

RED STATES, BLUE STATES, MARRIAGE DEBATES

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Our nation is divided over what legal significance should attach to committed same-sex relationships. We currently live, and I assume for some time will live, in a state of affairs where it is constitutionally permissible for states to have completely opposite policies about granting legal rights to same-sex partners who wish to be considered married. Only one state, my own state of Massachusetts, currently allows same-sex partners to be fully married.¹ Several states allow less than full benefits to same-sex couples, ranging from the near-marriage domestic partnerships of Vermont,² to the far more meager domestic partner benefits of California.³ On the other end of the spectrum, on the election day that preceded the symposium for which this article was written, eleven states passed legislation, referenda, or constitutional amendments that opposed same-sex marriage, and in some cases, same-sex legal benefits of any sort.⁴

Currently, far more states vehemently oppose recognizing same-sex unions than favor granting rights to such unions, although it is far from certain that this balance will always remain tilted in this way. Two former fundamental conflicts about who can marry, the conflicts over polygamy and interracial marriage, were eventually resolved in favor of a single national policy. Some opponents of same-sex

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1. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (requiring Massachusetts to grant marriage licenses to same-sex couples within six months of issuance of the opinion).

2. See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (requiring the Vermont legislature to establish civil unions); VT. STAT. ANN. tit. 15, § 1202 (2002) (establishing such unions).

3. See 2001 Cal. Adv. Legis. Serv. 893 (Deering) ("enabl[ing] domestic partners to make medical decisions for incapacitated loved ones, adopt their partner's child, use sick leave to care for their partner, recover damages for wrongful death, and allow the right to be named a conservator of a will").

4. See, e.g., Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16; Bob von Sternberg, *Foes of Gay Marriage Press for More Bans; Buoyed by Election Day Success, They're Seeking Constitutional Measures on the State and Federal Levels*, STAR TRIB. (Minneapolis), Dec. 26, 2004, at 14A.

marriage hope that same-sex unions will be outlawed like polygamy,⁵ perhaps by federal constitutional amendment.⁶ Proponents of same-sex unions, on the contrary, hope that all prohibitions on same-sex unions will eventually be declared unconstitutional, as were prohibitions on interracial marriage.⁷ I do not know whether same-sex unions will eventually go the way of polygamy, or whether opposition to them will eventually go the way of miscegenation statutes. For purposes of this article, however, I am assuming that neither of these possibilities will soon occur. I am instead assuming the status quo, with a potential increase in the number of states that endorse same-sex unions, but with a far greater number of states strongly opposed to giving any recognition to same-sex unions, including recognition of any incidents of such unions. We live in a nation where there are red states and blue states regarding this issue.⁸

My focus in this brief article is on what kind of recognition should be universally desired, or perhaps even constitutionally required, for other states' marriages. I am especially interested in whether the reddest states have to recognize the bluest states' marriages. There was significant discussion during the oral version of this symposium about whether states might want, as a matter of their domestic conflicts law, to recognize the incidents of foreign marriages, and whether some types of family law relationships, because they are not marriages, might be exempt from efforts to take away their effect under the federal Defense of Marriage Act ("DOMA")⁹ and the mini-DOMAs¹⁰ that many states have enacted to oppose same-sex unions.

5. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 50 (1890) (stating that the state has the right to prohibit polygamy despite the fact that a religion may advocate the practice); *Davis v. Beason*, 133 U.S. 333, 341 (1890) (approving criminalization of polygamy); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (similar).

6. See, e.g., David D. Kirkpatrick & Sheryl Gay Stolberg, *Backers of Gay Marriage Ban Use Social Security as Cudgel*, N.Y. TIMES, Jan. 25, 2005, at A17 (remarking that "a coalition of major conservative Christian groups is threatening to withhold support for President Bush's plans to remake Social Security unless [he] vigorously champions a constitutional amendment banning same-sex marriage").

7. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (finding Virginia's ban on mixed-race marriages unconstitutional).

8. My point in using the red state/blue state analogy is not that all states that voted for George W. Bush (red states) also oppose same-sex marriage, nor—by any means—that all states that supported John Kerry (blue states) support same-sex marriage. I instead mean only to emphasize that states are diametrically opposed on this issue, to the extent that some persons living in some of the reddest states consider the bluest states extremely foreign territory, and vice versa.

9. 28 U.S.C. § 1738C (2000) provides:

These approaches may appeal to some courts wrestling with conflicts that arise out of same-sex relationships. For example, Professors Emily Sack and Barbara Cox argue that states, even those with mini-DOMAs on the books, should not and do not have to oppose all incidents of a same-sex relationship.¹¹ One way this could happen, as Professor Sack emphasizes, is if the mini-DOMAs and DOMA itself are construed to apply only to marriage relationships, defined as such by the state that has sanctioned the marriage.¹² Under this reasoning, everything short of a marriage, such as a domestic partnership union or a homosexual couple adoption, is outside the DOMA and mini-DOMA regimes. In addition to plain text statutory construction arguments,¹³ a policy justification for limiting DOMA and mini-DOMA animosity to same-sex marriages, defined as such, is that there is something so special about the marriage relationship that only that which has been “improperly” defined as a marriage should receive a state’s special animus. This approach of inviting courts in mini-DOMA states to read their statutes and constitutional amendments narrowly thus leaves it to non-DOMA policy balancing

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

10. For purposes of this article, I mean by a mini-DOMA a state law or constitutional amendment, enacted after the federal DOMA, which expresses the state’s policy as being strongly opposed to same-sex unions and unwilling to give them any legal effect. *See, e.g.,* W. VA. CODE ANN. § 48-2-603 (Michie 2004) (“A 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 the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.”).

11. *See* Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relation Law*, 3 AVE MARIA L. REV. 497, 506-14 (2005). Professor Barbara Cox also delivered a paper at the Interjurisdictional Recognition of Civil Unions, Domestic Partnerships, and Benefits symposium.

12. *See id.* at 507.

13. Since DOMA speaks only of “a relationship . . . treated as a marriage under the laws of such other State,” 28 U.S.C. § 1738C, it is a fair reading of DOMA that its policies apply only when the state recognizing same-sex unions treats these unions the same way it treats heterosexual unions for marriage purposes. Alternative legal unions, such as domestic partnerships, precisely because they are not defined as marriages, and especially if they provide benefits different from those received by married couples, are arguably not marriages for DOMA purposes.

to determine which state's law should govern potential non-marital conflicts.

In connection with Professor Barbara Cox's presentation at the symposium, there was discussion about whether courts engaged in such policy balancing might profitably focus on shared policies regarding the incidents of marriage, rather than automatically reject all implications of same-sex relationships because of opposition to homosexuality. A state can support, for example, shared best interests of the child value by recognizing homosexual custody rights without thereby endorsing the homosexual relationship. A state can endorse shared tort values of compensating those closest to, legally speaking, a victim by recognizing wrongful death recovery for a same-sex partner, without thereby endorsing other aspects of the homosexual union. This approach is a variant of the familiar conflicts technique of making a conflict go away by recharacterizing it as apparent rather than real.¹⁴

My guess is that arguments like these—to read state provisions narrowly and to focus on shared policies—will have the greatest appeal in states that do not have the strongest antipathy to same-sex unions. It is perhaps no accident that Professors Sack and Cox hail from Rhode Island and California, respectively, both blue states in the current political shorthand. In states without the strongest antipathy to same-sex unions, it may indeed be accurate to read conflicts about same-sex marriage as being more apparent than real so far as many incidents of the relationship are concerned. A state that has not endorsed same-sex marriage for its own citizens nevertheless may not so totally oppose same-sex relationships that it wants to take away all legal effect from them for parties who have their most significant connections with a state that grants benefits to such relationships. These situations may well be false conflict situations, but at any rate they can credibly be argued to be such. A blue versus blue state same-sex marriage dispute, in short, is unlikely to produce the same sort of conflict as a blue versus red state dispute.

When a state's policy against homosexual relationships is antagonistic, however, this approach of reading away the interest of the opposing state seems more a strategic legal maneuver than an

14. Cf. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) (advocating a "restrained" interpretation of state interests as a way to avoid true conflicts).

accurate assessment of the state policies involved. This does not mean that courts in even the reddest of states, with strongly worded mini-DOMAs recently enacted, cannot accept invitations to read their mini-DOMAs narrowly or to look for shared state policies. The conflict-of-laws casebooks contain many fact patterns where judges have been invited to find a shared policy that purportedly resolves conflicts, even though arguments could be made that the conflicts are irreconcilable.¹⁵ I only emphasize that on the humane level (to speak high-mindedly) or on the result-oriented level (to speak less high-mindedly), a judge from a red state who feels that her state's policy against homosexual relationships is ill-conceived might find shelter in invitations to read her state's interests lightly. I leave it to others, or to other spaces, to consider whether this reading makes for good or bad conflicts policy.¹⁶ As political strategy for those trying to encourage recognition of same-sex relationships, it makes sense. To tell the public that esoteric conflict of laws doctrine requires giving effect to certain aspects of same-sex unions is a more politically palatable way of saying that the state's interests, even though constitutionally permissible, should not reach as far as the state legislature or populace might have wanted them to reach.

On the other side of the debate, professors like our host for this conference, Professor Lynn Wardle, remind us that there is no obligation to read state interests so narrowly.¹⁷ There are credible arguments to be made that a state with real interests in an underlying controversy should pursue its interests fully, precisely because these interests represent legitimate state policies. It is perhaps no accident that Professor Wardle hails from a quintessentially red state and is likely to perceive any encroachment on such a state's policies against validating a homosexual lifestyle as true conflict rather than merely apparent. Whether one is appalled by or in agreement with Professor

15. See, e.g., *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961) (reading away California's interest in protecting California beneficiaries through its statute of frauds law, and instead recognizing a shared policy of California and Nevada of upholding promises, whether supported by writings or not).

16. Cf. Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316 (1997) (in context of assessing whether morally repugnant slavery contracts should be upheld, author expresses second thoughts about her usual conflicts position that a state with a real interest in the underlying controversy should apply its own substantive policies).

17. See Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Gay Adoptions*, 3 AVE MARIA L. REV. 561, 579-614 (2005).

Wardle's analogy comparing same-sex marriage to slavery situations,¹⁸ the analogy should be taken seriously. If I understand him correctly, Professor Wardle argues that, for the strongly opposing state, any incident of a same-sex marriage is like slavery for the state into which attempts are made to import that incident.¹⁹ If anti-slavery states had a legitimate right to free out-of-state slaves who came within their borders,²⁰ states opposed to same-sex unions have a similar right to free those involved from the shackles of such unions. I take the analogy to stand for at least this much: the policies opposing same-sex unions are hardly trivial. They form part of the fundamental value system of the state opposing same-sex unions. And the underlying reasons for the opposition are constitutionally legitimate. Invalidating the incidents of same-sex unions, from the opposing state's perspective, is for the benefit of society generally, for the benefit of the persons who mistakenly desire to be in same-sex relationships, and for the benefit of innocents, such as children, who might be involved in the relationships.

In the remainder of this article, I briefly respond to these red state arguments and try to convince those with even the greatest antipathy to same-sex marriage that they should, and perhaps are required to, give effect to many of the incidents of same-sex unions. My argument does not focus on a shared policy regarding the underlying same-sex relationship because I think this focus inaccurately measures the opposing state's hostility regarding that relationship. Nevertheless, my position ends up with results similar to those achieved by an approach that focuses on divorcing the incidents of marriage from the moral approbation associated with the marriage. I think my approach is different from an incidents-based approach in that I focus more upon the right of the married parties to have their marriage rights

18. *Id.* at 615.

19. I take it also to be an important side point of the analogy that the incident of same-sex relationship being opposed is seen to derive from the same-sex relationship rather than have any independent basis. Thus, there is no shared state policy that can be appealed to, since the source of the claimed entitlement is the very relationship most strongly opposed. A same-sex partner, in other words, is only entitled to wrongful death damages if and because he or she is a next-of-kin, and he or she is only next-of-kin because the same-sex relationship creates that status. A same-sex spouse who is a parent by virtue of a same-sex marriage cannot be redefined to be a guardian of the child's best interests if in fact the relationship involved came about as a result solely of the same-sex marriage conferring the benefits.

20. *See, e.g.,* Jackson v. Bulloch, 12 Conn. 38, 54 (1837) (holding that a free state can liberate slaves temporarily present with their masters in the state).

respected by other states than upon the opposing state's policies about the various incidents of the marriage. My argument, in brief, is that fundamental marital policies of the state of marital domicile should not, as a matter of sensible domestic choice of law doctrine, and perhaps constitutionally cannot, under the Full Faith and Credit Clause,²¹ be undermined by any other state in our federal union.

It is probably no accident regarding my arguments in this article that I hail from the bluest of blue states on this issue, Massachusetts.²² Massachusetts is currently the only state that grants full marriage rights to same-sex partners as a matter of our domestic relations law. It is my state's marriages, involving real life Massachusetts same-sex married couples, that are potentially undermined by other states' decisions about a Massachusetts married couple's rights. But it is not just what happens to Massachusetts *same-sex* marriages that concerns me. My perspective is that of a married Massachusetts domiciliary watching debates about what will happen to Massachusetts couples when they travel outside the state. From my perspective, the issue is whether *my* marriage, even though it is not a same-sex union, is still good anywhere outside Massachusetts. Since I am a Massachusetts domiciliary, I am worried by any attempts to take away the validity of my own marriage. I think residents in all states should similarly view the implications of current debates about same-sex marriage as affecting the validity of their own marriages. The debates should be federalism debates regarding marriage recognition generally, not disputes about whether same-sex marriage is a good or a bad thing.

The conflict of laws implications for current same-sex recognition debates, in other words, are for all married persons in all states. If any other state in the union can effectively "un-marry" a Massachusetts couple when that couple crosses over the state line, every state in the union can "un-marry" couples of other states for other reasons. The conflict of laws principles are not unique to same-sex unions. All marriages are potentially as insecure as Massachusetts same-sex marriages if conflicts rules allow Massachusetts same-sex marriages to be totally denied validity by any other state.

21. U.S. CONST. art. IV, § 1.

22. I have, however, made arguments similar to those being made in this article for some time prior to Massachusetts becoming the home for same-sex marriage, including at a time when it did not look like Massachusetts was the state most likely to authorize such marriages. See Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063 (1999).

Perhaps a non-same-sex hypothetical will help communicate my states' rights distress: What should happen when a sister state defines marriage more narrowly than the majority of other states? For example, assume, contrary to the apparent results of efforts launched in this direction,²³ that a strong version of covenant marriage not only grabs a foothold in, but more dramatically takes hold in, state *A*. Assume that in state *A*, couples will only be considered validly married if they enter into a covenant marriage, whereby they agree not to divorce unless they first undergo a significant period of attempted reconciliation, that if a divorce is eventually granted it must be for fault-based reasons, and that any divorced person cannot remarry until after the death of their first spouse.

Assume a state *B* couple, married under state *B*'s non-covenant rules for marriage, travels temporarily to state *A*. May state *A* refuse to consider the state *B* couple married while in state *A*? If one spouse is injured while hiking in a state *A* state park or while skiing on one of state *A*'s privately owned slopes, for example, may the other spouse be refused the right to make medical treatment decisions in state *A* for the injured spouse? Or, if the spouse dies as a result of tortious action in state *A*, may the surviving spouse be refused the right to recover damages as next-of-kin in state *A*'s courts?

State *A* can legitimately argue that it has the right to define marriage as it sees fit to accomplish purposes promoting family values that it deems important. It might further argue that it has no obligation to give any marriage-related benefits except to persons it considers married by its own definition of valid marriage. It might argue that in most cases nothing prevents the state *B* couple from entering into a covenant marriage.²⁴ Of course, this argument will not work if one of the state *B* spouses has previously been divorced. In such situations, it is not possible for this particular state *B* couple to be married to each other the way the covenant marriage law of state *A* requires. Even in such situations, state *A* might still argue that

23. See, e.g., Kristina E. Zurcher, Note, "I Do" or "I Don't"? Covenant Marriage After Six Years, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273, 285-88 (2004) (cataloging relative lack of enthusiasm for covenant marriage as a state policy).

24. This argument would not necessarily require that the couple begin married life by entering into a covenant marriage in state *A*. A second marriage proceeding in state *A*, applying covenant marriage law (a proceeding which could be viewed by the couple as a re-commitment proceeding for other purposes), or producing proof that the couple is bound through private agreement in ways similar to what is accomplished by operation of law when a marriage takes place in state *A*, might satisfy state *A* that the couple is "covenantly" married.

nothing originally prevented the state *B* couple from marrying persons state *A* defines as marriageable. At any rate, state *A*'s position might be that if the state *B* couple wants any benefits associated with state *A* law, each person must be married according to state *A*'s laws. To give marriage benefits in state *A* to a relationship less than a state *A* defined covenant marriage might be seen, through state *A*'s eyes, to undermine the value of marriage. State *A* could concede that other states may set marriage rules as they wish, but could argue that those who are not in covenant marriages, as defined by state *A* law, are simply not married for any state *A* purposes.

May state *A* thus refuse to recognize non-covenant marriages for any and all state *A* purposes? Perhaps state *A* may thus dictate its marriage policy to the rest of the country. An out-of-state couple, after all, does not have to travel to state *A*. The couple can enjoy the benefits of its "marriage" wherever such a non-covenant marriage might be recognized. The effect, however, would be that no couple is securely married in any state except their home state. What state *A* can do, states *C*, *D*, and *E* through *Z* can do. And since each state may define marriage differently from every other state, marriages would be valid only as between states that define marriage exactly the same way.

The reality is that marriage definitions are not identical. If marriage definitions actually conflict, it becomes impossible for couples to comply with the marriage laws of all sister states. Consider, for example, the situation of the state *B* couple where one of the spouses was previously divorced. When this state *B* couple married each other, their commitments under state *B* law were real and had real legal consequences. Surely it does not make legal sense, not to say anything of personal feelings, commitment, and romance, for the state *B* couple to have to divorce each other in order to obtain any state *A* benefits associated with being married. If they have an obligation to remain married under state *B* law, they should not also have an obligation to be divorced under state *A* law. The conflict is real and can be avoided only if one state's policies are required to give way.

Both state policies are legitimate, yet are, to repeat, incompatible. State *B*'s policy of allowing formerly divorced persons to establish meaningful marriage with a more compatible partner is a defensible one. State *A*'s policy, while out of touch with current trends in family

law, certainly has a respectable history of support²⁵ and equally ostensible legitimacy. From state *A*'s perspective, when a person can easily walk out on the one partner to whom she supposedly made a lifetime commitment in favor of establishing a relationship with another, the law has cheapened marriage, fundamentally converting it from a commitment to one person for life to the promise merely of serial monogamy with whomever one might be temporarily disposed to love. The fundamental sanctity of marriage, from state *A*'s perspective, should not be thus undercut. While both states use the word "marriage" to define a loving relationship between two persons involved in a long-term relationship, this shared emphasis on love does not bridge the fundamentally different views on what should be the nature of the commitment that is entitled to be called marriage.

I mean by such a hypothetical to emphasize that conflicts about the nature of marriage are not limited to same-sex situations and are not new.²⁶ Nevertheless, it is also obvious that same-sex marriage

25. In the grand scheme of things, it is only relatively recently that we have gone to a system of no-fault divorce.

26. Any difference in marriage definition can result in a fundamental conflict of values. While the miscegenation and polygamy debates formerly racked our country and were obvious examples of fundamental differences between states about what constitutes valid marriage, less politically charged differences regarding the definition of valid marriage still constitute real policy disputes.

A state that does not permit uncles and nieces to marry, for example, might view this prohibition as a fundamental marriage policy. The prohibition could reflect concerns not just about birth risks, but also, or alternatively, about incest-like closeness of marital partners. My point is not to argue whether such policy is a good or bad value judgment, but rather to emphasize that a legitimate state purpose can be articulated to support the policy. Once the purpose is seen by the state as legitimate and central to what is necessary to be married, it cannot be overridden by arguments about some shared state value of love and/or commitment. If the policy against these marriages is real enough to prevent in-state marriages between uncles and nieces, the policy concern does not disappear for out-of-state marriages between uncles and nieces. The prohibition may give way because of a particular couple's connection to another state, but that is a matter of conflicts doctrine, to which we will return shortly. The point for now is merely that there is no shared substantive policy about the desirability of uncle-niece marriages. One state may think such unions are a good idea; another state may consider them anathema. *Compare* *Catalano v. Catalano*, 170 A.2d 726, 728-29 (Conn. 1961) (holding that a marriage between an uncle and his niece under Italian law was not valid in Connecticut as against public policy), *with In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953) (holding that a marriage between an uncle and his niece under Rhode Island law was valid in New York).

Similar arguments could be made regarding underage marriages. If one state believes that parties lack the maturity to enter into marriage until they are twenty-one, whereas another state believes a fourteen-year-old can become a marriage partner, both states' substantive policies theoretically apply to any sixteen-year-old who wishes to marry. If the sixteen-year-old ends up being considered married by both states, this is not because of some shared substantive policy

debates, for our time period, have become the focal point for demonstrating the continuing reality that different states can define the reality of marriage differently. A blue state marriage does not necessarily mean the same thing as a red state marriage. Competing views of marriage are not necessarily compatible with each other, and the incompatible views cannot be overcome by looking to a shared definition of marriage when one does not exist.²⁷

Massachusetts, as would other states that might eventually give full marriage rights to same-sex partners, does not merely allow same-sex partners to achieve a union that is similar in kind to that experienced by opposite-sex couples.²⁸ Massachusetts instead clarifies, or redefines, depending on your perspective, that Massachusetts marriages do not have anything to do with the sex of the partners.²⁹ Even if an opposite-sex couple wished to obtain a marriage from Massachusetts that affirmed their commitment to each other as man (male) and wife (female), they simply could not do so. Massachusetts does not define marriage that way. *All* marriages in Massachusetts are formed based on a commitment of the partners to each other that does *not* take into account the sex of the two partners.

about the capacity to marry, but rather because, on the facts of the case, the state prohibiting the marriage yielded to the policies of the other state.

Likewise, if one state refuses to recognize common law marriages, requiring promise of commitment before a state authority, whereas another state gets rid of all state sanctioned promises and ceremonies entirely, the situation represents very real policy differences about what constitutes a marriage. Especially for the state that views marriage as requiring a formal and conscious commitment before any obligations or entitlements are allowed to attach, any other form of marriage could be viewed as fatally deficient. The state that instead eschews all ceremonies and promises, allowing a couple to be recognized as married whenever they so self-identify, has an arguably much more permissive view of marriage. The state requiring formal commitment might properly, from its perspective, view the other state's couples as merely engaging in consensual sex or living together rather than being married. If the other state, however, offers no other way of legally marrying than by self-identification, potentially no such couples are legally considered married under the ceremony-observing state's laws, but may be considered married in the other state's eyes.

27. The softer language of looking to a shared policy in favor of marriage generally, and therefore somewhat vaguely defined, is sometimes claimed to be a way around these conflicts. But to thus imply that all states have a strong policy in favor of validating all marriages is simply not true. Of course all states have a policy in favor of validating their own marriages, as defined by their own laws. As to marriages that do not conform to values that a state thinks are fundamentally required before the relationship should be deemed a marriage, there is no universally shared policy in favor of recognizing or promoting such marriages.

28. The Massachusetts policy thus differs significantly from same-sex civil unions, such as those allowed by Vermont.

29. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

That is the point of Massachusetts requiring that same-sex couples have exactly the same kinds of marriage rights as opposite-sex couples.³⁰ This point, of course, has not been lost on opponents of same-sex marriage. To those who believe that marriage is fundamentally a union between a man and a woman, the Massachusetts version of marriage is fundamentally flawed. My point is merely that Massachusetts has no other kind of civil marriage; to repeat, *no* civil marriages from Massachusetts currently incorporate a man plus woman value judgment about marriage.

To summarize, then, we have one state (Massachusetts) that defines marriage in a way that several other states say is fundamentally at odds with the way they define marriage. Other states will weigh in with their own definitions of marriage that may be variations on the competing themes or may emphasize completely different aspects of marriage. Whose policy is right? That question is not the concern of this article. From a conflicts perspective, which is the concern of this article, many policies are currently permissible. States that wish to define marriage as a union between a man and a woman are entitled to their view that the essence of marriage includes combining masculinity and femininity into one whole. States that define the essence of marriage as commitment, without regard to the sex of the partners, are entitled to their view that this is the essence of marriage. The two views regarding marriage are incompatible, but each state's view is permissible under current interpretations of federal constitutional provisions. The conflicts question becomes: must either state's policy give way as to any particular couple, and if so, when?

One state's policy might have to give way to that of another state either because sensible domestic choice of law doctrine counsels this outcome, or because federal choice of law rules constitutionally require it. We will briefly consider both possibilities.

As a matter of domestic conflicts doctrine, it seems desirable that a married couple should be able to remain married without fear that they will lose this status, and all of its essential benefits, any time they happen to venture across another state's borders. The problem is preserving the rights to which the couple should be entitled without infringing upon a visited state's ability to define marriage differently. The solution, it seems to me, is to recognize that the choice of law rule

30. *See id.*

for marital relations is that the law of the marital domicile determines a married couple's rights and their relationship, that these rights and the relationship must be recognized by all other states, but that these rights and the relationship are only recognized to the extent necessary to preserve the core realities of marriage as defined by the marital domicile state's law.

As does Professor William Reppy, I thus advocate that, as a matter of sensible conflicts doctrine, a single state's law should govern central aspects of the marital relationship.³¹ Unlike Professor Reppy,³² however, I argue that this single governing law should be the law of the marital domicile, not the law of the place of celebration of the marriage. Before sketching out how marital domicile law might work to govern central aspects of the marital relationship, perhaps a few words are in order as to why the place of celebration rule is an inappropriate conflicts rule to determine marital validity and marital entitlements.

The main problem with using the place of celebration rule to determine marital rights is that marriages are not necessarily lived out where they are celebrated. Accordingly, the rule is exceedingly arbitrary, selecting a law to govern that does not necessarily have any relation to the activity that will be governed. To take the most extreme example, a couple that celebrates their marriage on board a cruise ship likely does not plan to live their whole life aboard that cruise ship. Their marriage is entered into with the idea that it will be lived out elsewhere. This is true, however, as to all marriages. A couple does not plan to live in the Justice of the Peace's office or in the church where they exchange vows, but in a community that may or may not be in another state. While the marriage ceremony may properly mark the beginning of married life, and include important commitments that transform the status of the couple from single persons into married couple, where the ceremony takes place is irrelevant to the ultimate validity of the marriage. The validity of the transformation to married life and the legitimacy of rights claimed due to marriage are determined where the couple later lives, not where they choose to have a marriage ceremony. Marriage is always entered into with a place of marital living anticipated, usually quite

31. See William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393, 426-43 (2005).

32. See *id.* at 464-75.

consciously.³³ The place where the married couple will live should determine both whether the marriage is valid and also whether benefits or obligations attach.³⁴

A rule that uses the marital domicile's law to define marriage creates its own problems, however, which may be one reason traditional conflicts doctrine has hesitated to abandon the place of celebration rule.³⁵ While place of celebration does not later change, marital domicile may. If we concede that the law of marital domicile is the real governing law of a marriage, we necessarily also concede that neither marital status nor incidents are ever completely secure unless a couple chooses to remain their entire lives in the state where they began to live out their marriage. Some couples live their entire married lives in a single state, but many move from state to state. Should the validity of marriages and the concomitant benefits and obligations of being married change when the spouses move to a new domicile? I think the answer has to be yes, albeit with room for any new marital domicile state to make exceptions as it thinks appropriate to do justice for the parties.

To return to the covenant marriage example: if a state *B* couple that consists of partners who have never entered into marriage with anyone else decides to move to state *A*, it does not seem an undue intrusion for state *A* to insist that the partners, if they want to continue to consider themselves married, must enter into a covenant marriage that would impose upon them the more rigorous obligations of state *A* law. As to whether the couple would, under state *A* law, retrospectively be considered to have been married for the time prior to their entering into a covenant marriage, state *A* should be allowed room to do justice for the parties. As to the future validity of the marriage, however, I do not see how it would be fair to state *A*'s

33. Even for couples with absolutely no thought for the morrow, their intention to live somewhere after marriage is ultimately divined by their conduct in living in that somewhere.

34. I obviously reject the accepted wisdom that the validity of a marriage is presumptively determined by the law of the place of celebration, subject to a public policy veto by the law of the marital domicile. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). The conventional wisdom embodied in the place of celebration rule, with exceptions, seems to have the policies exactly backwards. It is the place where the couple intends to live immediately after marriage that has the only real interest in determining whether this pair is a couple that can be married to one another. The public policy exceptions to marriage validity under the traditional wisdom are thus not exceptions at all, but simply involve the marital domicile state quite properly applying its own law to determine the validity of a marriage for its own domiciliaries.

35. *See id.*

legitimate policy concerns for it to be bound by marriage laws (those of state *B*) that no longer have any relation to the parties. In short, if the newly domiciled state *B* couple refuses to endorse state *A*'s covenant marriage values, state *A* should have the right to consider them unmarried for any and all future purposes.³⁶

The harder case, of course, is the state *B* couple that includes a formerly divorced person as one of the spouses. Under strict interpretation of state *A* law, this couple can never be deemed married. Does state *A* have a right to effectively divorce the couple and deprive them of any future marital benefits? I think so, although I think state *A* could certainly instead craft an exception policy allowing the couple to become a covenant couple under state *A* law. My main point is that state *A* does not have to be bound by any other jurisdiction's policies about what marital rights accrue to those who voluntarily choose to establish domicile in state *A*. A couple validly married under another state's law (that of state *B*) does not have the right to import that law into other domiciles when the couple chooses to leave state *B* and establish a domicile elsewhere.³⁷ A change of domiciliary affiliation to a red or blue state from the other color state carries with it a change of governing background values and obligations.

I do not particularly like all the results that might occur under this marital domicile rule, but I think such a rule achieves a fair accommodation of competing interests and reflects the realities of the sovereignties involved. Applying this rule to my own marriage, which is something I think a reader should always do when

36. This would effectively divorce the couple, thereby requiring some additional choice of law decisions if any interested parties litigated issues about what law might govern past property accumulation or other state *B* marital rights previously applicable to the couple.

37. A marital domicile rule would produce similar results for same-sex marriage situations. Thus, a Massachusetts couple, whose marriage by definition does not reflect any male and female joining values, is potentially vulnerable to being effectively unmarried if the couple moves to a state which requires affirmation of such values as part of what it considers fundamental to marriage. For opposite-sex couples, perhaps a new ceremony would be required; perhaps the new state would simply incorporate the new couple into its marriage system, absent their opting out. This would be a matter for the new state's law to determine. For a same-sex couple, which is also like the state *B* couple with a previously divorced spouse as one of the partners moving to state *A*, the consequences would presumptively be far more drastic. Their marriages likely would be effectively terminated if the couple established a new domicile in a state very hostile to same-sex unions. Again, the main point is that this matter would be for the new marital domicile state to decide. I do not applaud such results substantively in this article, but instead merely describe what I think might happen under reasonable choice-of-law rules.

evaluating a marriage conflicts rule, the marital domicile rule means that my spouse and I can control the validity and core incidents of our marriage only by picking where we choose to center our married life. We do not have a right to insist that our marital status or benefits be determined by any other law except that of the domicile with which we voluntarily and significantly affiliate ourselves. When we left Kentucky to move to Massachusetts some thirteen years ago, we exposed ourselves to whatever different liabilities and obligations Massachusetts might impose on married couples. We more basically exposed our marriage itself, although we did not realize this at the time, to Massachusetts effectively dissolving it based on a potentially different Massachusetts definition of who can be properly married to whom.

On the other side of the coin, the marital domicile rule I am describing would require all other states to recognize the validity and core incidents of a marriage, under the marital domicile state's law, whenever a couple is merely visiting any other state. To repeat, it is not just the status of being married that other states would have to respect, but all incidents of the marriage that are central to that status. It is no good to tell me that I remain married in Massachusetts, but that I can do nothing as a married person in Utah until and unless I satisfy whatever definition of marriage Utah might impose upon me. My marriage thus becomes completely, albeit temporarily, subject to Utah law. While it is good to know that my wedding photos and ring will still mean something when I return to Massachusetts, I want to know that my spouse is still my spouse while we are driving through the beautiful Utah countryside, sleeping in Utah hotels, or skiing on Utah slopes. It similarly would be no good to tell me that I retain my marital status while in Utah, but that Utah gets to decide what, if any, incidents attach to that status. Being able to call myself married under Massachusetts law while I am in Utah means nothing unless there are tangible consequences (incidents) in Utah that go along with that status.

As a starting point, however, let me emphasize that the marital domicile rule advocated here does not effectively convert my Massachusetts marriage into a Utah marriage for the time that I am in Utah. Utah should not have to give me all the benefits that it would give its own married couples. I am not married under Utah law, but under Massachusetts law. If Utah has special benefits for its marital domiciliaries, or for those it defines as equivalently married under its

law, I might want to have these benefits (and Utah might choose as a matter of its own law to give them to me), but I am not entitled to demand them under the marital domicile rule proposed here. For instance, if Utah gives discounts on state park admission tickets to married couples, Utah has a right to define who is married for the purpose of conferring this benefit. If Utah law more broadly requires all Utah merchants to grant special discounts or benefits to married patrons, or confers special immunity from tort liability on married couples, or gives married couples special recovery rights when the other spouse is injured, etc., Utah has a right to define who is married for the purpose of conferring any of these benefits. The marital domicile rule advocated here does not ask Utah to apply its law to my marriage, but instead only requires Utah to give effect to my Massachusetts marriage.

Conversely, but similarly, the marital domicile rule suggested here cannot force Utah to come up with benefits of the kind to which I might be entitled under Massachusetts marital law if these benefits are unknown to Utah law. I cannot, in other words, ask for more than a Utah married couple would get, even if I might be so entitled under Massachusetts law. This means, of course, that any special price breaks granted couples under Massachusetts law remain available to me only in Massachusetts. It also means that in many situations where I might be used to one substantive rule for married couples at home, I may have to adjust to a different rule while outside my marital domicile. For instance, if Utah extends no privilege to communications between spouses, and assuming Massachusetts does extend such privilege, I should not be able to claim a privilege for such communications while in Utah as to any matters into which Utah has a legitimate right to inquire.

What I should be able to claim under the marital domicile rule suggested here, however, is that core aspects of my Massachusetts marriage be given effect in Utah so long as Utah provides similar benefits to any other persons confronted with similar situations. We can legitimately disagree about exactly what is core and what is less central to a marital relationship, and the core might well be different under different states' marriage laws. Let me suggest one example of what I consider core to my own marriage, and concomitantly reemphasize in regards to that example how this core is being claimed as an entitlement under Massachusetts law rather than under Utah law.

To be able to act upon and receive benefits based upon the next-of-kin relationship my spouse has to me seems to be a core aspect of my Massachusetts marriage. If I become injured and comatose while I am visiting Utah, my spouse should be able to be by my side and discuss with the doctors what treatment I should receive. If I die as a result of injuries tortiously sustained in Utah, my spouse should be able to sue in Utah on her own behalf and on behalf of my children for damages. These entitlements assume that Utah provides such rights to those it defines as in a next-of-kin relationship with a comatose or deceased relative. If Utah's position regarding comatose patients was instead that no one gets to terminate treatment, or that treatment alternatives are solely within the discretion of the physician, then my spouse cannot claim rights that are unknown to Utah law. Similarly if Utah provides no recovery to surviving spouses for wrongful death, my spouse cannot export a tort right into Utah that is unknown to Utah law. But if Utah instead attempts to disqualify my spouse as next-of-kin because Utah does not recognize my Massachusetts marriage, my spouse should be able to insist that Utah's definition of marriage is irrelevant to the issue of whether she is my next-of-kin. Her next-of-kin relationship is established by Massachusetts's, not Utah's, law under the marital domicile choice of law rule advocated here.

It remains to briefly suggest why a marital domicile choice of law rule such as the one sketched in the preceding paragraphs might not only make sensible conflicts policy but perhaps is required by the Full Faith and Credit Clause of the Constitution. Admittedly it is an uphill battle in the post-*Allstate*³⁸ age to argue that any choice of law rule can be constitutionally required. As the Court in *Philips Petroleum Co. v. Shutts*³⁹ observed, when invalidating Kansas choice of law on the facts before it, "we make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law."⁴⁰ The current constitutional limits on choice of law seem to be rules of veto or proscription, rather than rules of prescription as to whose law must be applied. It may well be that the Supreme Court,

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

39. 472 U.S. 797 (1985).

40. *Id.* at 823.

embarrassed by its former insistence that vested rights rules were constitutionally compelled, now reads the Constitution as unable to dictate to any state which law it must apply, but only whether the law it has chosen to apply violates a fairly weak connectedness test as articulated in *Allstate*.⁴¹

Nevertheless, in at least one area related to marital conflicts law, the Court seems comfortable with the idea that not just any sort of state relationship to the parties or facts of the litigation enables a state to substantively define the validity of the marriage relationship. In the context of divorce litigation, the Court allows only the state of domicile of one of the spouses to determine, as against every other state that might want to apply its marriage law to the controversy, whether the couple remains married or not.⁴² These rules from the *Williams* cases⁴³ are, of course, rules of divorce jurisdiction and of judgment preclusion, not rules of choice of law or of marriage recognition. Nevertheless, the *Williams* decisions do not allow every state with an asserted connection to the parties to adjudicate status. The prerequisite to binding judgment is true domicile of one of the spouses in the adjudicating state.⁴⁴

It would concededly be a very long leap from the Court's requirement of domicile for valid divorce judgments to assert that this jurisdictional requirement implies a constitutionally required choice of the law of the marital domicile to determine all significant incidents of a marriage. I do not mean the *Williams* cases should be construed this way. I merely use them to demonstrate that when the Court has explicitly addressed conflict of laws issues in the marriage context, it has done mainly two things: 1) reaffirmed that marital relations are primarily committed to the states; and 2) assumed that the state of

41. See *Allstate*, 449 U.S. at 312-13. As to the rejection of the former approach, see *id.* at 308 n.11. The *Allstate* Court articulates the currently governing constitutional test as follows: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13.

42. See *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 299 (1942); *Williams v. North Carolina (Williams II)*, 325 U.S. 226, 229-30 (1945).

43. See *id.*

44. See, e.g., *Williams II*, 325 U.S. at 229-30, 231 & n.7. Arguably, the Court later undercut the rule that the domicile must be objectively true, but the Court still required the judgment court to proceed only if the record before it indicated it was the state of domicile of one of the spouses. See *Sherrer v. Sherrer*, 334 U.S. 343, 351-52 (1948) (holding that the opportunity to litigate the issue of domicile in the original divorce proceeding precluded collateral attack on the validity of domicile).

domicile of one or both of the parties would be the state that would have the right to determine whether a couple is validly married.

With no Supreme Court precedents on point telling visited states whether they can refuse to recognize core rights that another state has granted to its married domiciliaries, I conclude with a few policy ruminations about why the Full Faith and Credit Clause might be construed to counsel deference to the marital domicile state's law for visitors from sister states. First, although one of my main points in this article has been about the incompatibility of red state versus blue state definitions of marriage, one should not lose sight of the fact that all states' versions of marriage must be constitutionally appropriate under the federal laws and Constitution. Whatever we are doing in our blue states about redefining or clarifying marriage, it cannot get too far out of hand in a federal sense, or the national Congress or federal judiciary will correct us. That this has not yet occurred may be some indication that our marriages and the rights that accrue as a result of them are not absolutely dangerous to red state welfare.

Second, the Full Faith and Credit Clause and the other provisions of Article IV seem designed in large part to encourage respect for other states' different local laws and to encourage rather than discourage interaction between the citizens of the states.⁴⁵ A policy of such hostility to out-of-state marriages that blue state couples would be well advised to stay at home rather than risk losing core benefits of their marriage hardly promotes travel between the citizens of the several states.

Third, a required respect for the law of the marital domicile by other states, without regard to that law's content, treats every state's marriages equally, promoting co-equal federalism. Each state may define marriage in the way that each thinks is best for its own domiciliaries, with the assurance that its domiciliaries will not receive disfavored treatment by any other state.

Finally, the state of marital domicile is the state which has the greatest stake in a marriage. The marital domicile state is where a couple primarily lives out its marriage. Other states have only a fleeting or much more tenuous connection with the couple. Another state's laws should not be allowed to bruise the health of a marriage which is not that other state's concern. A couple should not be subject to being effectively divorced when they step onto sister-state soil if

45. *See, e.g.*, U.S. CONST. art. IV, § 2, cl. 1.

their home state wants their marriage instead to grow where it has been planted. Our couples will be coming back to their blue state homes soon enough after their visits to red states. It would be better if they came back still ruddy after their contacts with red states, with their marriage rights totally intact, rather than return to us black and blue.

Let me in conclusion take this opportunity again to thank Professor Wardle for organizing this symposium and for his marvelous hospitality in connection with it. As this dialogue about marital recognition has continued over the past six and one-half years, I have very much appreciated being allowed to be part of the conversation. I look forward to continuing the discussions.