most controversial of those articulated by Leflar. Leflar believed that this consideration was one that courts had always employed, often covertly.¹²² His point was that it was proper for courts to select between conflicting laws on the basis of their quality in order to achieve justice in the individual case.¹²³ The consideration invites courts to determine whether forum law is “anachronistic, behind the times, a ‘drag on the coat tails of civilization,’ or that the law of some other state has these benighted characteristics.”¹²⁴

Marriage was one of the areas in which Leflar believed that predictability of results pointed strongly in favor of selecting the law favoring validity.¹²⁵ Maintenance of interstate order also militated in favor of sustaining the validity of a marriage invalid in the forum but valid where performed, because “[i]t is messy to have a couple married in one state and not in another, or to be uncertain what law determines if they are married or unmarried.”¹²⁶ However, Leflar seemed to agree that the forum’s policies could trump non-forum law when forum domiciliaries were involved and thus render invalid a marriage that was valid where performed.¹²⁷ He hedged quite a bit on this, however, indicating that the strength of the forum’s invalidating policies can vary quite a bit from one fact situation to another,¹²⁸ which accords with the prior observation, above, concerning the variation in the strength with which the strong public policy exception applies from case to case.¹²⁹ As for the better law consideration, Leflar observed, in the context of a hypothetical extra-state marriage invalid under forum law because one of the parties was underage, that it could be assumed that the forum would “prefer its own law unless it is anachronistic, as it clearly is not in the present

121. See *id.*; see also Whitten, *supra* note 110, at 201–05 (criticizing this approach to determining the forum’s interests).

122. See Leflar, *supra* note 112, at 295–304; see also Whitten, *supra* note 110, at 227.

123. See Leflar, *supra* note 112, at 297, 303–04; Whitten, *supra* note 110, at 227.

124. See Leflar, *supra* note 112, at 299–300.

125. See *id.* at 283–84, 321.

126. See *id.* at 321.

127. See *id.* at 321–22 (discussing the marriage of two forum domiciliaries, one underage, in another state under whose law the marriage would be valid).

128. See *id.* at 322.

129. See *supra* note 84 and accompanying text.

case, but the importance of this preference is relatively small as against the genuine significance of [the other choice-influencing considerations].”¹³⁰ Thus, whether the advancement of the forum’s governmental interests would trump predictability and maintenance of interstate order would depend partly on the seriousness with which the forum viewed its invalidating policy and partly on what was being litigated in the action. Thus, he suggested that the underage marriage would be invalidated under forum law in a suit for an annulment, but validated under non-forum law if one of the spouses is claiming a survivor’s share in the other spouse’s estate.¹³¹

How would Leflar’s choice-influencing considerations apply to domestic partnership cases? Assume again that *A* and *B* are domiciliaries of State *X*, which recognizes domestic partnerships, and that they live in State *X* long enough and under sufficient circumstances that they would be considered domestic partners under principles identical to those proposed by the ALI. They move to State *Y*, which does not recognize domestic partnerships and there decide to end their relationship. *A* sues *B* in a State *Y* court to obtain recognition of the domestic partnership under State *X* law and obtain a property award from *A*. The predictability of results consideration is arguably less important in the domestic partnership situation described above than it is in a case involving the validity of a marriage. Although *A* and *B* entered into a consensual relationship in State *X*, they did not plan the relationship in the same manner as a couple that chooses to marry. Nor did they enter into a contract in which they attempted to settle the financial rights and obligations arising from their relationship, as they might have done. Indeed, it is difficult to say that any real expectations would be defeated if a State *Y* court applied its own law and refused to recognize the relationship. Similarly, the maintenance of interstate order consideration is also arguably weaker in the domestic partnership case described than it is in cases of marriage. If there is uncertainty about what the parties’ financial rights and obligations will be, including uncertainty created by doubt about the law that will be applied, it is uncertainty created by the parties’ failure to marry or contract. The criteria for recognizing domestic partnerships

130. See Leflar, *supra* note 112, at 322. In the context of the underage marriage, Leflar also considered the simplification of the judicial task consideration to be unimportant. See *id.* at 321.

131. See *id.* at 322.

are themselves fluid.¹³² Therefore, even if the parties had remained in State *X*, it might not be completely clear whether their domestic partnership would be recognized. Furthermore, to the extent that the maintenance of interstate order consideration exhorts states to take into account the interests of other states, the same problem exists as discussed earlier with interest analysis: does the change in domicile from State *X* to State *Y* weaken or destroy State *X*'s interest in applying its law to *A* and *B*?¹³³ Although Leflar's system does not emphasize domiciliary connections as much as interest analysis,¹³⁴ domicile still matters in his system and creates the same kind of uncertainty that it creates in governmental interest analysis.

The simplification of the judicial task factor might also present problems for domestic partnerships under Leflar's system. The ALI *Principles* contain presumptions and other evidentiary factors designed to facilitate a court's determination of the existence of a domestic partnership.¹³⁵ Because the simplification of the judicial task factor is designed primarily to avoid substantial importation of the procedural law of another state into adjudications within the forum, this factor would weigh in favor of State *Y* not applying the domestic partnership law of State *X* if that law is configured as the ALI recommends. Furthermore, a strong emphasis by State *Y* on the simplification of the judicial task factor might cause it to reject application of the domestic partnership law of State *X* entirely, given that the "procedural" portions of the ALI *Principles* are inextricably inter-

132. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(7) (stating that whether persons have shared a life together as a couple is determined by all the circumstances and listing thirteen considerations that can, among others, be taken into account in making the determination).

133. See *supra* text accompanying notes 103–04.

134. See Leflar, *supra* note 112, at 293:

The once powerful concern of the domiciliary state with matters of familial status is weakening. In the United States, the increasing mobility of the citizenry is decreasing the importance attached to the socio-political idea of each person's having a pre-eminent headquarters at some one place. The fact that in this country the states are becoming more alike, less chauvinistic in their eccentricities, contributes to this. Most of the states are becoming accustomed to the fact that a large proportion of the human beings who at any given moment are working or playing within their borders will have ties with other states as well. An effect of this is that the states are less concerned than they once were with protection of the local citizen as distinguished from the "stranger," and more inclined than they once were to promulgate and enforce laws that apply to both equally

135. See PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 6.03(3), (6), (7). See also *supra* note 84.

twined with the substantive portions. Even if State *Y* only rejected the procedural part of State *X*'s partnership law, however, the partial rejection might create significant difficulties for the plaintiff in establishing the existence of the partnership. If State *Y* substitutes evidentiary provisions of its own for the ones found in the ALI *Principles*, and if the provisions favor the defendant more than do those of the ALI *Principles*, the result on the outcome of the action could be significant.

Another real question in the domestic partnership case described would be whether the forum considers that it has a strong interest in refusing to recognize domestic partnerships. Again, this presents the same problems of policy identification discussed above in conjunction with governmental interest analysis,¹³⁶ plus the additional need to estimate how strong State *Y*'s interest is in comparison with that of State *X*. Both aspects of the inquiry create additional uncertainty about how State *Y* as the forum will react to the choice-of-law problem. Finally, of course, the better law consideration in Leflar's system is an additional wild card that creates unpredictability. It is conceivable that even if State *Y* determines that the weight of all of the other choice-influencing considerations is low and that the interests of both involved states are relatively weak, the court might still determine that its own law is a "drag on the coat tails of civilization" and apply State *X*'s domestic partnership law as the "better law." Doubtless the court's tendency to do this would depend upon its conservative or activist tendencies.

5. Summary

The above discussion has attempted to identify the points of difficulty that will exist in conflicts cases involving domestic partnerships under the principal choice-of-law systems in use today in the United States. The analysis has been far from exhaustive, but may be useful in identifying the chief questions that will arise as states begin to adopt domestic partnership laws. The absence of real-world experience with domestic partnerships, coupled with the differences between those partnerships and the analogy that courts are most likely to look to in determining conflicts cases—marriage—creates substantial doubt about how conflicts problems with domestic partnerships

136. See *supra* text accompanying notes 104–06.

will be resolved under the principal choice-of-law systems. Each of those systems has points at which uncertainty of application exists, even in conflicts situations with which the courts have had a significant amount of experience. This uncertainty will exist in domestic partnership situations as well. In addition, the novel character of domestic partnerships will create additional uncertainty. Only concrete cases will resolve that uncertainty, if indeed it can be resolved at all.

C. Same-Sex Domestic Partnerships

All of the same conflicts problems that exist with domestic partnerships between persons of the opposite sex will also exist with same-sex partnerships. In addition, same-sex domestic partners can expect greater difficulty in obtaining recognition of partnerships formed in states where they are valid when the partners migrate to other states. This is because of the existence of statutory or constitutional provisions prohibiting same-sex marriages and substitutes for marriage in many states. This legislation will sometimes, though rarely, control a choice-of-law decision directly. More often, it will provide a potential basis for determining that a state has a public policy against formal recognition of same-sex marriages, and the public policy may be extended by analogy to the domestic partnership area.

An example of a situation in which a state's law will directly control a choice-of-law decision concerning domestic partnerships is a recent constitutional provision adopted by referendum in Nebraska. Article I, Section 29, of the Nebraska Constitution now provides, "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."¹³⁷

The prohibition in this provision against recognition of domestic partnerships would preclude a Nebraska court from making a choice-of-law decision that applies the domestic partnership law of another state to same-sex partners who have moved to Nebraska. However, Nebraska is currently unique in having a provision directly dealing with domestic partnerships. Thirty-five states¹³⁸ now have "defense of

137. NEB. CONST. art. I, § 29 (adopted 2000).

138. See David O. Coolidge & William C. Duncan, *The Nebraska Marriage Amendment: It's All About Marriage* 7 n.10 (October 6, 2000) (unpublished manuscript, on file with the

marriage” statutes or constitutional provisions, but Nebraska’s, as one of the two newest, is the only one that deals with domestic partnerships. This is because domestic partnerships themselves are a relatively new concept, having been approved by the ALI only in May of 2000.¹³⁹ More typical are provisions that simply provide that marriage is limited to persons of opposite sexes. For example, Utah simply provides that marriages between persons of the same sex are prohibited.¹⁴⁰ Such provisions would not directly control the choice-of-law decision as does the Nebraska constitutional amendment, but they could have an indirect impact on that decision.

Both the *Restatement* and *Restatement (Second)* provisions resort to the public policy concept at some point in determining the validity of marriages. To the extent that the marriage analogy controls domestic partnership cases, public policy might also be brought to bear on choice-of-law decisions in the latter cases. It is conceivable that courts applying the public policy concept might draw on the policies against same-sex marriage to invalidate same-sex partnerships, even if they would sustain domestic partnerships between persons of the opposite sex. Furthermore, under both governmental interest analysis and Leflar’s choice-influencing considerations, it is necessary to identify policies supporting the forum’s law and those of other states in order to apply the systems. Courts have, to put it mildly, not been shy about finding state policies and interests in some problematic ways.¹⁴¹ Under both systems it would not be surprising to find courts resorting to prohibitions on same-sex marriage as defining the policy of forum law for same-sex domestic partnerships.

The point is not that the analogy to same-sex marriage will necessarily defeat claims based on same-sex partnerships authorized under the laws of other states, but that it might do so. Thus, there will likely be greater general difficulty in obtaining recognition of same-

Creighton Law School Library) (discussing the Nebraska provision when it was still an initiative measure). At the cited page, the document lists thirty-three states that have adopted provisions limiting marriage to a man and a woman. To these must be added Nebraska and Nevada, which passed provisions in November 2000.

139. See *id.* at 11 (discussing why domestic partnerships and civil unions were included in the Nebraska provision).

140. See UTAH CODE ANN. § 30-1-2(5) (Supp. 2000).

141. For example, the California Court of Appeals once identified the policy supporting a Mexican limit on the amount of damages that could be recovered for wrongful death as the encouragement of tourism! See *Hernandez v. Burger*, 162 Cal. Rptr. 564 (Ct. App. 1980).

sex partnerships in other states than there will be in obtaining such recognition for opposite-sex domestic partnerships. In addition, if other states follow Nebraska's lead, their statutes and constitutional provisions dealing with same-sex marriages may also be extended to domestic partnerships in the future, thus producing direct control over the choice-of-law decision under the internal law of many forums.

IV. CONCLUSION: FROM STATUS TO CONTRACT?

"The life of the law," wrote Oliver Wendell Holmes, "has not been logic: it has been experience."¹⁴² The reader will understand by now the main difficulty with this article: there is no experience to draw on in analyzing the conflict-of-laws problems that will occur in domestic partnership cases. Logic, with all of its deficiencies, must do. But logic leaves us with an unsettled picture indeed.

With regard to domestic partnerships between persons of the opposite sex, enforcement of judgments will be straightforward enough under existing law. At the very least, the jurisdictional and other problems with such judgments will be no more difficult than with any other kind of judgment arising from the domestic relations area. As the preceding discussion has indicated, however, there is great uncertainty about how choice-of-law decisions will be made in cases involving both opposite-sex and same-sex domestic partnerships. The uncertainty is produced both by our lack of experience generally with domestic partnerships and by the fact that the marriage analogy the courts are most likely to draw on in analyzing conflicts problems in the domestic partnership area is not completely apt for the job. The real question is whether there is available a mechanism with which to curtail, if not altogether eliminate, choice-of-law uncertainty.

One possibility, for both opposite-sex and same-sex partners, is contract. The ALI envisions that contracts between domestic partners can waive or limit claims otherwise provided for under its domestic partnership principles, as well as provide remedies not provided for under the principles.¹⁴³ In addition, the ALI *Principles* provide explicitly that they do not foreclose contract claims between persons who have no claims under the principles, "but who have

142. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Harvard 1967).

143. See *PRINCIPLES* (Tentative Draft No. 4), *supra* note 1, § 6.01(2).

formed a contract that is enforceable under applicable law.”¹⁴⁴ In conflict of laws generally, there is a strong tendency to enforce contracts with multi-state elements or characteristics, as long as they have substantial connections with any state under whose law they are valid.¹⁴⁵ In addition, choice-of-law clauses in contracts, whereby parties select the law of the state to govern their contractual rights and duties, are usually enforced, as long as there is a reasonable basis for the choice.¹⁴⁶ Furthermore, the parties may be able to create even greater certainty by inserting a choice-of-forum clause in a contract, by which the parties agree to litigate any issues arising out of their agreement in a particular state. By this method, they may select the courts of a state that is friendly to their contractual arrangement. Reasonable choice-of-forum clauses, like choice-of-law clauses, are also usually enforced in the United States.¹⁴⁷ Thus, a contract between opposite-sex or same-sex¹⁴⁸ partners can greatly reduce the uncertainty existing in the choice-of-law context.

It is, of course, obvious that contracts between domestic partners may not be practical, for the same reason that prenuptial agreements are often not practical. The nature of the relationships involved is such that it may not occur to the partners to provide a contractual financial settlement that will be relevant only if their relationship terminates. In matters of the heart, the relationship may be presumed, alas frequently in error, to be eternal. Even if it occurs to one of the partners that a contractual arrangement might be prudent, it may not be possible to persuade the other partner, perhaps the financially more secure of the two, that it is in his or her best interest to enter into such an agreement.

Thus, while contractual arrangements hold the possibility of eliminating much of the uncertainty that exists in the choice-of-law area, the impracticality of such contracts may leave the uncertainty

144. *Id.* § 6.01(3).

145. See MCDUGAL ET AL., *supra* note 12, § 135 (Contracts: The Preference for Validation).

146. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (Supp. 1989); see also MCDUGAL ET AL., *supra* note 12, § 136 (Contracts with a Choice-of-law Clause).

147. See MCDUGAL ET AL., *supra* note 12, § 48 (Choice-of-Forum Clauses); TEPLY & WHITTEN, *supra* note 12, at 352–54.

148. It should be noted that even provisions such as those of Nebraska, described in the preceding section, are not designed to affect private contracts. They are only designed to prohibit same-sex relationships from producing rights by operation of law. See *supra* text accompanying note 137.

intact. If this is so, domestic partners will be left with choice-of-law doctrine by default. This is not a happy situation, but it will likely be no unhappier with regard to domestic partnerships than it is in many other areas. American choice-of-law doctrine has been aptly described as a “mess.”¹⁴⁹ There is no reason to expect domestic partnerships, whether a good or a bad idea generally, to make the mess any better or any worse.

149. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999). Objecting to a proposal for a third conflicts restatement, the late Professor Friedrich Juenger queried, “How does one restate gibberish?” Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403 (2000).