

THE ESSENTIAL IRRELEVANCE OF THE FULL FAITH AND CREDIT CLAUSE TO THE SAME-SEX MARRIAGE DEBATE

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INTRODUCTION

Sometimes ideas gain momentum through repetition. The idea that the Full Faith and Credit Clause would require national recognition of a same-sex marriage solemnized by one state is apparently one of them. Some discussion of the issue appears almost once per day, on average, in the popular press.¹ While some commentary and reporting are reasonably well-informed, much of it is in the vein of the following: “[s]tates that do not have gay-marriage bans in place will likely be required to recognize same-sex married couples from Massachusetts because of the ‘full faith and credit clause’ in the federal Constitution, legal experts say.”²

As we shall see, this is a very dubious assertion. A large volume of legal commentary, including two efforts of my own, has already addressed this issue.³ It is difficult to plow new ground. My modest purpose in this essay is to review some of the major points and to discuss some new judicial developments.

I. THE PLACE-OF-CELEBRATION RULE

Let’s begin with an elementary proposition: most of conflicts law is state law. Where, for example, the tort laws of states come into conflict, it is the forum state’s conflicts principles that determine which state’s tort law to apply.⁴ Where the contractual rules of states come into conflict, it is up to the forum state’s conflicts rules to determine which state’s contract law applies.⁵ And where the marriage

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1. On April 5, 2004 a search for: “full faith and credit” and “same sex marriage” or “same-sex marriage” or “homosexual marriage” or “gay marriage”) generated 517 articles in Lexis’s “News, Most Recent Two Years (English, Full Text File).”

2. Dan DeLeo, *Gays from out of State may be out of Luck*, THE PATRIOT LEDGER, Mar. 31, 2004, at 7.

3. Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998) [hereinafter Borchers, *Interjurisdictional Recognition*]; Patrick J. Borchers, *Interstate Recognition of Nontraditional Marriages*, in MARRIAGE AND SAME SEX-UNIONS: A DEBATE 332 (Wardle, Strasser, Duncan & Coolidge eds. 2003).

4. See, e.g., *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967).

5. See, e.g., *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1968).

laws of states come into conflict, it is up the forum state's conflicts principles to decide which state's marriage law to apply.⁶

It probably should not come as a surprise that questions concerning the validity of interstate marriages have produced their fair share of interesting conflicts cases over the years. Marriage laws of states often differ in particulars such as age and consanguinity rules. Not infrequently, couples have married in a state that would validate their union but then found themselves in a state whose marriage law would not allow their union. In such circumstances, the courts have been required to figure out what to do.⁷

The basic rule in the United States has been and continues to be, that marriages valid in the place of celebration are generally valid everywhere.⁸ For the most part, this is a sensible rule. A so-called "limping marriage"⁹—valid in some places but not in others—is a sub-optimal arrangement. Couples moving from state to state usually rightly anticipate that their status does not change. Marriages, after all, are not like fishing licenses where one needs a new one in each new state and with each new season.

But, and there is always a "but" when it comes to the conflict of laws, there is an exception for public policy reasons. For most traditional choice-of-law rules, states have claimed a right not to apply foreign rules that offend "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹⁰ Although sparingly applied, this public policy defense varies in its application from state to state and serves as a safety valve against the application of unfamiliar rules that offend the forum's deeply held policies.

Occasionally, the public policy exception is invoked to refuse recognition to an out-of-state marriage.¹¹ But the question of whether or not to recognize a foreign marriage has almost always been treated as a question of state law. With the exception of limitations on marriage

6. See, e.g., *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

7. See, e.g., *id.*

8. RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1969).

9. Martha Bailey, *Hawaii's Same-sex Marriage Initiatives: Implications for Canada*, 15 J. CAN. FAM. L. 153, 168-69 (1998).

10. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

11. See, e.g., *Metropolitan Life Ins. Co. v. Chase*, 294 F.2d 500 (3d Cir. 1961) (refusing to recognize common-law marriage because it would violate strong public policy of the forum); *Goldman v. Dithrich*, 179 So. 715 (Fla. 1938) (putative marriage between woman and her son-in-law void as violating public policy); *Brinson v. Brinson*, 96 So.2d 653 (La. 1957) (concluding bigamous marriage not recognized by forum state even though valid in the celebration state due to later divorce of first marriage).

that are substantively unconstitutional,¹² definition and recognition of marriages is a state law issue.

II. FULL FAITH AND CREDIT BASICS

The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."¹³ There is convincing historical research showing that the Clause and its implementing statute¹⁴ were meant to realize the "evidentiary" view that common law courts took towards the judgments and laws of other states.¹⁵ Under this view, giving faith and credit to another state's laws or judgments would mean that if properly proved their authenticity could not be disputed, but the effect of them would be for the recognizing court to determine. In the case of sister state judgments, the Supreme Court, however, rejected the evidentiary view early on, holding—with some limited exceptions—that a judgment had to be given at least as much effect by a recognizing state as it would have in the rendering state.¹⁶ As a consequence, U.S. courts are required to honor each others' judgments even if convinced that those judgments are premised on a serious legal or factual error.¹⁷

Although the "automatic effect" rule works reasonably well for judgments, it would be hugely problematic in giving faith and credit to other states' laws. Pursued logically, this approach would require automatic application of a sister state's law every time that other state had a connection with the dispute. The Supreme Court eventually recognized this problem, and thus developed a much more flexible approach to the constitutional regulation of choice-of-law.¹⁸ The most significant modern application of that approach is the Supreme Court's opinion in *Allstate Ins. Co. v. Hague*.¹⁹ In that case, Ralph Hague, a longtime Wisconsin resident employed over the border in

12. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (state prohibition on interracial marriage violates the Equal Protection Clause).

13. U.S. CONST. art. IV, § 1.

14. The current version is codified at 28 U.S.C. § 1738 (2000).

15. See Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 Creighton L. Rev. 499 (1981).

16. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

17. See, e.g., *Faunterloy v. Lum*, 210 U.S. 230 (1908) (recognizing state required to give faith and credit to a judgment enforcing a gambling contract in violation of the recognizing state's statutory policy).

18. See, e.g., *Alaska Packers Assoc. v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532 (1935).

19. 449 U.S. 302 (1981).

Minnesota, died while riding as a passenger on a motorcycle that collided with another car.²⁰ The accident occurred in Wisconsin; the other car was driven by a Wisconsin resident.²¹ Neither the driver of the other car nor the operator of the motorcycle carried insurance, so Hague's widow was left to pursue the couple's insurer for their uninsured motorist coverage.²² The couple had three vehicles, each with \$15,000 in coverage for uninsured motorists. Minnesota and Wisconsin law apparently differed on a question of construing the policies.²³ Minnesota law allowed Mrs. Hague to "stack" the policies and recover \$45,000; Wisconsin law—as understood by the Minnesota courts—would not have allowed stacking and would have limited her to \$15,000.²⁴

The Minnesota Supreme Court decided to apply Minnesota law to the dispute.²⁵ Although acknowledging the relatively slight connection of the dispute to the forum state, the Minnesota high court—applying Professor Leflar's five-factor test²⁶—decided to apply its own rule in large part based on its judgment that "the Minnesota rule is better . . ."²⁷ Allstate challenged the Minnesota Supreme Court's ruling in the United States Supreme Court, contending that applying Minnesota law with such a slight connection violated the Full Faith and Credit and Due Process Clauses.

Five justices concluded that Minnesota's application of its own rule did not violate either constitutional provision. Justice William Brennan's plurality opinion concluded that the combination of three "significant . . . contacts"²⁸ gave Minnesota a sufficient interest to apply its own law. The first contact was that Ralph Hague had been a member of the Minnesota workforce.²⁹ Second was that Allstate had a substantial business presence in Minnesota.³⁰ Third, Mrs. Hague had moved to Minnesota after the accident but before the litigation began.³¹ In his concurring opinion, Justice John Paul Stevens argued

20. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305 (1981).

21. *Hague*, 449 U.S. at 305.

22. *Id.*

23. *Id.* at 305-06. I say "apparently" because subsequent research has shown that fairly construed there was no difference between Wisconsin and Minnesota law as applied to this case. Neither state's law would have denied Mrs. Hague the right to "stack" the policies. See Russell Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17 (1981).

24. *Hague*, 449 U.S. at 306.

25. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978).

26. *Hague*, 289 N.W.2d. 43, 46 (citing Robert A. Leflar, *Choice-Influencing Considerations in the Conflict of Laws*, 41 N.Y.U. L. REV. 267 (1965)).

27. *Id.* at 49.

28. *Hague*, 449 U.S. at 313.

29. *Id.* at 314-15.

30. *Id.* at 317-18.

31. *Id.* at 318-19.

that the first and third contacts were of little significance, but nonetheless thought the second contact sufficient to justify the result.³² As a result, the *Allstate* plurality's "significant contacts" test has now become the accepted test for determining the constitutionality of a state court's decision to apply its own law.³³ In fact, to the extent that there has been any movement since *Allstate*, the movement has been towards relaxing the test further. In *Sun Oil Co. v. Wortman*,³⁴ the Supreme Court held that traditional choice-of-law rules are constitutional even if they lead to the application of a law that would not meet the *Allstate* test.

Consequently, it is hard to imagine a case of a state applying its own marriage law that presents a close constitutional question. Probably the most commonly hypothesized case is one in which a couple lives in a state which does not allow same-sex marriage, but gets married in a state that allows it, and then returns home and becomes involved in litigation in which the couple's marital status is crucial.³⁵ But under the *Allstate* test, the domiciliary connection to the forum state is easily sufficient to justify application of the forum state's law.³⁶ Perhaps the best case that could be made for a constitutional duty to apply the celebration state's law would involve a couple genuinely domiciled in a state allowing same-sex marriages and then becoming involved in litigation in a state that does not allow them. Suppose, for example, a same-sex couple is married and living in Massachusetts and one of them is injured in Nebraska and a loss of consortium claim is brought by the other spouse in Nebraska, a state whose constitution prohibits recognition of same-sex marriages.³⁷ Would Nebraska be required to treat the couple as married? Admittedly, this is a closer question than the first hypothetical, but the answer is still in the negative. The public policy exception is a deeply ingrained feature of traditional choice-of-law principles, and recall that the Supreme Court held in *Wortman* that such principles are constitutional even if they do not meet the *Allstate* test. State courts have long refused to recognize marriages that violate their public policy even if the marriage was validly celebrated elsewhere.³⁸

32. *Id.* at 319-21 (Stevens, J., concurring in the judgment).

33. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-20 (1985).

34. 486 U.S. 717 (1986).

35. *See, e.g.*, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (visitation rights after "civil union" in Vermont); *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411 (Sup. Ct. 2003) (wrongful death action brought by surviving participant to a "civil union" ceremony in Vermont).

36. *See, e.g.*, *Cooney v. Osgood Mach. Co.*, 612 N.E.2d 277, 279-80 (N.Y. 1993).

37. NEB. CONST. art. I, § 29 (as amended by Initiative 416).

38. *See supra* note 11 and accompanying text.

So why all the confusion over this relatively straightforward matter? A good deal of it stems from the confusion of the two branches of the Supreme Court's full faith and credit jurisprudence. As we have seen, while the Supreme Court's constitutional review of state choice of law has been deferential, its review of full faith and credit as to judgments has been "exacting."³⁹ Much of the commentary has wrongly assumed that a marriage license is the functional equivalent of a judgment for full faith and credit purposes⁴⁰ This, however, is obviously incorrect. A judgment requires the adjudication of a controversy or at least a potential controversy.⁴¹ A marriage license (or a fishing, hunting or law license for that matter) lacks this character. Marriage is not a matter of one potential spouse wanting to get married, the other not wanting to get married, and then heading to the courthouse to resolve the dispute. The superficially appealing analogy to divorces is therefore wanting, because divorce decrees involve controversies (or at least the potential therefor) that involve opposing positions of the parties requiring a court's resolution.⁴² Thus, whichever branch of the full faith and credit jurisprudence is followed, the ultimate result is that states are free to recognize or not recognize same-sex marriages celebrated in other states.

III. THE DEFENSE OF MARRIAGE ACT

The relevant portion of the Defense of Marriage Act ("DOMA") provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.⁴³

In large part, DOMA simply states what the law would be without it, a point made by some who testified in opposition to it.⁴⁴ As we have seen, DOMA or no DOMA, full faith and credit principles do not require one state to give effect to a marriage celebrated in another state. For the most part, therefore, the arguments against the consti-

39. See *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998).

40. See Borchers, *Interjurisdictional Recognition*, *supra* note 3, at 164-67 (summarizing commentary).

41. See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS § 92, cmt. d (1969).

42. Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 194 (1996).

43. 28 U.S.C. § 1738C (2000).

44. Borchers, *Interjurisdictional Recognition*, *supra* note 3, at 177.

tutionality of DOMA are fanciful.⁴⁵ The common mistaken premise of these attacks is that DOMA engaged in a radical revision of the accepted understanding of full faith and credit principles when, in fact, it did not.

Only in one limited circumstance could there be a serious full faith and credit argument as to DOMA's constitutionality. Suppose that a same-sex couple, validly married under Massachusetts law, were to be involved in an automobile accident in Massachusetts with a Nebraska resident. One spouse brings a loss of consortium claim in a Massachusetts court, which validly asserts jurisdiction against the Nebraska resident and recovers a judgment, which is not satisfied. The judgment-creditor spouse then takes the judgment to Nebraska and seeks recognition of the judgment.⁴⁶ Could a Nebraska court refuse to enforce the judgment?

Prior to DOMA, it was well-accepted that such a judgment would have to be enforced by Nebraska. Disagreements as to substantive law do not excuse a U.S. court from refusing to recognize the judgment of another U.S. court.⁴⁷ DOMA, however, at least arguably purports to give Nebraska the right to refuse to enforce such a judgment. In interpreting DOMA, the questions of statutory interpretation would appear to be whether such a judgment is a "judicial proceeding . . . respecting a relationship between persons of the same sex" or a "right or claim arising from such a relationship."⁴⁸ At least debatably, DOMA does not cover a circumstance that involves a fully litigated judgment in which the existence of the marital relationship is an incidental question.⁴⁹ But even if one takes an expansive view of DOMA, note that DOMA only gives courts the right, not the duty, to refuse recognition. Moreover, DOMA is probably constitutional even as applied to judgments under the second sentence of the Full Faith and Credit Clause, which provides: "And Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁵⁰ If one were to conclude that DOMA is unconstitutional in application in this regard, this would presumably sound the death knell for the Parental Kidnapping Pre-

45. *Id.* at 183-84.

46. I have used a variant of this hypothetical before. See Borchers, *Interjurisdictional Recognition*, *supra* note 3, at 180-81.

47. See, e.g., *Faunterloy v. Lum*, 210 U.S. 230 (1908); see also *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (stating there is "roving" public policy exception to the recognition of judgments).

48. 28 U.S.C. § 1738C.

49. Borchers, *Interjurisdictional Recognition*, *supra* note 3, at 180-82.

50. U.S. CONST. art IV, § 1. See Borchers, *Interjurisdictional Recognition*, *supra* note 3, at 183-84 (discussing the constitutionality of DOMA in this regard).

vention Act⁵¹ as well, an unlikely and unfortunate result were it to occur.

IV. RECENT CASES

With the advent of civil unions in Vermont, we now have some case law to evaluate. *Burns v. Burns*⁵² concerned a contempt motion filed by a father against his ex-wife for violating the terms of a child visitation order that prohibited overnight stays or cohabitation “with any adult to which such party is not legally married”⁵³ The ex-wife and her female companion traveled to Vermont and entered into a civil union. In opposing the motion for contempt, the ex-wife’s primary argument was that full faith and credit principles required the Georgia court to treat her as being “married” for purposes of the visitation order.⁵⁴

The Georgia court rejected her contention for two reasons. First, the court noted, a civil union is not an exact duplicate of a marriage and thus would not necessarily fall within the ambit of the marriage exception in the visitation order.⁵⁵ Second, the court held that “Georgia is not required to give full faith and credit to same-sex marriages of other states.”⁵⁶ The court cited DOMA and described the question of defining a marriage within the borders of Georgia as being “a legislative function, not a judicial one.”⁵⁷

A similar issue arose in *Rosengarten v. Downes*.⁵⁸ In that case, a same-sex couple entered into a civil union in Vermont. Upon returning to Connecticut, one of the partners invoked that state’s divorce laws in an effort to dissolve the union. The plaintiff contended that full faith and credit principles required Connecticut to recognize the civil union and thus provide a forum in which to dissolve it.⁵⁹ They saw the question as one of whether to give full faith and credit to the Vermont civil union legislation. The court agreed with the view of the trial court that “the Vermont legislature cannot legislate for the people of Connecticut” and thus dispensed with the full faith and credit contention of the plaintiff and held that Connecticut was not required to attempt adjudicate a “divorce” of the civil union.⁶⁰

51. 28 U.S.C. § 1738A (2000).

52. 560 S.E.2d 47 (Ga. Ct. App. 2002).

53. *Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002).

54. *Burns*, 560 S.E.2d at 47, 48.

55. *Id.* at 48-49.

56. *Id.* at 49.

57. *Id.*

58. 802 A.2d 170 (Conn. App. Ct. 2002).

59. *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002).

60. *Rosengarten*, 802 A.2d at 170, 178.

Two recent cases involved the related question of marriages involving transsexuals. In the case of *In re Application for a Marriage License for Jacob B. Nash and Erin A. Barr*,⁶¹ the applicants were a woman and Jacob Nash. Nash had been born Pamela Ann McAloney and had been married but divorced and then underwent surgery to become a male.⁶² Nash then obtained an amended birth certificate changing Nash's designated sex to male and then sought to marry Barr. Nash and Barr contended that full faith and credit principles required the Ohio court to treat Nash as male for purposes of that state's marriage laws. The court agreed with Nash that the birth certificate was entitled to some full faith and credit effect in the sense that it was "prima facie evidence of the facts recorded."⁶³ But the court squarely rejected the couple's contention that the Massachusetts birth certificate could control the question of whether the couple could be legally married in Ohio. To hold otherwise, the court reasoned, would be "directly contrary to the state's position against same-sex and common law marriages, neither of which Ohio recognizes."⁶⁴

The Kansas Supreme Court considered a similar issue in *In re Estate of Marshall G. Gardiner*.⁶⁵ In that case Marshall Gardiner had married a post-operative transsexual female who had taken the name of J'Noel Gardiner. After Marshall Gardiner's death, his son claimed the estate on the grounds that Marshall and J'Noel's Kansas marriage was void as being a same-sex marriage. J'Noel contended that her amended Wisconsin birth certificate controlled the issue of her sex for purposes of Kansas marriage law. The Kansas court, however, held that J'Noel's sex was an issue of fact to be resolved by the trial court on remand. The court, in surveying the case law, concluded that there are essentially two lines of cases: those cases that treat the issue as one of law and fix the sex of the person as being his or her sex at birth and those cases that treat the issue as one of fact and allow the person to attempt to prove that he or she has a new sex.⁶⁶

The common thread in all of these cases, however, is that the courts treat the issue as one of state law. In each case, the courts held that the marital or gender status of the person in another state could not determine that person's status in the forum state. In that regard, each court correctly identified the Full Faith and Credit Clause as having either having no impact, or simply having an evidentiary im-

61. 2003 Ohio 7221 (Ohio Ct. App. 2003).

62. *In re Application for Marriage License for Nash*, 2003 Ohio LEXIS 7221, *1, *2 (Ohio Ct. App. 2003).

63. *Nash*, 2003 Ohio LEXIS 7221, at *12.

64. *Id.* at *17.

65. 42 P.2d 120 (Kan. 2002).

66. *In re Estate of Gardiner*, 42 P.3d 120, 132-33 (Kan. 2002).

pact in the sense that the issuing state's record (civil union license or birth certificate) was prima facie evidence of that person's status.

Let us turn now, however, to the case that received the most attention on this issue. In *Langan v. St. Vincent's Hospital of New York*,⁶⁷ a New York trial court faced a case involving two New York men, John Langan and Neil Spicehandler, who entered into a civil union in Vermont.⁶⁸ Spicehandler was injured in an auto accident and later died in St. Vincent's hospital, allegedly as a result of negligent medical treatment.⁶⁹ Langan brought a wrongful death action in the New York courts against the hospital. The question of New York law was whether Langan was Spicehandler's spouse within the meaning of that state's wrongful death statute.⁷⁰

Invoking several rationales, the New York trial court held that Langan was indeed Spicehandler's spouse for wrongful death purposes. First, the court invoked the place-of-celebration rule, noting that generally, "marriage contracts, valid where made, are valid everywhere, unless contrary to natural law or statutes."⁷¹ As the court noted, New York had not enacted a state DOMA, so the Empire State lacked a clear expression of statutory policy on this point.⁷² The court noted that the acronym DOMA came from the federal enactment.⁷³ After quoting the relevant part of the federal DOMA, the court continued: "[i]t is unclear by what authority the Congress may suspend or limit the full faith and credit clause of the Constitution, and the constitutionality of DOMA has been put into doubt."⁷⁴ Finally, after surveying a variety of New York decisions, the court concluded that state policy favored treating same-sex couples who have entered into a civil union as married for wrongful death purposes.

The court's casual dictum regarding the constitutionality of DOMA is almost surely incorrect⁷⁵ and utterly beside the point. Even if full faith and credit principles were implicated in the case, DOMA simply gives states the freedom to choose what effect to give same-sex unions. One of the analytical problems in the opinion is its equation of the place-of-celebration rule with full faith and credit principles.⁷⁶

67. 765 N.Y.S.2d 411 (Sup. Ct. 2003).

68. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 412 (Sup. Ct. 2003).

69. *Langan*, 765 N.Y.S.2d at 412.

70. *Id.* at 419 (citing N.Y. Est., Prop. & Trust L. § 4-1.1(a)).

71. *Id.* at 414 (quoting *Shea v. Shea*, 63 N.E.2d 113 (N.Y. 1945)).

72. *Id.* at 415.

73. *Id.* (citing 28 U.S.C. § 1738C).

74. *Id.* (citing Mark Strasser, *Baker and Some Recipes for Disaster: on DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOKLYN L. REV. 307 (1998)).

75. See *supra* notes 43-51 and accompanying text.

76. *Langan*, 765 N.Y.S.2d at 415.

But as we've seen, the Full Faith and Credit Clause places only loose outer boundaries on permissible choices of state law; it certainly does not confine states to a single, correct and constitutional choice-of-law.⁷⁷

Of course, the result in *Langan* may turn out to be correct as a matter of New York state law. In a well-known opinion, New York's high court held that same-sex domestic partners could be treated as "family" within the meaning of New York City's rent control laws.⁷⁸ Moreover, even if New York's wrongful death statute would not generally give rights to same-sex partners, New York is within its rights to provide the same benefits that would be provided in the state in which the union was celebrated. But the major point is that this is a policy choice New York, and every other state, must make for itself. The result is not dictated one way or the other by the Full Faith and Credit Clause. The *Langan* case is on appeal and has attracted a good deal of attention.⁷⁹ Perhaps the appellate decision will make clear that the result, whatever it may be, rests squarely on state law grounds.

CONCLUSION

The nature of marital and similar relationships has always been nearly exclusively a matter of state law. Nothing about the same-sex marriage debate changes this, despite the frequent invocation of the Full Faith and Credit Clause as if it were an all-encompassing rule of the transportability of such relationships across state lines. The fact of the matter is that the question will have to be resolved state by state. For the most part, courts facing these questions have correctly perceived the issue as not being one of full faith and credit jurisprudence, though the New York trial court's opinion in *Langan* does, in dictum, seem to conflate full faith and credit and state conflicts principles. In the interests of analytical clarity, hopefully the forthcoming appellate opinion or opinions in that case will make clear that the result rests on state law grounds.

77. See *supra* notes 18-34 and accompanying text.

78. *Braschi v. Stahl Ass'n. Co.*, 543 N.E.2d 49 (N.Y. 1989).

79. See, e.g., *NEW YORK FAMILY LAW MONTHLY*, July 11, 2003, at 1; *NEW YORK L.J.*, NEWS, Jan. 26, 2004, at 1; *NEW YORK L.J.*, NEWS, Jan. 27, 2004, at 16 (noting the filing of appellate briefs).