

STATE CHOICE-OF-LAW DOCTRINE AND NON-MARITAL SAME-SEX PARTNER BENEFITS: HOW WILL STATES ENFORCE THE PUBLIC POLICY EXCEPTION?

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Public and private sector employers are increasingly extending various sorts of employment benefits to domestic partners of employees. Interstate mobility coupled with the portability of many of these benefits raise issues regarding the interjurisdictional recognition of these benefits. Those benefits either are or should be entitled to recognition. Nor should the public policy exception impede their recognition or enforcement. Benefits for a domestic partner of the same sex may be sought for purely economic reasons or as part of a larger agenda to secure validation of that relationship's legitimacy. Benefits regimes that are economic or designed to assure pragmatic, facilitative aspects of domestic relationships such as health care decision-making or child care without implying a larger claim of equivalency to heterosexual marriage are unlikely to encounter legal objections in an interjurisdictional enforcement context. Barriers to recognition require some level of obnoxiousness or odium—offensive to forum notions of morality or justice—in order to apply. Prevailing doctrines of full faith and credit and equal protection foreclose application of these objections in all but the most serious instances,

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e.g., where the domestic partner benefit claim is a proxy for recognition of an odious foreign marriage, or marriage equivalent, such as a homosexual union.

DEFINING DOMESTIC PARTNERS

The term “domestic partner” has varied definitions. Under California law—perhaps the most expansive statutory regime and therefore a good starting point—domestic partners are “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring,”¹ and who are legally eligible to receive benefits, usually employee benefits, defined by contract or by law. A domestic partner may be exclusively of the same sex as the employee² or may be a heterosexual domestic partner.³ States that do not allow public sector domestic partner benefits have generally done so because state law sets a definition of

1. CAL. FAM. CODE § 297(a) (West Supp. 2004). Other terms as well may be used to refer to a domestic partner. For example, they are sometimes referred to as a “life partner.” *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1236-37 (Pa. 2004). They also may be referred to as a “dependent.” *City of Atlanta v. Morgan*, 492 S.E.2d 193, 193 (Ga. 1997). In *Slattery v. City of New York*, 686 N.Y.S.2d 683, 689 (Sup. Ct. 1999), the court approved a city ordinance extending health and retirement benefits to domestic partners. Observing that state law allowed cities to extend benefits to employees “and their families,” the court rejected the notion that the definition of a “family” should turn on a marriage certificate or an adoption order but rather held that it should turn on “the reality of family life.” *Id.* Consideration should be given to “nuclear units” “characterized by an emotional and financial commitment and interdependence.” *Id.* This flexible approach mirrors the Court’s action in *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977). The Court in *Moore* invalidated a zoning ordinance limiting occupancy of a dwelling to members of a single “family” so narrowly defined as to exclude two first cousins who lived with their grandmother. *But see* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding a zoning restriction that excluded *unrelated* individuals).

2. *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001) (upholding a limitation on domestic partner health benefits to only a homosexual partner); *see also* *Schaefer v. City & County of Denver*, 973 P.2d 717, 718 (Colo. Ct. App. 1998) (upholding a Denver ordinance extending health and dental benefits to partners of employees in a “committed” homosexual relationship).

3. Permitting heterosexual couples to be domestic partners allows for the creation of an alternative to conventional marriage for those who could otherwise marry. California allows this for heterosexual couples over the age of sixty-two and eligible for social security benefits. CAL. FAM. CODE § 297(b)(5)(B) (West Supp. 2004). This provision is intended to protect benefits that would otherwise be lost or reduced should the couple marry. *See* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1559 n.12 (2004). This compassionate provision exposes the fundamental theory of California’s “Domestic Partner Rights and Responsibilities Act” as principally a benefits regime. *Id.* at 1561.

dependency from which units of local government acting under their home rule powers cannot deviate.⁴ This objection, of course, is grounded in state legislative policy and is beyond the scope of this analysis, which is focused on interjurisdictional recognition problems where entitlement under law or contract is unquestioned.

The question of domestic partner benefits is a complex one, which is compounded by social overlays. Motives for seeking these benefits can be economic. Employers may receive a greater return for labor from employees motivated by these benefits, and this in turn allows employers to direct that enhanced return toward beneficiaries identified by the worker. Employers may also desire equitable treatment for all employees, offering the same benefits for those seen as similarly situated.⁵ These motives can also be cultural. Those seeking benefits may do so in an effort to morally equate homosexual and heterosexual relationships in an effort to establish a legal parity that is currently denied by the law. Some believe equal benefits will promote the notion that homosexuality is a normal relationship and same-sex "marriage" is legally accepted.⁶ In a recent article, Professor Grace Ganz Blumberg identifies three methods of bestowing legal significance to same-sex relationships:

The first is recognition of same-sex marriage. The second is construction and recognition of a formal shadow institution to marriage, such as California registered domestic partnership. The third is legal recognition of informal conjugal relationships, that is, legal recognition for the purpose of assigning both public rights and private responsibilities to same-sex conjugal partners.⁷

4. See, e.g., *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520-21 (Ga. 1995) (extending domestic partner benefits to domestic partners violated constitutional home rule provisions); *Connors v. City of Boston*, 714 N.E.2d 335, 342 (Mass. 1999) (legislative definition of dependents foreclosed local governments from expanding the category under their home rule powers); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 108-10 (Minn. Ct. App. 1995) (state statutory definition of dependents precluded a city's authority to define a domestic partner as a dependent under its home rule powers).

5. The dimensions of the equitable basis are explored at length in Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

6. See L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29 (1998).

7. Blumberg, *supra* note 3, at 1557.

Blumberg's third means, legal recognition of informal conjugal relationships, was realized in the *Lawrence v. Texas*⁸ decision that decriminalized homosexual sodomy and thus legally recognized informal homosexual—as well as heterosexual—relationships.⁹ That which previously could be made criminal is now licit. The analysis advanced here argues that the issue of benefits and benefits recognition must be separated from Blumberg's issue, the legalization of same-sex conjugal relationships.

Proponents of a homosexual rights agenda conventionally begin with characterization of marriage as a "bundle of rights."¹⁰ Much has been made of the General Accounting Office study identifying over 1,138 federal benefits, rights, and obligations based on marriage.¹¹ A *White Paper*, by the American Bar Association Section of Family Law, compiled a useful taxonomy of federal and state benefits categorized in the areas of family law, taxation, health care law, probate, torts, real estate, bankruptcy, immigration, and criminal law.¹² Both public and private sector employers are increasingly extending benefits to same-sex partners in order to attract the employees they want.¹³ Portable benefits should encounter no legal impediments to interstate enforcement, particularly if they are viewed strictly as benefits and not proxies for a more expansive claim of moral parity.

Two Georgia cases illustrate how courts approach the task of disentangling public sector benefits claims from efforts by homosexual activists to gain an additional moral purchase from a benefits law: *City of Atlanta v. McKinney*¹⁴ and *City of Atlanta v.*

8. 539 U.S. 558 (2003).

9. *Id.* at 579.

10. Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 598-606 (2004).

11. See, e.g., Am. Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339, 346, 366 nn.98-99 (2004) [hereinafter *A White Paper*]; Suffredini & Findley, *supra* note 10, at 598.

12. *A White Paper*, *supra* note 11, at 366-70 (also listing private sector labor benefits such as family health insurance, including rights under COBRA, eligibility for life insurance group coverage for a spouse/partner, eligibility for disability insurance, the ability to utilize sick leave to care for another who is seriously ill, the ability to roll over a 401(k) or other retirement accounts, and eligibility for family memberships and discounts).

13. "According to data collected by the Human Rights Campaign Foundation, the number of private sector employers offering domestic partnership health benefits has been steadily increasing, from 4892 in 2001 to 6811 in 2004, an increase of 39%. The number of Fortune 500 companies offering health benefits is now at 211, up from 61 in 1998." *Id.* at 405.

14. 454 S.E.2d 517 (Ga. 1995).

Morgan.¹⁵ The *McKinney* case presented a challenge *inter alia* to a city ordinance that established a domestic partnership registry for jail visitation, and extended insurance and other employee benefits to domestic partners of city employees. The Georgia Supreme Court held Atlanta's domestic partner benefit ordinance unconstitutional because it recognized a domestic partnership as "a family relationship" and provided employee benefits to domestic partners "in a comparable manner . . . as for a spouse,"¹⁶ thereby expanding the definition of a "dependent" in a manner inconsistent with state law and in violation of both the Georgia Constitution and Georgia's statutory home rule limitations on municipalities.¹⁷ The court concluded that the Georgia Constitution prohibited "cities from enacting special laws relating to the rights or status of private persons."¹⁸ In seeking to enlarge the definition of dependents to include domestic partners, the city departed from the limited application of the term dependent to a spouse, child, or next of kin. The law's clear subtext was to advance a claim that domestic partners enjoyed a relationship comparable in dignity with spouses. In invalidating the city's law, the court also rejected this purported equivalency.

Other courts struggling to define the relationship between domestic partner benefits and marriage have reached different conclusions. For example, *Crawford v. City of Chicago*¹⁹ concerned a taxpayers' challenge to a city domestic partnership ordinance extending employee health insurance benefits to the homosexual partners of city employees. The *Crawford* court rejected the notion that the ordinance created or purported to create a marriage or marital status, finding it limited to providing employee benefits.²⁰ Similarly, in *Slattery v. City of New York*,²¹ the court rejected the argument that an ordinance extending health and retirement benefits to domestic partners of city employees also legalized common-law

15. 492 S.E.2d 193 (Ga. 1997).

16. *McKinney*, 454 S.E.2d at 519.

17. *Id.* at 520-21.

18. *Id.* at 520 (citing GA. CONST. art. III, § 6, ¶ 4(c)).

19. 710 N.E.2d 91 (Ill. App. Ct. 1999).

20. "Nothing in the [Chicago domestic partnership ordinance] purports to create a marital status or marriage as those terms are commonly defined. Rather, [it] addresses only health benefits extended to City employees and those residing with them." *Id.* at 98.

21. 686 N.Y.S.2d 683 (Sup. Ct. 1999).

marriage.²² If the state perceives no ulterior motive in a benefits regime, of course, there is no *McKinney*-type problem presented.

After the decision in the *McKinney* case, the city of Atlanta passed another domestic partnership benefits ordinance that extended benefits simply to “dependents,” defined in more conventional terms as one relying on another for economic support. In the ensuing challenge to the new ordinance, *City of Atlanta v. Morgan*,²³ the Georgia Supreme Court recognized that where benefits—in that case public sector, municipal employee benefits—are extended to dependents and not styled as marriage benefits or marital benefits, they are enforceable.²⁴ Employee benefits or dependent benefits extending to domestic partners are licit so long as the statute does not attempt to leverage the benefits into an acceptance or legitimization of homosexual marriage. The analysis coming out of the *McKinney* and *Morgan* cases emphasizes the importance of limiting benefits to their immediate purpose and avoiding any sort of collateral agenda.

WHY THE CHARACTERIZATION OF BENEFITS CLAIMS MATTERS

Opposition to domestic partner benefits, in instances where they are perceived as a Trojan horse or fifth column for homosexual rights activists by those who object to homosexuality or same-sex “marriages,” can affect the interjurisdictional enforcement of domestic partner benefits.

Interjurisdictional enforcement of domestic partner benefits takes place against a backdrop of growing hostility to the recognition of same-sex marriages.²⁵ Several states have enacted constitutional

22. In fact, the court held that marriage and domestic partnership under the ordinance differed in several significant respects, e.g., marriage was subject to more stringent formal requirements than was the regulation of domestic partnerships; marriage was subject to several prerequisites that did not apply to domestic partnerships; a marriage license was more detailed in form than a domestic partnership certificate; marriage carried with it rights and responsibilities respecting both spouses and marital property that were inapplicable to domestic partners; after divorce, former spouses retained substantial protections unavailable to a former domestic partner. *Id.* at 686-88.

23. 492 S.E.2d 193 (Ga. 1997).

24. *Id.* at 195.

25. L. Lynn Hogue, *Examining a Strand of the Public Policy Exception with Constitutional Underpinnings: How the “Foreign Marriage Recognition Exception” Affects the Interjurisdictional Recognition of Same-Sex “Marriage,”* 38 CREIGHTON L. REV. 449 (2005).

barriers to the recognition of homosexual marriages,²⁶ and a marriage amendment has been proposed to the federal Constitution.²⁷ There are already clear barriers to the enforcement of same-sex “marriages” in states that do not choose to recognize them. For example, some states, such as Georgia, have enacted statutory barriers to the recognition of same-sex “marriages,” both domestic and foreign.²⁸ States have always been able to rely on the public policy exception in choice-of-law theory to avoid recognizing marriages that offend their sense of morality, including a foreign same-sex marriage.²⁹ States may also rely on the federal Defense of Marriage Act (“DOMA”).³⁰

26. Eleven states have adopted state constitutional marriage amendments. *See* ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”); GA. CONST. art. I, § 4, ¶ 1 (a) (“[Georgia recognizes] as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.”); KY. CONST. § 233a (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.”); LA. CONST. art. XII, § 15 (providing that “Marriage in the state of Louisiana shall consist only of the union of one man and one woman”); MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman shall be the only agreement recognized as a marriage or similar union for any purpose.”); MISS. CONST. art. XIV, § 263A (“Marriage may take place and may be valid under the laws of this state only between a man and a woman.”); MO. CONST. art. I, § 33 (“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”); MONT. CONST. art. XIII, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized by this state or its political subdivisions.”); OKLA. CONST. art. II, § 35 (“Marriage of this state shall consist only of the union of one man and one woman.”); OR. CONST. art. XV, § 5a (“It is the Policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as marriage.”); UT. CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”).

27. H.R.J. Res. 56, 108th Cong. (2003) (“Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”).

28. GA. CODE ANN. § 19-3-3.1 (2004). *See* Hogue, *supra* note 6, at 42-43.

29. *See generally* Hogue, *supra* note 6. The following are some early examples of application of the public policy exception to the recognition of foreign marriages. *See, e.g., In re Takahashi's Estate*, 129 P.2d 217 (Mont. 1942) (miscegenous marriage between Japanese and Caucasian residents prohibited by Montana law would not be recognized even when solemnized in Washington where such marriages were legal); *In re Vetas' Estate*, 170 P.2d 183 (Utah 1946) (voiding a common-law marriage contracted out-of-state by Utah residents). Miscegenation statutes were invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967), and the cases cited are intended merely as an example of the operation of the public policy doctrine in the area of domestic relations law.

30. 28 U.S.C. § 1738C (2000) (“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

Finally, they can perhaps avail themselves of a “marriage recognition exception,” similar to the public policy exception, but an independent constitutional barrier to the recognition of odious marriages with deep roots in our federalism. These clear barriers to recognition of same-sex “marriages” and their analogues and cognates do not, however, apply to the recognition of domestic partner benefits. Provisions like the state and federal DOMAs are directed immediately at marriage. Benefits are properly characterized as something else altogether.

The public policy exception is not limited to marriage.³¹ As noted above, application of the public policy exception turns on forum law tolerance for odious foreign law. Odium is defined various ways. Justice, then Judge, Cardozo defined it thusly: the foreign law objected to must offend “our sense of justice or menace the public welfare,” or “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal,” or “shock our sense of justice.”³² Foreign law can violate a forum court’s sense of fairness or morality³³ or simply reflect dissimilarity in legal treatment that reflects significant differences in policy.³⁴

Even states harboring hostility toward same-sex marriage have no hostility to benefits as such. The threat to interjurisdictional enforcement arises from the danger that, as in the *McKinney* decision discussed above, odium will attach to an underlying homosexual relationship and obscure the benefits enforcement aspect of the case.³⁵ After *Lawrence*, states cannot criminalize some forms of non-marital sexual relations, including homosexual ones, and cannot penalize those who engage in them. Likewise, after *Romer v. Evans*³⁶ it is a

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.”).

31. *E.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998) (affirming the use of the public policy exception to avoid an injunction against testifying); *Alexander v. Gen. Motors Corp.*, 478 S.E.2d 123 (Ga. 1996) (Virginia products liability law, which did not allow strict liability, was adverse to Georgian public policy).

32. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201-02 (N.Y. 1918).

33. *E.g.*, *Alexander*, 478 S.E.2d 123; *Paul v. Nat’l Life*, 352 S.E.2d 550, 556 (W. Va. 1986) (“[A]utomobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others.”). For a discussion of the public policy doctrine and its application to marriage recognition, see Hogue, *supra* note 6.

34. *See Baker*, 522 U.S. 222.

35. *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995).

36. 517 U.S. 620 (1996).

violation of the Equal Protection Clause for states to punitively classify homosexuals for no “proper legislative end [except] to make them unequal to everyone else.”³⁷

Opponents of the Georgia marriage amendment have asserted that its enactment would imperil enforcement of domestic partner benefits.³⁸ The argument turns, however, on a forced and ultimately specious reading of the amendment.³⁹ Examination of the text of all of these state marriage amendments discloses no language addressing domestic partner benefits. The assertion in those instances seems to be nothing more than an (obviously failed) scare tactic to foster opposition to the ballot proposals. In fact, one can anticipate that in the event a denial of a domestic partner benefit were to occur based on application of a state marriage amendment, proponents of the benefit would switch positions and argue for a narrow reading of the respective amendment. Under that reading, the amendment’s scope would be limited to marriages, marriage cognates, and analogues that are marriages in fact under foreign law, albeit under different names. Of course, if these or similar constitutional provisions were construed to cover domestic partner benefits, such an extension would be vulnerable as suggested above under *Lawrence* and *Romer*.

CONSTITUTIONAL CONSIDERATIONS

The legal path that requires recognition of domestic partner benefits will be clear to those schooled in the law of conflicts. The Full Faith and Credit Clause largely provides the principal framework for sorting out these cases. Early case law, exemplified by *Bradford*

37. *Id.* at 635.

38. Shannon L. Goessling, *Partners Safe in Marriage Amendment*, ATLANTA J.-CONST., Sept. 27, 2004, at 11A.

39. See *O’Kelley v. Cox*, 604 S.E.2d 773, 777 (Ga. 2004) (Sears, J., dissenting). In *O’Kelley*, the Georgia Supreme Court rejected an anticipatory attack on Georgia’s proposed marriage amendment prior to the election. The attack was premised on the contention that the language of the amendment violated the Georgia Constitution’s Single Subject Rule that provides “[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more articles or related changes in one or more articles may be submitted in a single amendment.” *Id.* at 777 (quoting GA. CONST., art. X, § 1, ¶ 2). The alleged violation was a consequence of the reference in subsection (b) of paragraph one of the amendment to “union” and the asserted possibility that it could refer to a civil union or a domestic partnership rather than exclusively to a marriage or marriage cognate. *Id.*

Electric Light Co. v. Clapper,⁴⁰ identified three bases for refusing recognition to a claim grounded on foreign law: “the forum fails to provide a court with jurisdiction of the controversy[,] . . . fails to provide procedure appropriate to its determination, . . . or because the enforcement of the right conferred would be obnoxious to the public policy of the forum.”⁴¹ Obnoxiousness to forum public policy, a special concern in instances of marriage recognition, has declined in significance since the Court’s decision in *Bradford*. It is now a commonplace that the Full Faith and Credit Clause does not require a state to subordinate its policies to those of a sister state, a position affirmed in *Carroll v. Lanza*⁴² and *Thomas v. Washington Gas Light Co.*,⁴³ as well as *Alaska Packers Association v. Industrial Accident Commission*,⁴⁴ and *Pacific Employers Insurance Co. v. Industrial Accident Commission*.⁴⁵

The first *Bradford* objection, that “the forum [state] fails to provide a court with jurisdiction of the controversy,”⁴⁶ is subject to the constraint of the Full Faith and Credit Clause as applied in *Hughes v. Fetter*.⁴⁷ In that case, the Supreme Court established that in order to close its courts to a particular cause of action, the state must evidence a “real feeling of antagonism” against the cause of action.⁴⁸ In *Hughes*, Wisconsin sought to invoke a statute that closed its courts to wrongful death actions brought under the statutes of sister states. The plaintiff based his complaint on the wrongful death statute of Illinois, where the decedent’s death occurred. Wisconsin’s statutory policy to close its courts to all wrongful death actions save those that could be based on its own statute was trumped by “the national policy of the Full Faith and Credit Clause.”⁴⁹ That policy would

40. 286 U.S. 145 (1932).

41. *Id.* at 160.

42. 349 U.S. 408, 425-26 (1955) (holding that an Arkansas common law negligence judgment does not deny full faith and credit to the Missouri workmen’s compensation statute).

43. 448 U.S. 261, 279 (1980) (plurality opinion) (finding that a state has no legitimate interest in preventing a supplemental workmen’s compensation award from another state); see also *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965) (holding that the Full Faith and Credit Clause did not require Alabama to follow Georgia procedures in fashioning a workers’ compensation award).

44. 294 U.S. 532 (1935).

45. 306 U.S. 493 (1939).

46. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

47. 341 U.S. 609 (1951).

48. *Id.* at 612.

49. *Id.* at 613.

similarly require sister states to open their courts to enforcement actions based on foreign domestic partner provisions.

The second *Bradford* objection, the want of appropriate enforcement procedure, would seem the weakest both at the time *Bradford* was decided and now.⁵⁰ Cases that raise the issue of procedure address the problem of efforts to confine enforcement to the courts of the state creating the cause of action described by Justice Lamar in *Tennessee, Coal, Iron & Railroad Co. v. George*⁵¹ as “cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act.”⁵² That restriction has, however, proven insubstantial. It is clear that states can no more fence in enforcement actions dealing with domestic partner benefits than they can fence them out.⁵³

CONCLUSION

Recall the equal protection discussion above drawing particularly on *Romer v. Evans*. Relationships among homosexuals, falling short of state recognized marriage, should not encounter state enforcement problems. Since they are not marriages, they do not trigger the requisite odium that informs public policy objections whether they arise from the public policy exception grounded in conflicts theory or in a constitutionally grounded marriage exception.⁵⁴ In any event, those rules should be confined to objections to foreign marriages that offend forum policy.⁵⁵ To the extent that they make available portable domestic partner benefits, they should be enforceable.

In some respects, the law just canvassed with respect to domestic partner benefits applies to enforcement of agreements simply intended to facilitate medical decision-making, hospital visitation entitlements, and the like. To the extent that these arrangements are documented, there should be no impediment to their enforcement. Where those arrangements affect children, the issues are admittedly

50. *Bradford*, 286 U.S. at 160.

51. 233 U.S. 354 (1914).

52. *Id.* at 359.

53. *See Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42-43 (1965) (holding that the state where an employee resides and is injured may adopt the remedy it desires without any requirement imposed by the Full Faith and Credit Clause).

54. *See generally* Hogue, *supra* note 6.

55. *Id.*

more difficult. Child custody arrangements remain a problem. Child “custody decrees that do not altogether terminate the parental rights of one parent are always modifiable in order to take account of changed circumstances of the parents and the child.”⁵⁶ The *Lofton* case decided by the Eleventh Circuit,⁵⁷ upholding a Florida ban on adoption by homosexuals, suggests that a court considering custody issues can consider sexual orientation in weighing the appropriate placement of children.⁵⁸ The recent study by the American Bar Association Section of Family Law sees

[t]he trend in the law is for courts to treat a parent’s sexual orientation as a neutral factor—similar to a parent’s non-marital heterosexual relationship—which will not justify loss of custody or a restriction on visitation unless the parent’s sexual orientation or activities can be shown to have harmed the child.⁵⁹

The study does note contrary cases.⁶⁰ Of course, adoption proceedings that are final are protected by the Full Faith and Credit Clause.⁶¹ Private agreements that are useful in facilitating other arrangements involving homosexuals are of limited utility here. The matter is controlled by *May v. Anderson*⁶² and the Parental Kidnapping Prevention Act (“PKPA”).⁶³

Overall, the prospects for interjurisdictional enforcement of both public and private sector benefits for domestic partners are quite promising. The key to enforcement is a clear disentanglement of the

56. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 680-81 (4th ed. 2004).

57. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (“[T]he state has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and a father.”).

58. *See id.* at 819-20.

59. *A White Paper*, *supra* note 11, at 360.

60. *Id.* at 360 n.68.

61. Ralph U. Whitten, *Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases*, 31 CAP. U. L. REV. 803, 804-05 (2003) (finding that a state cannot challenge a valid same-sex adoption on public policy grounds when the state that conducted the adoption proceedings permits same-sex adoption).

62. 345 U.S. 528, 534 (1953) (finding that a state must have personal jurisdiction over a parent in order to enter a binding custody decree).

63. 28 U.S.C. § 1738A (2000) (finding that the appropriate authorities of each state are to enforce any custody determination or visitation determination made by the courts of another state). The background of PKPA is considered in L. Lynn Hogue, *Enforcing the Full Faith and Credit Clause: Congress Legislates Finality for Child Custody Decrees*, 1 GA. ST. U. L. REV. 157 (1985).

issue of benefits from schemes by homosexual activist advocates for the acceptance or legitimization of homosexual marriage.