

A CHOICE-OF-LAW SOLUTION TO THE MARRIAGE DEBATES

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Abstract

The debate over the changing institution of marriage is marked by the clash of ideas about social institutions. Recent marriage reform proposals highlight these differences. Covenant marriages, in which spouses waive the right to a no-fault divorce, appeal to social conservatives but are regarded with suspicion by social liberals. Authorization of same sex marriages appeals to social liberals but is strongly opposed by social conservatives. Previous articles have focused on same sex marriage and have proclaimed a total victory to one side or the other in the debate. We offer a compromise based on jurisdictional choice and enforcement of contracts. Objections to recognizing covenant or same sex marriages in one's own state are stronger than those to enforcing at least the contractual elements of marriages solemnized elsewhere. At the same time, a state need not give a non-standard foreign marriage the same effect internally as to government-conferred subsidies and benefits as it has in the state of celebration. In other words, we would reject the all-or-nothing principle by which a marriage is either wholly valid or wholly invalid in other states for all purposes. This compromise approach is preferable to absolutist, top-down solutions because it offers a chance of building a consensus between the two sides in the debate.

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The cultural clash about legal institutions is most prominent in the current debate about marriage law. Social conservatives support covenant marriages, now recognized in Louisiana and Arizona, in which the parties waive their rights to a quick, no-fault divorce.¹ While social conservatives herald the return to tradition, liberals tend to regard covenant marriage as a reactionary step that reintroduces notions of fault and responsibility in divorce proceedings. Liberals support, and conservatives condemn, recognition of marriage between people of the same sex. Although state court decisions, most prominently in Hawaii and Vermont, have moved toward recognition of same sex unions, a combination of referenda, state statutes and the limited reach of the judicial decisions themselves has so far prevented the full authorization of same sex marriage in any state.² The rhetoric about marriage can be hot. A Congressional attempt to prevent the spread of same sex marriage has been described as "an embarrassment to have been offered and an absolute scandal to have been signed into law."³

Choice of law is a logical next front in the marriage wars. Once some states recognize the new forms of marriage the others must decide what local effect to give such marriages. Commentators quickly recognized the choice of law issues in same sex marriages,⁴ writing more than 70 law review articles on the subject since the first Hawaii decision.⁵ Many states have enacted laws that purport to deny local recognition to foreign same sex marriages.⁶

Viewing together the two new forms of marriage, which most commentators curiously have failed to do, demonstrates the need for compromise. Choice of law can provide such a compromise rather than serving merely as the next battlefield. Courts should delineate the contractual and non-contractual aspects of marriage, and apply principles of contractual choice of law to the contractual aspects. Spouses would then be able to marry under any state law and have that marriage recognized by courts for contractual purposes in every other state. At the same time, states could determine local non-contractual effects of marriage such as subsidies and tax benefits. This would give states the power to make local public policy concerning marriage and family institutions, while giving spouses lawfully married and contracting in any state the freedom to live as married couples and have their contracts enforced anywhere else.

Relying on choice-of-law gives neither side of the marriage debates the total victory it would prefer. Marriage is endowed with social meaning and therefore has considerable power to determine norms and preferences. Each side of the marriage debates therefore would like to be able to define marriage and its attributes consistently with its objectives. However, in the absence of a consensus on or criteria for resolving these issues, we eschew a Constitutional or federal statutory solution. Instead, we propose a pragmatic solution that finds a common ground between

¹ See *infra* Part I.A.

² See *infra* notes ___ and accompanying text.

³ See Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 281 (1997) (describing the Defense of Marriage Act).

⁴ See Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?* 1994 WIS. L. REV. 1033, 1040 (1994) (noting that "[w]ithout such home-state recognition, we will have won a meager right indeed. For although most of us would be happy to live forever in Hawaii, whatever has kept us in our home states will probably still pull us to return, and we will bring with us, besides our snapshots and fading leis, a demand that our new marital status accompany us").

⁵ See Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, And Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, ___ (1998) (setting forth bibliography citing 62 articles, not including the 14 articles in the symposium on that topic in which this article appeared). There has also been at least one book,

⁶ See *infra* note 96 and accompanying text.

the two sides of the debate based on freedom of contract and jurisdictional choice.

The article proceeds as follows. Part I discusses contractual choice of law generally and its application to marriage. Part II discusses the debate over the most contentious marriage issues of no-fault divorce and same sex marriage. Part III shows how enforcing the parties' choice of marriage jurisdiction can close gaps between the two sides of the marriage debate over many of these issues. Part IV discusses how most of the remaining issues can be dealt with by "unbundling" the contractual and non-contractual elements of marriage rather than adhering to the general choice-of-law rule of all-or-nothing enforceability. Part V shows how our pragmatic approach is superior to an absolutist solution that declares total victory for one side, and how this analysis helps to make sense out of the current Constitutional law relating to marriage.

I. CONTRACTUAL CHOICE OF LAW

This Part introduces the contractual choice of law model, which we use as a starting point for analyzing marriage. Subpart A shows that contractual choice of law is well-recognized in Anglo-American jurisprudence. Subparts B and C discuss costs and benefits of enforcing contractual choice of law as a mechanism for promoting jurisdictional choice in marriage and in other contexts. Subpart D discusses the enforcement of contractual choice of law in marriage.

A. THE ENFORCEMENT OF CONTRACTUAL CHOICE OF LAW

The dominant rule in American choice of law today is to enforce the law contractually chosen by the parties subject to limited exceptions.⁷ This is consistent with the classic case on enforcing contractual choice from Commonwealth law. In *Vita Food Products Inc. v. Unus Shipping Co.*,⁸ the court enforced a provision applying English law though there was nothing to connect the contract with England except the choice of law clause.

American law has accepted the *Vita Food* freedom-of-contract position despite the general ascendancy of "interest" analysis, which emphasizes the interests of *governments* rather than the rights of private parties.⁹ Section 187 of the Second Restatement on Conflicts adopted the choice of law rule as the proper law of the contract, subject to two exceptions.¹⁰ The first exception is where "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." ¹¹ While in theory this might seem a rejection of the English position, the rule as applied is close to *Vita Food*.

The second exception is where "application of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the

⁷ See Larry E. Ribstein, *Choosing Law By Contract*, 18 J. Corp. L. 245 (1993).

⁸ [1939] A.C. 277.

⁹ See Lea Brilmayer, CONFLICT OF LAWS at 110 (2d ed. 1995). More modern theories of choice of law depart somewhat from interest analysis but nevertheless stress the interests of government. For example, Brilmayer's theory shows how governments can achieve their regulatory objectives by cooperating with other governments in choice of law. See *id.* Ch. 4. Larry Kramer's theory would, however, give greater recognition to the parties' expectations and contracts. See Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 336-38 (1990).

¹⁰ See Ribstein, *supra* note 7 at 261-66 (discussing these exceptions).

¹¹ RESTATEMENT (SECOND) OF CONFLICTS, §187(1)(a) (1971).

absence of an effective choice of law by the parties.¹² This exception is consistent with *Vita Food* itself,¹³ as well as with the conflicts rules of every country.¹⁴ However, the scope of the exception is unclear.¹⁵ Among other things, the public policy exception lets states enforce mandatory rules "designed to protect a person against the oppressive use of superior bargaining power."¹⁶ A court might also ignore the contractual choice if the contract is tainted by a defect of capacity under otherwise applicable law but not under the chosen law.¹⁷

Beyond these applications of the rule, questions arise as to the extent to which states do and should regard contracts enforceable under the chosen state as contrary to local "fundamental policy." This requires an analysis of the benefits and costs of enforcing jurisdictional choice.¹⁸ Section B discusses the considerations that should impel the courts to narrowly interpret the fundamental policy exception, while section C discusses the case where courts should hesitate to enforce contractual choice -- i.e., where potential spillovers are involved.

B. THE CASE FOR JURISDICTIONAL CHOICE

Enforcing contractual choice provides an efficient mechanism for promoting jurisdictional choice.¹⁹ The parties necessarily can choose their legal regime whether or not courts enforce choice of law contracts. They can always vote with their feet by choosing to live in a jurisdiction whose laws they prefer, and in doing so will sort themselves out by their preferences. That such sorting occurs is indicated by the fact that more than 40% of Americans live in states other than the one in which they were born.²⁰ Requiring migrants to choose all the laws that govern their affairs through a single choice of where to live, however, constrains their choice. One might like the climate and job opportunities of Virginia, but prefer to contract under New York law, incorporate in Delaware, and marry under Louisiana or Hawaii law. The choice of law is easily made if the parties can specify by contract the law that governs their contracts, corporations, or marriage without having to visit, reside or contract in the chosen state.²¹

¹² See RESTATEMENT (SECOND) OF CONFLICTS, §187(1)(b) (1971).

¹³ *Vita Foods* at 290 (opinion of Lord Wright noting the exception).

¹⁴ See Dicey Rule 184, exception 2. DICEY AND MORRIS ON THE CONFLICT OF LAWS 1125-26 (11th ed., 1987) (London: Stevens).

¹⁵ See generally Monrad Paulsen and Michael Sovern, *Public Policy in Conflict Of Laws*, 56 COLUM. L. REV. 969 (1956); Ribstein, *supra* note 7 at 264-66.

¹⁶ See RESTATEMENT (SECOND) OF CONFLICTS, (1971) at 568.

¹⁷ Dicey Rule 182. Dicey and Morris, *supra* note 14 at 1202.

¹⁸ See generally Ribstein, *supra* note 7.

¹⁹ Enforcing the parties' choice has the further advantage of eliminating the costs of determining the applicable law under the vague default choice of law rules. If the spouses' choice of marriage jurisdiction is not enforced, then the applicable law may depend on a variety of facts, including the domicile or residence of one or both of the spouses and the location of marital property. See generally Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS (2d ed. 1992).

²⁰ Kristen A. Hansen, Bureau of the Census, *Selected Place of Birth and Migration Statistics for States* CPH-L-121 (1990), table 1.

²¹ Such costs may, however, be less burdensome for infrequent relationships such as marriage, particularly

Parties' ability to choose the applicable law has several positive effects. First, letting people choose from among various contract forms can serve as a discovery mechanism. States have an incentive to adopt various contract forms in order to attract business from other states. At the same time, society has an opportunity to discover superior rules by observing the contracts individuals select.

Second, contractual choice helps ensure that the chosen law suits the parties' specific needs better than a one-size-fits-all statutory rule. This reduces the error costs of applying an unsuitable rule. The sorting effect is particularly important in accommodating the variety of views that exist regarding marriage and the family. As long as the choice of law rules give each state adequate scope to enforce its regime, people can choose where to live and where to marry based on their differing preferences for family law.²²

Third, contractual choice of law effectuates efficient competition among the states. Even without enforcement of contractual choice, states compete for the business and tax revenues associated with increased population. The market for migrants disciplines states to reject inefficient or undesirable laws. This account of a race to the top for migrants is most closely associated with Charles Tiebout,²³ but was first discussed by Frederick Jackson Turner at the end of the last century (when states more clearly perceived increased population as a good thing).²⁴ But when parties may contract cheaply for the applicable law, they may more easily undo a state's internal illegality rules. Provided third party effects do not intrude,²⁵ this results in a race to the top that yields the benefits of more efficient laws with fewer error costs.²⁶ Ensuring party autonomy regarding the applicable law not only produces more variety, but also tends to produce more efficient laws by motivating legislators to be more public-regarding.²⁷ Legislators can earn political rents, such as a campaign contributions,²⁸ by redistributing wealth among interest groups that have different costs of organizing to promote or defeat laws.²⁹ Enforcing the parties' choice of law forces legislators to compete with other jurisdictions and so can reduce their rent-seeking opportunities. Indeed, complete party autonomy to choose the applicable law would trivialize wealth-redistributing laws.³⁰

when states relax residency requirements in part with an eye to the hotel and tourist trade.

²² For commentary making this point regarding choice of law rules in marriage, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921 (1998); Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 Creighton L. Rev. 83 (1998). For commentary relying on sorting as a reason to emphasize state over federal law in this area, Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

²³ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

²⁴ Frederick Jackson Turner, *THE FRONTIER IN AMERICAN HISTORY* (Arizona, 1986) (1893).

²⁵ See *infra* §II(A)(3)-(4).

²⁶ See generally Ribstein, *supra* note 7; Larry E. Ribstein & Bruce H. Kobayashi, *Contract and Jurisdictional Freedom*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley, ed. Duke, 1999).

²⁷ See generally Erin O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law* (ms. 1999).

²⁸ See R. McCormick & R. Tollison, *POLITICIANS, LEGISLATIONS AND THE ECONOMY*, 3-4 (1981); Robert Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

²⁹ See generally, Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION* (1965).

³⁰ This is the reason why those who favor such laws fear the consequences of locational choice, and speak

C. SPILLOVERS

Despite the benefits of enforcing contractual choice of law, there are some circumstances where such choices may be value-reducing. A "race to the bottom" may develop when the parties employ choice of law clauses to evade benign internal rules.³¹ Whether the race is to the top or bottom depends partly on whether the out-of-state regime inefficiently imposes "spillover" costs on other states.³² Some choices, particularly marriage, have social consequences that extend far beyond the contracting parties. In such cases, a privately optimal choice might be socially wasteful, and a state might efficiently override a choice of law clause. This explains why a person cannot purchase in Hawaii the right to pollute in Virginia. Because the migration state has inadequate incentives to consider out-of-state harms, its internal rules might be excessively lax.

The race to the bottom problem is illustrated by state competition in the provision of insolvency laws during the Articles of Confederation period and the early Republic. States offered an excessively lax fresh start in order to promote migration by debtors from other states with more rigorous insolvency policies. The lax state would benefit from new residents with sterling credit, whose creditors had been left behind them. A state might thus enact inefficient fresh start policies because the costs were borne by out-of-state creditors.³³

The probability of spillover effects and a race to the bottom is increased when the parties can choose the law of a jurisdiction with which they have no connection. But restricting choice of law clauses to states with which the parties have significant contacts often is not an efficient solution to the spillover problem. If there are significant effects on both sides of the border, legislators may be adequately disciplined to resist inefficient legislation by the local presence of affected parties even if the parties to a particular contract have no contact with that jurisdiction. Moreover, some contracts, such as those relating to marriage, have external effects in the other states regardless of the nature of the initial contacts with the selected state. Thus, the benefits of this rule are often outweighed by the costs of imposing a barrier to contractual choice of law that impedes the efficiency-promoting aspects of jurisdictional choice.

D. MARRIAGE AND CHOICE OF LAW

Choice of law rules about marriage emphasize its contractual nature by giving the parties considerable power to specify which marriage regime applies. The law of the state of celebration generally determines validity in the absence of the strong countervailing public policy of some other state closely connected with the marriage.³⁴ Although the public policy exception seems to provide a potential escape route, the courts frequently uphold marriages that are valid where

of a "race to the bottom" amongst states to lower welfare benefits in order to discourage welfare-motivated migrants. See Paul E. Peterson and Mark Rom, *WELFARE MAGNETS: A NEW CASE FOR A FEDERAL STANDARD* (Brookings Institution, 1990).

³¹ See Brilmayer, *supra* note 9 at 206.

³² For discussions of spillover effects see Frank H. Easterbrook, *Federalism and European Business Law*, 14 INT'L REV. LAW & ECON. 125 (1994); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23 (1983); Daniel R. Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 85; Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 568-69 (1983).

³³ See F. H. Buckley, *The American Fresh Start*, 4 S. Cal. Interdis. L.J. 67 (1994). In general, insolvency laws were more generous to debtors, and courts were more hostile to creditors, the further west one went. On race to the bottom theories, this is unsurprising, since the positive externalities of migration were greatest in the west.

³⁴ See RESTATEMENT (SECOND) OF CONFLICTS, §284 (1971); RESTATEMENT OF CONFLICTS §132 (1934); Scoles & Hay, *supra* note 19 at 438.

made but barred by the internal domicile law,³⁵ and this authority is reinforced by statutes that specifically provide that a marriage valid where entered into is valid everywhere.³⁶ Thus, courts generally distinguish internal and external illegality, reflecting a strong policy favoring certainty regarding the validity of a marriage.³⁷

It is not clear whether external rules would favor same sex marriages in the same way. There is a difference between formal requirements as to capacity and same sex unions. When the age of consent is 18, a marriage between 17 year-olds might violate norms of internal illegality, but does not offend traditional morality as homosexual unions do. Similarly, the “potential polygamous marriage,” which is generally upheld in the U.S. and England despite the risk of later polygamous marriages,³⁸ arguably does not violate traditional norms because the marriage is actually monogamous. Some argue that permitting domicile states to invoke the public policy exception as a way to deal with evasion of their marriage laws appropriately resolves differences regarding same sex marriage.³⁹ But same sex marriage involves an arguably unprecedented clash of fundamental values regarding the essence of marriage that challenges prior law on the public policy exception.⁴⁰ Thus, the public policy exception might sharply limit the interstate recognition of same sex marriage, depending on what non-recognition entails. Unless it is declared unconstitutional,⁴¹ the public policy exception would at least leave the issue for case by case adjudication.⁴² The application of the public policy limitation therefore is not an answer but simply another way to state the question.

Apart from the scope of the public policy exception, it may be significant that a marriage is formally regarded for choice of law purposes not as a contract but rather as a status conferred by the law of the celebration.⁴³ This is analogous to the treatment of corporations for choice of law purposes.⁴⁴ The status approach to marriage has some important implications for choice of

³⁵ *Id.* at 444-45.

³⁶ *Id.* at 439.

³⁷ *Id.* at 445.

³⁸ See Bartholemew, *Recognition of Polygamous Marriages in America*, 13 INT. & COMP. L.Q. 1022 (1964); Dicey & Morris, *supra* note 14, at 629; Scoles & Hay, *supra* note 19 at 458-59. A marriage is “potentially polygamous” when celebrated in a state or according to a rite that permits polygamous marriage, and neither of the parties is married to anyone else.

³⁹ See Koppelman, *supra* note 22; Solimine, *supra* note 22 at 98.

⁴⁰ For other commentary making a similar point, 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, 43 (1998); Koppelman, *supra* note 22 (concluding that the only realistic precedent for same sex marriage was anti-miscegenation laws); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 Creighton L. Rev. 45 (1998); Solimine, *supra* note 22 at 95-6.

⁴¹ See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997) (arguing for application of full faith and credit clause to same sex marriage).

⁴² See Koppelman, *supra* note 22 at 985-86 (suggesting that such litigation may be the best resolution short of a political solution).

⁴³ See *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888); Scoles & Hay, *supra* note 19 at 430.

⁴⁴ The rules for marriage have been compared to the strong internal affairs rule that applies to corporations. See Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws*, 109 Harv. L. Rev. 2038, 2053

law. First, while individuals can determine the applicable marriage regime, they can do so only by traveling to it rather than selecting the state in their contract. Although this imposes higher costs on parties seeking jurisdictional choice than pure contractual choice of law, these costs might not be thought forbidding in so fundamental a contract as marriage.

Second, the status nature of marriage may pose a difficulty for same sex marriages by implying an all-or-nothing approach in which one is either married (with all the incidents of this status) or not (with none of them).⁴⁵ Thus, monogamous heterosexual marriages valid under the law of the state of celebration have all consequences of marriage under the law of the spouses' domiciles. The state does not adjust consequences to suit the particular relationship in accordance either with the state's policy or with the parties' contract. Courts that are unwilling to recognize some of the consequences of same sex marriage may recognize none. On the other hand, courts are willing to distinguish between status and the contractual incidents of actual polygamous marriages. For example, the multiple wives of a polygamous marriage may have inheritance rights.⁴⁶ Thus, a court might enforce a same sex marriage for some purposes but not others. Indeed, some recent state laws on same sex marriage do not recognize any incidents of such marriage, while others recognize domestic partnerships.⁴⁷

Third, the failure of choice of law rules to treat marriage as a contract is problematic for covenant marriages. Under current law, a divorce valid where entered is entitled to recognition everywhere.⁴⁸ Thus, a Nevada divorce might end a Louisiana covenant marriage even if the divorce is contrary to Louisiana law. This suggests a dark future for covenant marriage laws, short of a new federal law or constitutional amendment,⁴⁹ and thereby considerably diminishes the value of a covenant marriage as a self-bonding device. If, on the other hand, marriage and divorce were treated more like contracts, the parties could choose the law under which the contract might be terminated through divorce under the *Vita Food* principle of free choice.⁵⁰ Thus, although it is said that marriage is more than a contract, from a choice of law standpoint it might be said that the status aspect of marriage makes it less than a contract. These rules have arguably led to a race to the bottom in divorce law. Divorce laws were always more lax in western states such as Nevada, which sought migrants from more restrictive eastern states.⁵¹ Because the party who seeks a divorce may have acquired a second family in the new state, cutting off the claims of an out-of state spouse effects a wealth transfer to the new family in the

(1996). As to the state-creation basis of the corporate rule, see Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995). The difference between corporations and marriages is that courts are more apt to pay attention to the external effects of the marriage in the domicile state than to analogous facts in the corporate context, particularly concerning the types of marriages that are recognized and questions concerning divorce.

⁴⁵ See Scoles & Hay, *supra* note 19 at 433.

⁴⁶ See *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P. 2d 499 (1948).

⁴⁷ For a detailed summary of the statutes on this issue, see David Orgon Coolidge and William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes In The "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3 (1998). See also *infra* note 165 and accompanying text.

⁴⁸ See *Williams v. North Carolina*, 317 U.S. 287 (1942) (upholding Nevada's power to divorce a North Carolina couple though it lacked jurisdiction over one of the members).

⁴⁹ As of this writing, only two states had passed covenant marriage laws, although 17 have considered doing so. See Christine B. Whelan, *No Honeymoon for Covenant Marriage*, Wall St. J., Aug. 17, 1998 (suggesting that "people are waiting for role models" who have chosen covenant marriage before deciding to do so themselves).

⁵⁰ See *infra* text accompanying note 8.

⁵¹ See Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEG. STUD. 201 (1996).

divorce state from the original family in the marriage state. Moreover, divorce havens such as Nevada attract legal and tourist business within the state while imposing some costs on divorced families elsewhere. The competition for migrants may explain why all states liberalized their divorce laws⁵² and why lax divorce laws continue to attract migrants.⁵³

The application of contractual choice of law to non-standard forms of marriage is, therefore, unsettled. The critical policy issue is whether contractual choice of law would lead to spillovers and a race to the bottom. The issues relating to the types and extent of effects of foreign marriages in the spouses' domicile are discussed below in Part II. The issues cannot be resolved by simply characterizing marriage as either status or contract for all purposes. As discussed below in Part IV, complete analysis of choice of law issues in marriage requires unbundling its contractual and non-contractual elements. In the meantime, we discuss in the following two parts the substantive policy issues involved in marriage and how choice of law offers an approach to resolving those issues.

II. THE MARRIAGE DEBATES

This Part discusses the current debates over marriage. This discussion forms the background for the analysis in the remainder of the article of how the contractual choice of law model should be applied to marriage.

A. WAIVING NO-FAULT DIVORCE RIGHTS

Since 1975, every state has permitted divorce without proof of fault.⁵⁴ Liberalization of divorce law appears to have increased the rate of divorce.⁵⁵ Recently enacted laws in Louisiana⁵⁶

⁵² See Scoles & Hay, *supra* note 19 at 452-3.

⁵³ See Margaret F. Brinig & F. H. Buckley, *No-Fault Laws and At-Fault People*, 18 Int. Rev. Law & Econ. 325 (1998).

⁵⁴ See Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273 (1995).

⁵⁵ See Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998). H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986) finds no such effect after controlling for state differences in divorce propensities. Friedberg adjusts for these differences through panel data on state divorce rates.

⁵⁶ The act provides in part:

A. A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.

B. A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license . . . and executing a declaration of intent to contract a covenant marriage . . . and executing a declaration of intent to contract a covenant marriage. . .

La. Rev. Stat. §9:272.

Other states also are considering laws that would make divorce more difficult. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453 (1998).

and Arizona⁵⁷ give the parties the option to elect a more durable form of covenant marriage, by permitting them to waive their rights to a subsequent no-fault divorce. Spouses in such a marriage may divorce only upon a showing of adultery, abandonment, crime, one-year separation or a judgment of separation on showing of abuse.⁵⁸ Because courts do not enforce promises not to divorce,⁵⁹ this law supplements what the parties are able to do for themselves by private contract. Subsection 1 discusses some reasons for covenant marriage. Even if one disagrees with these arguments, the important question is whether there are any problems with making this option available to the parties.⁶⁰ The remaining subsections consider some possible objections to covenant marriage laws.

1. The case for covenant marriage

Covenant marriage can be viewed as a type of standard form contract, in which expanded choice facilitates socially beneficial arrangements. The most important function of covenant marriage is to protect spouses and others (particularly children) from the opportunist spouse who seeks an easy marital dissolution under no-fault divorce law. Because of the possibility of opportunism, and the loss of what the economist calls "appropriable quasi-rents,"⁶¹ the parties will under-invest in the marriage: they will not commit as closely to each other as they would if they could contract around easy divorce rights. The under-investment might take the form of a weaker emotional commitment. Alternatively, the parties might be less ready to embark on projects (such as offering each other material support or buying a house) affected by divorce. These pathologies mutually reinforce one another.⁶²

The increased probability of divorce particularly affects a married couple's desire to have children. Children are "marriage specific" assets who increase the costs of a marriage break-up.⁶³ One or both of the spouses likely will make investments in raising children.⁶⁴ Those who invest in children may forego valuable opportunities to develop skills they could sell in employment markets. Spouses who are freed from childcare responsibility can work outside the home and contribute financial assets to the marriage. The child care and childbirth contributions are normally loaded in the front end of the relationship while the financial contributions are back-end loaded. The asymmetric quality of the spouses' investments creates a risk of opportunism: The "working" spouse can withdraw from the marriage after reaping much of the advantage of specific investment in the children but before making his or her financial contribution (assuming

⁵⁷ See Ariz. Rev. St., tit. 7, §§25-901-906.

⁵⁸ La. Rev. Stat. §9:307.

⁵⁹ See Brinig & Buckley, *supra* note 53.

⁶⁰ This discussion assumes that the covenant marriage is actually enforceable in other states and defers until Part V whether this is the case under current choice of law rules.

⁶¹ A quasi-rent is an asset that has value only in the context of a continuing relationship. For example, the difference in the pleasure one takes in a child in a continuing marriage and after divorce (including the parent's sorrow at the cost of divorce to the child) is a quasi-rent appropriated by the party seeking a divorce. See Benjamin Klein et al., *Vertical Integration, Appropriable Rents and the Competitive Contracting Process*, 21 J.L. & Econ. 297 (1978).

⁶² Brinig & Buckley, *supra* note 53.

⁶³ See Gary S. Becker, *A TREATISE ON THE FAMILY* (rev. & enlarged ed. 1991).

⁶⁴ Couples that contract out the work to nannies or day care will make fewer marriage-specific investments and therefore have less need for covenant marriage.

he manages to keep his emotions pliable).⁶⁵

The asymmetry and opportunism are reinforced by gender roles, which to some extent are biologically determined. Mothers are more likely to make the investments than fathers, since mothers have a closer physical connection to their children and place a higher value on time spent with them.⁶⁶ This encourages the sort of specialization of activities in the household that gives rise to the opportunism problem. Whether or not they invest during the early years in marriage-specific assets like children, women invest critical years of reproductive capacity and sexual attractiveness.⁶⁷

Covenant marriage protects against this appropriation of the homemaker spouse's marriage-specific investment. A covenant marriage statute that makes divorce available only with the consent of both spouses or on a strong showing of fault is a kind of "property" rule that forces the wage earner to buy his way out of the marriage. The price will depend on the homemaker's evaluation of what she will lose by divorce. By contrast, under no-fault divorce, the homemaker's protection depends on alimony and support payments. This is a liability rule that attempts to fix the value of the homemaker's loss. Yet it is difficult to do this through legal rules and judicial decisions. Although the basis of alimony and support payments is unclear,⁶⁸ they probably do not fully compensate the homemaker for her opportunity costs.⁶⁹ This is consistent with evidence of women's increased participation in the labor market under no-fault divorce, an indication that women are making fewer marriage-specific investments.⁷⁰

Covenant marriage's ability to protect investments from appropriation not only helps the spouse who specializes in childcare, but also can benefit children, to the extent that it reduces divorce rates, for children are often the principal victims of divorce.⁷¹ Moreover, covenant marriage offers potential self-binding gains for the non-caregiver. Self-binding gains arise when promises are time-inconsistent, that is, where one's interests at contract formation are different from those at the time of performance. It is often in one's interest to promise to perform at formation, but to breach when the time comes for performance. In such cases, the promisor may be made better off if, at the time of formation, he can credibly commit to perform, since contractual gains will be lost if the promisee cannot rely on the promise.⁷² Covenant marriage

⁶⁵ See Gary S. Becker, Elisabeth M. Landes, and Robert T. Michael, *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1989); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

⁶⁶ See Becker, *supra* note 63.

⁶⁷ See Cohen, *supra* note 65.

⁶⁸ For discussions attempting to discern the basis of alimony awards see June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

⁶⁹ See Cohen, *supra* note 65.

⁷⁰ See Gray, *Divorce Law Changes and Women's Labor Supply* [get cite]; Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rates of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992).

⁷¹ See Elizabeth Scott and Robert Scott, *A Contract Theory of Marriage*, in *The Fall and Rise Of Freedom Of Contract* (F.H. Buckley, ed. 1999).

⁷² See Jon Elster, *ULYSSES AND THE SIRENS* (Cambridge 1983). The idea that contracts permit the parties to exploit self-binding gains is not a novel one. See David Hume, *A TREATISE ON HUMAN NATURE*,

may help in this way by making it easier for the non-caregiver to secure a caregiver mate. Thus, barriers to divorce facilitate the traditional homemaker/wage-earner marriage some couples prefer but would be reluctant to enter into without protection from opportunism

The commitment facilitated by covenant marriage also has side benefits for both spouses. Couples who choose the covenant marriage option for its self-binding benefits may enter into higher quality marriages. Because the restriction on exit increases the cost of a bad marriage, the parties will react to this before marriage by conducting a more thorough search for a compatible partner.⁷³ Making available the covenant marriage option also signals useful information to a prospective spouse. This is particularly important in light of the importance of choosing a mate and the difficulty of learning all of the relevant facts about a prospective mate prior to marriage. An important characteristic many look for in a spouse is the prospective partner's commitment to the marriage. The potential mate's agreement to a covenant marriage sends a strong signal of commitment that is not available when the law provides for only a weaker marriage regime.

The discussion so far in this subsection has focused on tangible effects of covenant marriage. But covenant marriage has important symbolic value as well. Through covenant marriage, states endorse the primacy of commitment and responsibility over individual freedom and love. Perhaps more fundamentally, a state's refusal to break the bonds of marriage represents a return to traditional values from the instability that has characterized modern marriage.

Even with the covenant marriage option, many couples will prefer to retain no-fault exit rights. Covenant marriages are not mandatory. The case for covenant marriage rests on the simple proposition that it offers a useful *option*.⁷⁴ The question is whether couples should be denied this choice. The remainder of this section discusses some potential arguments against the covenant marriage option.

2. Protecting covenant spouses.

Lawmakers may conclude that parties who agree to a covenant marriage will thereafter regret their choice, and wish they had elected the easier no-fault option. Barriers to no-fault marriages benefit such parties. There might seem to be special reasons for concern since the choice often will be made by young adults when they are in love and more forgiving of faults in their partners than they will be after a few years of marriage. In addition, survey data suggests that newlyweds underestimate the probability of divorce.⁷⁵

It is, however, difficult to evaluate such claims. One would expect the parties to weigh more carefully the risks of divorce when they elect a stronger marriage bond, and the problem might thus be self-correcting. It is not surprising that husbands who enter covenant marriages are reported to be better educated than those who choose non-covenant marriages.⁷⁶ Survey data about divorce expectations also are inconclusive, since couples may appreciate the risks of

III.II.v (1739).

⁷³ See Gary S. Becker, Elisabeth M. Landes, and Robert T. Michael, *An Economic Analysis of Marital Instability*, 85 J. Pol. Econ. 1141 (1977).

⁷⁴ Even if covenant marriages were mandated in a state, a couple who wished to preserve the option of a no-fault divorce might do so, under our proposal, by celebrating their marriage in a no-fault state.

⁷⁵ See Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 L. & HUM. BEH. 439 (1993) (showing evidence that individuals are unrealistically optimistic about whether their marriages will succeed).

⁷⁶ See Whelan, *supra* note 49.

divorce even if they misreport them.

Some commentators make gender-based arguments for restrictions on contract. They argue that men are better bargainers than women,⁷⁷ and that women are more risk averse than men, and therefore more willing to make concessions in negotiations.⁷⁸ But these arguments are questionable, even if one accepts their anti-feminist logic. First, even without covenant marriage, the spouses would still be able to bargain over the terms of marriage contract. If men had superior bargaining ability, they might then be expected to reap the same advantages through ante-nuptial agreements over alimony and property rights. At best, barriers to covenant marriage would resemble a fence against foxes erected on one side only of the hen house. Second, if options are to be limited, there is no reason to think that the no-fault option is the right one for women, since there is significant evidence that no-fault has harmed them.⁷⁹ If women need paternalism, one might more plausibly withdraw the no-fault option from them.⁸⁰ Third, the risk of opportunism in marriage stems from the fact that women have more to contribute at the front-end of the marriage. The same consideration suggests that women may have a stronger bargaining position at that time and therefore might reap a greater advantage than men from the opportunity to bargain.⁸¹ Fourth, there are less intrusive ways of dealing with biased judgment and bargaining problems. For example, the law might make the election ineffective unless confirmed by the parties six months or a year after marriage, on the model of cooling-off rights in consumer protection law.⁸² It also might require the parties to attend counseling sessions before signing on to a covenant marriage, as under the Louisiana statute.⁸³ In the past, the bargaining problem was addressed by giving the parents a role in the negotiations, and this tradition might perhaps be revived as the children of formerly progressive baby boomers reach marriage age.

3. Protecting children

Covenant marriage might impose costs on parties other than the spouses. Preserving a bad marriage may hurt the children of this marriage.⁸⁴ But these effects are ambiguous, for

⁷⁷ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998).

⁷⁸ See Wax, *supra* note 77.

⁷⁹ See Brinig & Buckley, *supra* note 53.

⁸⁰ See Rasmusen & Stake, *supra* note 56 at 473.

⁸¹ *Id.*

⁸² See Elizabeth Scott & Robert Scott, *supra* note 71.

⁸³ See *supra* note 56.

⁸⁴ See Mavis Hetherington, Martha Cox & Roger Cox, *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AMER. ACADEMY OF CHILD PSYCHIATRY 518 (1985); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AMER. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 349 (1997) (children of divorce reflect their parents' problems in their own adult relationships). Children of divorce make up a very large proportion of those below poverty level. See, e.g., Sara McLanahan & Irwin Garfinkel, *Single Mothers, the Underclass, and Social Policy*, 501 ANNALS, AAPSS 92, 98-99 (1989) (reporting that 18 percent of single mothers in 1987 had been dependent on welfare for ten or more years); Irwin Garfinkel & Sara S. McLanahan, *SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA* (Urban Institute, 1986). Children also lose out through their distance from their parents after separation. Short-term studies report that children are confused and depressed, sometimes clinically so. Joanmarie Kalter,

children are the primary beneficiaries if covenant marriages reduce divorce rates. Moreover, spouses arguably will take prospective costs as well as benefits to their children fully into account in deciding whether to have a covenant marriage.

4. Judicial costs.

Rocky marriages also impose a strain on the courts.⁸⁵ Since the courts are supported by tax dollars, covenant spouses would not internalize these costs. However, the problem of potential litigation exists in any type of relationship, and easy divorce has not proven to be a cure for litigation over the consequences of divorce.⁸⁶ If covenant marriages reduce divorce levels, they might then reduce litigation levels.

5. Over-signaling

A potential advantage of covenant marriage -- that it offers couples a way to signal their reliability as marriage partners -- might be considered a disadvantage if it leads couples to over-commit to durable marriage. Presented with a choice between hard and soft marriage laws, both parties might prefer the more liberal no-fault regime, since both recognize the possibility that they might subsequently want to leave the marriage. But revealing this preference might be taken to signal that they are less reliable than is the case. Both parties might therefore commit to a covenant marriage when that option is available, although both privately prefer the no-fault divorce option.⁸⁷ This can be termed a problem of "over-signaling." In other words, by creating the covenant marriage option that spouses can accept or reject, the law forces parties to send a signal that is stronger than the one they wish to make.

But over-signaling concerns offer a problematic basis for policy prescriptions. Private preferences, which the parties are loath to reveal, are virtually impossible to verify. Also, the over-signaling argument makes possibly unrealistic assumptions about behavior. For example, marriage partners may well *under*-signal their level of commitment in order to avoid challenging prospective mates. Thus, over-signaling concerns do not support the denial of signaling benefits for those couples who do wish to waive no-fault divorce rights.

In sum, a variety of arguments may be made for and against covenant marriage, and reasonable people might differ on the design of rules of internal illegality. Even if there are potential costs to covenant spouses or others, these costs must be balanced against the benefits of covenant marriages for parties whose marriages are thereby made more durable, and who might have divorced under a no-fault regime.⁸⁸ The basic question is whether the costs and benefits of covenant marriage are to be weighed by the individual parties themselves or by the legislators on behalf of all couples. Since a one-size fits-all rule will prove unsuitable for many couples, there is much to be said for the covenant marriage option, even if the option is available only by

Children of Divorce in an Outpatient Psychiatric Population, 47 AM. J. ORTHOPSYCHIATRY 40 (1977). Over the longer term, children of divorce are more likely to drop out of school, see David L. Featherman & Robert M. Hauser, OPPORTUNITY AND CHANGE 242-46 (1978), and boys are more likely to commit criminal offences, see Douglas, *Broken Families and Child Behavior*, 4 J. ROYAL C. PHYSICIANS 203 (1970).

⁸⁵ See Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 544 (1995).

⁸⁶ See Rasmusen & Stake, *supra* note 56 at 470-72.

⁸⁷ Sam Rea has shown that all parties may be better off when fetters on bargaining freedom prevent them from engaging in an arm's race of costly signaling. See Samuel J. Rea, *Arm-Breaking, Consumer Credit and Personal Bankruptcy*, 22 ECON. INQUIRY 188 (1984).

⁸⁸ See Rasmusen & Stake, *supra* note 56, at 470-72.

moving to another state.

B. SAME SEX MARRIAGE

Many commentators have advocated giving homosexual couples the right to marry.⁸⁹ The debate about same sex marriage has continued for some time⁹⁰ but became more pressing when Hawaiian courts held that the refusal to recognize same sex marriages constituted unlawful discrimination.⁹¹ A judge in Alaska also held that individuals have a fundamental right to choose a "life partner."⁹² More recently, the Vermont supreme court held in *Baker v. State*⁹³ that homosexual couples are entitled to the same rights and benefits as heterosexual couples. Despite all this activity, no state so far has recognized same sex marriage. The *Baker* decision in Vermont stopped short of compelling the state to authorize same sex marriage.⁹⁴ Referenda overturned the Hawaii and Alaska court decisions.⁹⁵ Meanwhile, a majority of states have passed anti-same-sex-marriage laws⁹⁶ and one state court has denied a constitutional right to same sex marriage.⁹⁷ Thus, the availability of the same sex marriage option remains an open question. The following subsections discuss both sides of the debate on this question.

1. The case for same sex marriage

Proponents of same sex marriage have emphasized the benefits for homosexual couples.

⁸⁹ See generally, William N. Eskridge, Jr., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (Free Press. 1996).

⁹⁰ See *id.* The idea was first officially rejected in Minnesota. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). See also *Dean v. District of Columbia*, 653 A.2d 307 (D.C.App.1995).

⁹¹ *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) imposed the burden on the state to show that the state statute limiting marriage to heterosexual couples "further[s] compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir.Ct. 1996) held that burden had not been met. The court's injunction requiring the state to permit same sex marriages was stayed pending appeal. The Hawaii supreme court ultimately held that the decision had been mooted by a referendum rejecting same sex marriage. See *infra* note 95.

⁹² *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Feb. 27, 1998).

⁹³ *Baker v. State*, 1999 WL 1211709 (Vt. December 20, 1999).

⁹⁴ *Id.*, slip at 39.

⁹⁵ The vote in Hawaii was 69-20%. A subsequent Hawaii decision confirmed that the referendum mooted the earlier court decisions. See *Hawaii Court Says Gay Marriages to Get No Legal Recognition*, Wall St. J., December 13, 1999, 1999 WL-WSJ 24925484. An Alaska referendum against same sex marriage passed by 68-32%. See Lyle Denniston, *Voters in Alaska, Hawaii defeat initiatives on homosexual marriage; Washington state quashes affirmative action effort*, BALTIMORE SUN November 5, 1998 at 15A. A referendum on same sex marriage is scheduled in California in 2000. See Elaine Herscher, *Same-Sex Marriage Suffers Setback / Alaska, Hawaii voters say 'no'*, S.F. CHRON., November 5, 1998 at A2.

⁹⁶ The current tally is on the websites www.pono.net and www.ftm.org. For analyses of these state laws, see Coolidge & Duncan, *supra* note 47; Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, ____ (1998) (listing statutes as of late 1998); Koppelman, *supra* note 22 at 965-70 (noting that the statutes are vague and leave substantial room for judicial interpretation).

⁹⁷ See *Storrs v. Holcomb*, 168 Misc.2d 898, 645 N.Y.S.2d 286 (1996).

In other words, the asserted benefits of same sex marriage are, to some extent, the same as those for heterosexual marriage. Marriage provides access to benefits that are available to heterosexual married couples, including tax benefits, family benefits from private employers, evidentiary privileges, intestate inheritance rights and rights under immigration law.⁹⁸ Also, marriage lets same sex couples opt into the elaborate standard form framework that is now available to heterosexual couples.⁹⁹ This includes, among many other things, rules regarding ownership and inheritance of property, and dissolution rules that make break-up costly. These rules are particularly suitable for a long-term domestic relationship. As discussed in the previous Section, couples can signal a stronger commitment to each other by their willingness to incur a loss on a break-up of the relationship. They may then more securely invest in the relationship, and this will reduce the probability of a subsequent break-up.¹⁰⁰ This might benefit the couple, and perhaps society as a whole, if the positive external benefits of stable relationships are not restricted to heterosexual couples.¹⁰¹

Perhaps the most important benefit of marriage for same sex couples is that recognizing same sex marriages would place a seal of societal approval on homosexual relationships.¹⁰² This is what distinguishes recognition of same sex *marriage* from merely giving same sex domestic partners the same rights as heterosexual married couples. This issue is particularly contentious with respect to the Vermont decision in *Baker*, which as noted above refused to compel the legislature to permit same sex marriage. To the extent that the denial of marriage rights stigmatizes homosexuals, the recognition of same sex marriage might benefit them even if they would not marry themselves. Until recently, same sex relationships remained in the closet, since homosexuality was regarded as socially deviant. The social stigma of homosexuality is now much reduced, and recognizing same sex marriages would accelerate this trend. We discuss the role of the law in shaping norms and preferences in more detail below.

Opponents of same sex marriage have argued that these marriages involve several different types of costs. It is important to understand these potential arguments against same sex marriage in order to determine precisely how those arguments play in the context of choice of law.

2. Tradition

Recognizing same sex marriages would represent a sharp change in a major social institution, and this argues for prudence. As Edmund Burke has noted, “it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.”¹⁰³ The existence of a settled tradition,

⁹⁸ These benefits are discussed in more detail in *infra* Part IV(C)(I).

⁹⁹ This is analogous to the benefits available from applying the rules of one type of business association standard form to a similar type of business association. See Larry E. Ribstein, *Linking Statutory Forms*, 58 J. Law & Contemp. Prob. 187 (Spring, 1995).

¹⁰⁰ See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419 (1993) (discussing the advantages of this pre-commitment device for same-sex couples).

¹⁰¹ Although couples might bind themselves by contract (e.g., house purchases), see *infra* text accompanying notes 155-156, this proves too much. If non-marriage contractual duties perfectly substituted for marriage, then the institution of heterosexual marriage might be abolished at little costs, apart from symbolic effects.

¹⁰² See Craig W. Christensen, *If Not Marriage? On Securing Gay And Lesbian Family Values by a "Simulacrum Of Marriage,"* 66 FORD. L. REV. 1699 (1998).

¹⁰³ E. Burke, III REFLECTIONS, 31_ (1790).

concerning a fundamental institution, should give one pause before welcoming radical changes. The fact that something has worked over a long period says something about its usefulness, and raises questions about the relative merits of what might replace it. "Instead of exploding general prejudices," theorists might better "employ their sagacity to discover the latent wisdom which prevails in them."¹⁰⁴ Claims that such institutions have no essential meaning, and are simply defined over time by society,¹⁰⁵ ignore this point. As we learned from *Jules and Jim*, it often does not make sense to "start from zero and rediscover the rules."¹⁰⁶

The argument from tradition has limitations.¹⁰⁷ A settled tradition might strengthen the conservative position, but does not provide an independent reason to reject proposals for change. Merely because society defines an institution in a particular way does not necessarily mean that the definition is correct. If the case for reform is in other respects persuasive, the move should be made despite the long acceptance of the existing order. But where the matter is not so clear, and where the tradition is as fundamental as marriage, the additional arguments for conservatism that we consider below must be respectfully examined.

The debate over the role of tradition came to the fore in the recent case of *Baker v. State*. The Vermont court rejected as illogical and lacking empirical support the argument that giving the same benefits to same sex and heterosexual couples would have unpredictable effects on the institution of marriage.¹⁰⁸ However, in stopping short of requiring recognition of same sex marriage the court noted that arguments about destabilization of the institution of marriage are "not altogether irrelevant. A sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences."¹⁰⁹

3. Effect on marriage standard form.

A second argument against same sex marriage is that it might increase contracting costs for participants in heterosexual marriage. Marriage law economizes on transaction costs by providing married couples with standard form rules they would have had to bargain over in the absence of transaction costs.¹¹⁰ The extent to which transaction costs are saved depends on how well rules are tailored for marriage relationships. Because a single set of default rules will not suit some participants in heterogeneous relationships,¹¹¹ some people may have to incur the costs

¹⁰⁴ *Id.* at 87.

¹⁰⁵ See Eskridge, *supra* note 100.

¹⁰⁶ François Truffaut, *Jules et Jim* 108 (Paris: Seuil, 1971).

¹⁰⁷ See Mary Bonauto et al, *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont*, 5 MICH. J. GENDER & L. 409, 450-454 (1999) (arguing that tradition should not be controlling).

¹⁰⁸ Baker, slip at 39.

¹⁰⁹ *Id.* at 40.

¹¹⁰ Third parties might also economize on transaction costs by linking marital benefits to relationships legally defined as marriage under state law. See *ExxonMobil Ends Mobil Benefit Policy For Domestic Partners*, Wall St. J., December 7, 1999 at C17.

¹¹¹ See Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L. Q. 369 (1995).

of bargaining around, or being bound by, ill-fitting rules.¹¹²

Recognizing homosexual marriages might exacerbate the problem of ill-fitting default rules.¹¹³ The presence of children in heterosexual marriage has implications for default rules in marriage and divorce and inheritance rights. First, the different types of marriage demand different rules regarding the grounds for divorce. Homosexual spouses are less likely to demand sexual fidelity from their partners than heterosexual couples, who are concerned about the paternity of their natural children.¹¹⁴ This difference between the two types of couples may make it more difficult to reintroduce notions of fault in divorce, which itself may be desirable to reduce the costs of no-fault divorce discussed in Part II. Even under current no-fault divorce rules, homosexual marriage requires different rules regarding the consequences of divorce. As discussed above in Section II(A)(1), where one spouse has specialized in child-rearing in a heterosexual marriage, interspousal payments in a standard form divorce might usefully compensate her for her opportunity costs in foregoing a career, and reflect the bargain the parties would likely have struck at marriage.

Second, the different types of marriage also demand different inheritance rules. A deceased spouse in a heterosexual marriage is likely to want to leave everything to the surviving spouse for support and for the children as well as to recognize joint contributions to maintaining the household. The members of homosexual unions may be more likely to be financially independent and therefore might prefer to leave their wealth to other members of their immediate family.

Some homosexual couples do, of course, raise children, including the biological children of one of the spouses from prior marriage, artificial insemination and surrogacy. More might do so if marriage law changed to make homosexual unions more child-friendly. Conversely, many heterosexual couples are childless, and elderly couples who marry know they will never have children. Thus, this argument against same sex marriage depends on whether restricting marriage to heterosexual couples does a reasonably good job of fitting rules to particular cases. If most heterosexual marriages result in children, and very few homosexual couples would raise children, then different standard forms arguably commend themselves.

This is not to say that all heterosexual couples would seek the same set of implied terms in their marriage agreements. Different couples will often have different ideas about their responsibilities, and a single set of default rules will not fit every couple. But this argues for additional standard forms, such as covenant marriage, rather than for introducing greater incoherence by assimilating still more dissimilar unions into the marriage standard form. The law might offer different types of marriage based on the likelihood of children rather than on sexual preferences. On the other hand, the heterosexual couple, even if likely to remain childless, might be more likely than the homosexual couple to seek a standard form that resembles the normal marriage option. Elderly heterosexual couples may desire the same degree of fidelity as younger, fertile couples because their preferences about marriage were fixed when they were younger.

¹¹² See Douglas Allen, *An Inquiry into the State's Role in Marriage*, 13 J. ECON. BEHAV. & ORG. 171, 180 (1990) (noting that marriage loses its value as a standard form if it must cover many kinds of relationships).

¹¹³ Indeed, one might wonder why anyone would want to enter into a same sex marriage in view of these disadvantages. The answer is arguably that they are willing to trade inappropriate standard form rules for subsidies. The subsidies therefore amount to social waste because they encourage contracts that generate additional transaction and litigation costs. Cf. Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U. L. Q. 417 (1992) (making a similar point about the effect of tax breaks for partnerships on business association form).

¹¹⁴ See Richard Posner, SEX AND REASON 262 (Harvard 1992). Even Andrew Sullivan notes that same sex couples are likely to play by different rules. "There is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman."

Thus, a concern for the coherence of the stock of default rules might be thought to argue for separate forms of marriage for heterosexuals and homosexuals, rather than a ban on same sex marriages. Yet this intermediate solution is not free from difficulties either. It is difficult to believe that courts would keep the rules of closely related marriage categories in watertight compartments, without allowing slippage from one to the other. Nor would this solution satisfy those who want same sex unions blessed by the full state imprimatur.

4. Effect on children

As noted in Subsection 3, permitting same sex couples to marry might encourage them to have and raise children. By marrying, these couples would have access not only to child-friendly inheritance and divorce rules, as just discussed, but also might be more eligible for adoption and custody. This raises questions concerning the effect on children of parents of the same gender. A mother and father give the child two gender role models that contribute to its psychological development.¹¹⁵ Also, in a heterosexual union both are parents genetically related to their children, which motivates them to act altruistically toward their children. These benefits extend beyond the children themselves in the sense that well-functioning families form part of a society's "social capital."¹¹⁶

Apart from the effect of same-gender parents on the children they raise, the state also might be concerned in the number of children, and therefore offer subsidies to heterosexual marriages on the ground that they promote births. This argument would justify refusing a similar subsidy to childless same sex couples.¹¹⁷

5. Shaping norms and preferences

The above arguments take as given the parties' preferences and seek to design legal rules in light of these preferences. Though this may be enough for rules about commercial contracts, marriage has special social significance. Thus, it is important to take into account the way in which the legal system may shape individuals' preferences.¹¹⁸

The law relating to marriage functions in two ways to change preferences. Transfers and tax benefits and burdens change the benefits and burdens of certain relationships and thereby encourage individuals to prefer the relationships that most benefit society.¹¹⁹ In particular, the law encourages cohabitation and child-bearing in a particular type of long-term partnership --

¹¹⁵ The Vermont supreme court rejected this argument in *Baker* as a justification for discouraging same sex unions, noting that experts disagree over these effects, and that in any event the Vermont legislature had recognized same sex parentage. *Baker*, slip at 36.

¹¹⁶ Social capital may be thought of as the network benefits of individual human capital. For example, the atheist might reasonably prefer to live in a society of believers, if they are generally more trustworthy than atheists. See Gary S. Becker and Kevin M. Murphy, *The Family and the State*, 31 J. L. & Econ 1, 3 (1988). See generally Gary S. Becker, ACCOUNTING FOR TASTES 12-16 (1996); James S. Coleman, FOUNDATIONS OF SOCIAL THEORY (Harvard, 1990).

¹¹⁷ See Posner, *supra* note 114 at 313 (arguing that permitting same sex marriage confers inappropriate subsidies).

¹¹⁸ See generally, Becker, *supra* note 116 (arguing that a person's "meta-preferences" at any given time have been shaped by many influences, although once formed are stable).

¹¹⁹ For recent discussions of the benefits and burdens government allocates to the marriage relationship, see James Alm, et al, *The Marriage Penalty*, 13 J. ECON. PERSP. 193 (1999); Edward J. McCaffery, *The Burdens of Benefits*, USC Law School, Olin Working Paper No. 99-14.

companionate marriage.¹²⁰ This has been referred to as the "channeling" function of marriage law.¹²¹

Less directly, marriage law encourages some conduct, such as heterosexual sex and companionate marriage, by expressing society's approbation or condemnation.¹²² Society's sanction or disapproval sends signals about people's reliability or socialization.¹²³ Marriage law thereby defines the "social meaning" of a particular type of cohabitation.¹²⁴ Getting married is defined as one's passage into adult and responsible society and middle class domesticity, while cohabiting without marriage is defined as immature and irresponsible.¹²⁵ Marriage law thus establishes norms of behavior by setting types of conduct for which people earn the esteem of others in their group.¹²⁶

This raises questions concerning what effect marriage law *should* have on preferences and norms. One set of questions concerns the effect of marriage law on attitudes about homosexuality. Social conservatives use marriage law to defend traditional lifestyles by ensuring that benefits are conferred only on heterosexual relationships.¹²⁷ At the same time, activists who push for same sex marriage can be seen as "norm entrepreneurs"¹²⁸ who seek to change norms and preferences by legitimizing homosexuality. This is part of what has been termed the social

¹²⁰ The attributes of this relationship are described in Posner, *supra* note 114. The overall effect of subsidies and penalties is complex. Perhaps most importantly, two-earner households -- which would include many same-sex spouses -- pay a marriage *penalty*. This penalty has been found to affect the marriage rate. See James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 *ECONOMICA* 261 (1999). This arguably encourages childrearing by a stay-at-home spouse, particularly considering the nontaxable nature of this spouse's services. See Alm, et al, *supra* note 119 at 201.

¹²¹ See Carl E. Schneider, *The Channelling Function in Family Law*, 20 *Hofstra L Rev* 495 (1992).

¹²² See Dailey, *supra* note 22 (arguing that this should be a function of state rather than federal law); Cass R. Sunstein, *On The Expressive Function Of Law*, 144 *U. PA. L. REV.* 2021 (1996); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 *U.C. DAVIS L.REV.* (1989).

¹²³ See Eric Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 *J. LEG. STUD.* 765 (1998).

¹²⁴ See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943 (1995).

¹²⁵ As discussed *infra* at note 136, below, this may be a cost for homosexuals who would not marry if given the option to do so, similar to the over-signaling problem in covenant marriage.

¹²⁶ See Richard H. McAdams, *The Origin, Development, And Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997) (discussing how esteem both provides an external sanction and establishes particular behavior that imposes internal [guilt] sanctions).

¹²⁷ The ambiguity here is that conservatives might be said to favor encouraging homosexual couples to marry rather than cohabiting without marriage. Thus, Richard Posner has noted that "[i]t is the very conservatism of marriage as an institution that should attract support for homosexual marriage from conservative heterosexuals, desirous of "civilizing," of embourgeoising, the homosexual community--turning homosexuals into the Republicans they ought to be." Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 *Mich. L. Rev.* 1578, 1582 (1997). See also Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 *How. L.J.* 215, 227 (1998) (arguing that both traditionalists and defenders of same sex marriage might join together as defenders of traditional marriage values, including the idea of marriage as a monogamous lifelong commitment).

¹²⁸ See Sunstein, *supra* note 122.

construction of attitudes about homosexuality.¹²⁹

Another set of questions concerns the effect of same sex marriage on attitudes toward marriage. Recognizing same sex marriage arguably weakens the sacramental respect accorded marriage among those who think homosexual sex wrongful. Moreover, once the bounds of traditional marriage are erased, it is not clear what other types of marriage should be recognized, particularly polygamous marriages. Although religious norms condemn polygamous unions, this should not matter in a religiously neutral state, and in any event does not distinguish polygamy from same sex marriage.¹³⁰ Any reduction of incentives to marry, as by weakening the sacramental respect accorded marriage, might thus have serious repercussions, particularly when combined with other recent developments that have depressed marriage rates and raised divorce rates.¹³¹

On the other hand, allowing same sex marriage might strengthen marriage by encouraging homosexual couples to marry. Or if same sex marriage does weaken traditional marriage, this might be a good thing. It has been argued that, over the long run, recognizing same sex marriage might facilitate changes in existing social roles that ameliorate the loss of individual autonomy caused by the institution of the family.¹³²

Apart from questions about which way the law should go, there is a more fundamental question concerning the appropriateness of deliberately using law to shape norms and preferences. Setting norms arguably is best left to spiritual leaders rather than government.¹³³ For example, permitting homosexual marriage might inefficiently weaken valuable norms favoring traditional marriage.¹³⁴ Conversely, government reinforcement of traditional norms might inefficiently permit the prevailing majority to punish conduct by the minority that is socially productive or useful.¹³⁵

¹²⁹ See Eskridge, *supra* note 89.

¹³⁰ It has been argued that homosexual unions are more “fundamental” than polygamous and incestuous ones. Andrew Sullivan, “*Three’s a Crowd*,” *New Republic*, June 17, 1996, reprinted in Sullivan 1997, at 278. This is no more illuminating than saying that homosexual unions are “unnatural” -- it communicates a distaste for the relationship but not a reason why they should be banned or discouraged.

¹³¹ Indeed, even some conservatives might object to covenant marriage on similar grounds by arguing that alternative forms of marriage dilute the marriage concept and thereby pave the road for same sex and even polygamous marriage. See Whelan, *supra* note 49 (citing conservative opposition to covenant marriage).

¹³² See Martha Albertson Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995). See also, Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 Fla. St. U. L. Rev. 705, 726-29 (1998) (arguing that homosexual marriage reinforces both individual autonomy and communitarian ideals). In light of this criticism of the traditional family, it is not clear how permitting same sex marriage would be doing homosexuals much of a favor. In *M. v. H.*, 142 D.L.R. (4th) 1 (1996), for example, the Ontario Court of Appeal voiced the “anti-assimilationist” fear that recognizing same sex marriages might lower homosexual unions to the unenlightened level of traditional heterosexual marriages. Homosexual unions are happily free of the hierarchical gender roles of heterosexual marriage, and an Ontario Court would surely resist “a stereotypical attribution of roles within a relationship.”

¹³³ See Bonauto, et. al, *supra* note 107 at 456-57.

¹³⁴ Cf. Eric Posner, *Efficient Norms*, in 1 NEW PALGRAVE ENCYCLOPEDIA OF ECONOMICS AND THE LAW at 23 (1999) (noting how government might unintentionally weaken social norms, such as those against illegitimacy, in pursuit of other goals, such as welfare).

¹³⁵ Cf. McAdams, *supra* note 126 at ____ (discussing a majority-imposed norm may, by imposing esteem costs, cause a minority to refrain from conduct even where the minority values its freedom more than the majority

6. Over-signaling

Same sex marriages might create a more serious over-signaling problem than that for covenant marriage.¹³⁶ Many same sex couples will not want to opt into the marriage standard form because it does not suit their relationship. But if marriage is available and homosexual couples do not take advantage of it, they may be sending a negative signal about their social worth that they would not be sending in the absence of the marriage option.¹³⁷

III. THE MARRIAGE DEBATES AND CHOICE OF LAW

This subpart discusses how the policy debate over same sex and covenant marriage plays out in the context of choice of law. It shows that most of the arguments against non-standard forms of marriage can be resolved by letting states enforce foreign marriages that they would not enforce if contracted within their borders. This discussion assumes that states would retain some power to decide the precise local attributes of a foreign marriage. Part IV discusses more precisely which elements of foreign marriages would be enforced.

A. COVENANT MARRIAGE

Part II examined the case for restrictions on covenant marriages, as a matter of internal illegality. We now examine the same arguments from a choice of law perspective.

1. Protecting spouses from improvident marriages.

Arguments against covenant marriage based on paternalism not particularly compelling.¹³⁸ But even if they were, the argument from paternalism does not supply a reason to impeach a covenant marriage entered into under the laws of a state to which the parties have traveled to marry.

If the argument from paternalism justified the ban on no-fault waivers, it would also be sensible to impeach end-runs around the ban through choice of law clauses. A party who cannot bargain wisely over divorce rights is also unlikely to bargain wisely over the attempt to modify the divorce regime through another term in the contract. This explains why a party's capacity to contract is governed by the system of law with which the contract is most closely connected or by the law of his domicile or residence, notwithstanding the choice of another law to govern the contract.¹³⁹ However, while the spouses may not be able to enter into a binding choice of law clause, they can accomplish the same thing indirectly, by travelling to another state to marry. For example, minors might avoid internal barriers by travelling to a state with a lower age of majority, and this will be recognized by his home state.¹⁴⁰

values the prohibition).

¹³⁶ See *supra* §II(A)(2).

¹³⁷ Van Dyck v. Van Dyck, 425 S.E.2d 853 (Ga. 1993) refused to cut off alimony for a spouse who cohabited with a person of the same sex under a statute that cut off alimony only for meretricious relationships with persons of the opposite sex. A concurring opinion emphasized that same sex couples could not legally marry.

¹³⁸ See Section II(A)(2).

¹³⁹ See Dicey and Morris, *supra* note 14.

¹⁴⁰ See; State v. Graves, 228 Ark. 378, 307 S.W. 2d 545 (1957); McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163 (1936); Scoles & Hay, *supra* note 19 at 451-52. In a few states, marriage evasion legislation denies recognition to a marriage contracted in another state to avoid the first state's barriers. See Scoles & Hay, *supra* note 19 at 437.

It makes sense to permit the parties to skirt internal barriers in this way. It would be very troubling to introduce an element of doubt about the status of a marriage. For example, a second marriage might be bigamous in one state and not in another. Moreover, the laws as to capacity to marry are fairly uniform across the United States, so that recognizing the marriage will rarely shock the conscience.¹⁴¹ And if the problem is a concern that decisions be made in a deliberate manner, the parties will often have provided striking evidence of this by travelling to the foreign state.

These arguments are particularly compelling in the case of covenant marriage. First, certainty is vitally important here, since an agreement not to divorce is worthless unless the parties can be sure it will be enforced. Second, the difference between covenant and no-fault marriage options is not such as to shock the conscience. Liberalization of the divorce regime appears to have weakened marriages, and left women worse off.¹⁴² This suggests that the covenant marriage option is a reasonable choice for many couples. Third, and perhaps most important, the decision to travel to another state to take advantage of a rule that ensures the stability of the marriage provides even stronger evidence of deliberation in adults than it does of maturity in minors. The decision to have a marriage performed far from the homes of family and friends is likely to be a significant inconvenience. These costs will be most strongly felt by those couples who care about their marriage enough to seek out a foreign law in order to make it more durable. Thus, even if a state has concerns about covenant marriages performed locally, these concerns are not enough to justify refusing to enforce a covenant marriage performed elsewhere.

2. Protecting children and other third parties.

The domicile state may have a strong reason for protecting local children, courts and welfare agencies from the negative effects of binding a couple to an unhappy marriage.¹⁴³ As discussed in Part II, there is a strong debate over whether no-fault divorce or binding marriage offers the best set of solutions. Most importantly for present purposes, the effects of either option are felt in the state where the children are domiciled. Accordingly, there is a potential spillover problem if State A's covenant marriage law is enforceable in State B where the effects of unhappy covenant marriage occur. Thus, it is in this respect that requiring local enforcement of covenant marriages is most problematic. As discussed in the next Part, however, separating out the purely contractual elements of marriage offers a possible solution to this problem.

3. Protecting prospective or rational spouses: over-signaling.

A third objection to covenant marriage is that a couple might seek to over-commit when presented with a choice between hard and soft marriage laws in order to avoid sending a negative signal about their unwillingness to commit.¹⁴⁴ Thus, the availability of covenant marriage may impose costs even on couples that reject the covenant marriage option, or that enter into a covenant marriage with full appreciation of the consequences.

Even granting this argument, it is considerably weaker when the parties must travel to another state to waive no-fault divorce rights. Because the likelihood that the parties will over-signal depends on the availability of the option, the concern is greater for Louisiana couples than it is, for example, for Virginia couples who travel to Louisiana to marry. As noted above, couples normally marry at home, where their family and friends are. Most non-Louisiana couples will

¹⁴¹ See Scoles & Hay, *supra* note 19 at 452.

¹⁴² See *supra* §II(A)(1).

¹⁴³ See Section II(A)(3)-(4).

¹⁴⁴ See Section II(A)(5).

find it a great sacrifice to give this up, unless they strongly prefer a covenant marriage. This significantly dilutes the signal inherent in foregoing a covenant marriage. In other words, a potential spouse might credibly refuse an out-of-state covenant marriage because of cost and inconvenience without appearing to reject durability.

Even if making an interstate option available makes some over-signaling possible, its minimal costs are likely to be less than the significant signaling benefits of offering the covenant marriage option. Permitting spouses to choose from among the marriage standard forms available across the states would allow them to signal more precisely the level of commitment they are prepared to make.¹⁴⁵

B. SAME SEX MARRIAGE

A state that rejects same sex marriages under its internal laws might nevertheless, through a narrower doctrine of external illegality, recognize a same sex marriage contracted in another state with more liberal internal laws. Part II reviewed the case for banning same sex marriages as a matter of internal law. This Part shows that such arguments are weaker when it comes to the design of external illegality rules. Note, however, that this may depend on the domicile state's ability to control some of the consequences of marriage. Unbundling of marriage consequences is discussed further below in Section IV(C).

1. Effect on marriage law.

Recognizing same sex marriage would weaken the coherence of marriage rules by forcing them to deal with two very different types of marriages.¹⁴⁶ Suppose, however, that a state such as Hawaii chooses to make standard marriage available for same sex couples. Another state should not refuse to enforce the marriage on coherence grounds because a concern for coherence justifies internal and not external barriers. Applying a foreign law does not affect the coherence of the enforcing state's internal marriage regime. It might be otherwise if the enforcing state applied the foreign law as to the status of marriage, but its own law as the consequences of marriage (such as inheritance rights). At best, therefore, coherence concerns might argue for full-fledged enforcement of foreign same sex marriages, with the foreign law governing the consequences of marriage.

2. Effect on children.

If children of same sex spouses are worse off than those of heterosexual couples,¹⁴⁷ it should not make a difference whether the couple married under the law of another state. However, as long as the domicile state would control the consequences of such a marriage, including such things as custody and adoption of children, the mere fact of the foreign marriage would not have such effects outside of the state of celebration.

3. Norm and preference shaping.

The most contentious argument regarding recognizing same sex marriages is that it places a seal of approval on homosexual relationships.¹⁴⁸ This is deeply desired by many homosexuals but just as strongly opposed by many religious conservatives. Side-stepping the debate by

¹⁴⁵ Elizabeth Scott & Robert Scott, *supra* note 71.

¹⁴⁶ See Section II(B)(3).

¹⁴⁷ See Section II(B)(4).

¹⁴⁸ See Section II(B)(5).

declaring one side the unambiguous winner and anathematizing the other side does not serve to resolve it. Instead, we suggest a choice of law solution to the dispute.

If one accepts, as all sides in the debate about covenant and same sex marriage do, that the state has a reasonable role in play in shaping norms through its domestic laws, it by no means follows that such policies should also inform the state's private international laws. A state that objects to same sex marriages might signal its views with sufficient clarity through its rules for in-state marriages. There is far less need to go further and seek to legislate on the expressive function of *foreign* laws, when out-of-state marriages comes before in-state courts.

State recognition of the validity of same sex marriages that are validly celebrated under the laws of a foreign jurisdiction, while according different consequences to the two types of relationships, offers a Solomonic solution to the problem of preference-shaping effects of marriage law. Although the couple might earn some social respect as a "married" couple, as discussed in more detail below in Part IV, states might deny them many of the tangible benefits received by heterosexual couples. The absence of such benefits would not only directly affect conduct at the margins, but would also have the indirect effect of sending a message that homosexual relationships are not the norm. This, in turn, would attach additional "esteem" costs to the relationship.

4. Over-signaling.

Similar considerations apply to over-signaling arguments in the same sex context as regarding covenant marriage¹⁴⁹: the concern is greater for couples in states whose law provides for same sex marriage than it is for those who must travel to another state to marry.

IV. A CONTRACT-BASED APPROACH TO RECOGNIZING FOREIGN MARRIAGE

The distinction between external and internal enforcement of marriage does not wholly eliminate the kinds of difficulties with covenant and same sex marriage that discussed in Part II. The remaining question is precisely what effect states must give to foreign marriages. This Part proposes a judicial rule enforcing the *contractual* elements of marriage (such as property division and support), while stopping short of recognizing the public elements (such as welfare subsidies and tax breaks). Thus, we would unbundle marriage law, by discarding the status-based approach of recognizing the marriage either for some purposes or for none.¹⁵⁰

Subparts A and B set forth the analogy between marriage and contract. This analogy argues for a conflicts rule of interstate recognition of contractual elements of marriage. Subpart C discusses the distinction between contractual and non-contractual aspects of marriage for choice of law purposes.

A. COVENANT AND DURABLE MARRIAGES

Spouses could replicate many features of covenant marriage by contract, through private agreements that attach monetary penalties to divorce, or that condition divorce rights on a showing of fault, as under a covenant marriage. Through such contractual restrictions, the parties might privately craft a "durable marriage." To the extent that the parties can mimic a covenant by a durable marriage, there is less reason to resist our conflicts solution to the problem.

Courts might decline to specifically enforce a durable marriage because of the judicial

¹⁴⁹ See Section II(B)(6).

¹⁵⁰ See *supra* text accompanying note 45.

burden of supervising performance, by analogy to personal service contracts or partnerships,¹⁵¹ or because of paternalism concerns about holding the parties to onerous obligations.¹⁵² However, both concerns might be alleviated under a contract that merely imposes fault conditions or time requirements rather than forbidding divorce.¹⁵³ Although courts might now be reluctant to enforce these conditions because they fetter divorce rights that are generally assumed to be mandatory,¹⁵⁴ the expansion of free contracting rights suggests that courts might relax such barriers over time.

Even without specific enforcement, the parties might be able to contract for something close to covenant marriage by permitting divorce but providing for liquidated damages unless the contractual conditions of dissolution are satisfied.¹⁵⁵ In the debate over no-fault divorce, commentators sometimes overlook the extent to which property divisions and support duties penalize fault. Many states take marital misbehavior into account in assessing financial obligations, sometimes through explicit statutory injunctions, and sometimes through implicit judicial standards.¹⁵⁶ Could the parties take this one step further and bargain over fault penalties in a durable marriage? Such terms would be similar to those already included in some antenuptial agreements. The main legal issue would be whether the liquidated damages constituted a penalty.¹⁵⁷ From a policy standpoint, there might also be an over-signaling concern with offering the parties the ability to bind themselves by contract. On the other hand, the over-signaling problem is weaker than with covenant marriage if the state merely enforces contracts rather than offering a clear choice of a more binding commitment than standard-form marriage.

An important element missing from a durable marriage contract as compared with covenant marriage is a binding constraint on remarriage. A state might enforce the contract but permit divorce and thereby facilitate remarriage that is effective everywhere, including in the covenant marriage state. The contract might deter remarriage through a damage remedy, but this would not significantly constrain spouses who have little wealth. On the other hand, barriers to remarriage similarly may under-deter. While bigamy is illegal everywhere, legal restrictions on adultery are ineffective.¹⁵⁸

Even if courts hesitate fully to enforce durable marriages, legislatures might fill the gap by promulgating statutory standard form contracts that spouses could enter into when they marry requiring the party seeking a divorce to pay damages in some circumstances.¹⁵⁹ Such statutes

¹⁵¹ See Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L.Rev. 879, 902-04 (1988).

¹⁵² See Elizabeth Scott and Robert Scott, *supra* note 71.

¹⁵³ See Haas, *supra* note 151.

¹⁵⁴ See Brinig & Buckley, *supra* note 59.

¹⁵⁵ See Haas, *supra* note 151 at 911-14. The parties may even be able to contract for custody rights, at least to the extent of replacing a maternal custody with a fault presumption for custody. *Id.* at 914-21.

¹⁵⁶ See Brinig & Buckley, *supra* note 59.

¹⁵⁷ See Haas, *supra* note 151 at 911-14.

¹⁵⁸ See Eric Posner, *Family Law and Social Norms*, in Buckley, *supra* note 71.

¹⁵⁹ Standard forms may be provided by private parties such as bar groups as well as by statute. See Ribstein, *supra* note 111 (discussing the costs and benefits of private and statutory standard forms). But statutory standard forms offer significant advantages over privately developed forms. First, embodying the form in a statute

would have several potential advantages over simple enforcement of customized contracts. First, they would encourage the parties to make agreements by reducing contracting costs. Such costs may be particularly high because negotiating over divorce rules at the time of marriage introduces contentious issues at a sensitive time. Thus, without statutory standard forms, spouses might be reluctant to make contracts for durable marriage even if such contracts would be enforced. Second, statutory standard forms provide clear directions concerning complicated issues that courts cannot decide with any certainty in case by case adjudication. For example, legislatures might sort out the issue of appropriate remedies for breach, as well as impose conditions such as counseling that deal with some of the paternalism concerns.

Although statutory standard forms offer many of the advantages of covenant marriage, they would be less radical, and therefore more politically acceptable, than inventing a whole new type of marriage in which divorce rights are fettered. Standard forms are offered in a variety of other contexts, from business associations to living wills. Offering standard form contracts also might not be viewed as a sharp break with current law once legislatures recognize the extent to which private contracts could replicate covenant marriage.

In addition to offering many of the same advantages as covenant marriage, durable marriages have some legal advantages over covenant marriage. First, to the extent that durable marriage contracts do not prevent remarriage, they may be less subject than covenant marriage to paternalism concerns. Second, and more importantly, durable marriage contracts may be a more binding constraint against out-of-state divorces than covenant marriages. As discussed in Part III, a covenant spouse can get a unilateral, no-fault divorce in a non-covenant jurisdiction. However, in order to adjudicate the spouses' *contract*, the court would need jurisdiction over both spouses. Accordingly, the contractual aspects of an *ex parte* divorce would not be recognized elsewhere.

The discussion so far has focused on the parties' ability to contract effectively under the law of their own state. But the contractual approach also provides an alternative way for the parties to take advantage of more liberal laws in other states. Rather than traveling to those states to marry as required for effective choice of marriage regime, the parties might simply insert a choice of law clause in their agreement. Courts might enforce such a clause even if they would not enforce the contract as a matter of internal legality. Adopting such a form might provide many of the same advantages regarding certainty and legislative judgment that would be offered by a standard form in the parties' home state. Even if the home state does not generally enforce no-divorce contracts, the court might be willing to accept the legislative judgment inherent in a statutory standard form as an answer to paternalism arguments. In other words, courts may be more willing to enforce commitments fashioned by cold-hearted legislators in other states than by the starry-eyed couples alone.

B. CONTRACTS AND SAME SEX MARRIAGE

As with covenant marriage, contractual approaches are also available for same sex marriage. Again, these include both enforcement of statutory standard forms and enforcement of contracts. Contracts that replicate marriage for same sex couples would include terms on property ownership, income-splitting and support.¹⁶⁰ They would be analogous to cohabitation

enhances the role of the form as a focal point for judicial decisions and other interpretive material. These are sometimes referred to as network benefits. See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). Second, statutory promulgation provides assurances of what contract terms states will enforce. Third, a statutory form may provide a more stable relationship by providing mandatory terms that reduce the scope of potential re-negotiation. This permits the parties to credibly commit to such matters as penalties for divorce.

¹⁶⁰ For a discussion of these contractible aspects of same sex marriage, see Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 785-6 (1995).

(or "*Marvin*") contracts, now enforceable in most states.¹⁶¹ Indeed, courts give even polygamous marriage this kind of recognition.¹⁶² The contracts would not be marriages, and therefore would not be subject to proscriptions on same sex marriage.

The main problem with the contractual alternative is that it may be more costly for couples than simply opting into the marriage standard form. Since marriage is a complex long-term relationship, it may be costly to contract for many incidents of marriage, particularly divorce.¹⁶³ To be sure, couples already do this in ante-nuptial agreements. But unlike those agreements, a contractual substitute for marriage would have to replicate all of the terms of standard marriage, which are extensive and embedded in the common law. Ambiguities in these terms would not have the advantage of clarifying court decisions. Moreover, without recognition of status it may be uncertain which terms states will enforce. For example, courts may not enforce contracts for short-term relationships because they too closely resemble contracts for sex, or terms that force long-term relationships, such as covenant marriage, because of potential problems of over-optimism at the time of marriage.¹⁶⁴ States that would refuse to recognize contractual incidents of same sex marriage also may refuse to enforce same sex cohabitation contracts as end runs around these prohibitions.

States can reduce these problems in the same way that they can for durable marriage -- by promulgating statutory standard forms. As with covenant marriage, such statutes might reduce transaction costs without going significantly beyond what the parties legally could do without the statute. Some jurisdictions offer "domestic partnership" ordinances or statutes.¹⁶⁵ For example, the Danish registered partnership authorizes a standard form for same sex couples that provides for the contractual aspects of heterosexual marriage, including property in marriage, inheritance, support and alimony, but not rules relating to children such as adoption and custody rights.¹⁶⁶ Such statutes offer many of the advantages of marriage, including secure contract and property rights as well as state-conferred benefits, without compromising the preference-shaping function of giving marriage special status.¹⁶⁷ Indeed, the Vermont supreme court suggested in *Baker* that the legislature could satisfy its constitutional obligation to offer the same benefits to same sex as to heterosexual couples by authorizing domestic or registered partnerships.¹⁶⁸ Marriage substitutes can also facilitate recognition of same sex relationships by private parties without extending the full panoply of government subsidies. For example, the California domestic

¹⁶¹ This refers to *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), which first recognized the enforceability of cohabitation contracts. For a discussion of the general recognition of enforceability only a few years after *Marvin*, see Lenore J. Weitzman, *THE MARRIAGE CONTRACT*, 395-415 (1981).

¹⁶² See Posner, *supra* note 114 at 208-09.

¹⁶³ See Brown, *supra* note 160, at 784-5 (pointing out that the parties to a marriage need standard forms to save transaction costs).

¹⁶⁴ See *supra* text accompanying notes__.

¹⁶⁵ These are listed on the web site, www.cs.cmu.edu/afs/cs/user/dtw/www/companies.htm/#municipalities.

¹⁶⁶ See Jorge Martin, Note, *English Polygamy Law And The Danish Registered Partnership Act: A Case For The Consistent Treatment Of Foreign Polygamous Marriages And Danish Same-Sex Marriages In England*, 27 CORNELL INT'L L.J. 419 (1994). For discussions of domestic partnership laws in Denmark, Holland and Sweden, see Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition In Switzerland And Europe*, 32 CREIGHTON L. REV. 121 (1998).

¹⁶⁷ See *supra* §II(B)(3).

¹⁶⁸ *Baker*, slip at 39.

partnership law provides only for hospital visitation rights and health insurance coverage for the government employees' dependents.¹⁶⁹

The above discussion focuses on legal alternatives within a given state. As with covenant marriage, even if state that does not enforce contracts that offer close equivalents to marriage might enforce a contract that provides for application of the law of an enforcing state. It also might enforce the local adoption of another state's standard form, subject to the other state's law.¹⁷⁰ This would be a less drastic approach than recognizing the same sex relationship to be a "marriage."

C. UNBUNDLING MARRIAGE

So far this Part has shown that private contracting offers a method through which the parties might obtain many of the benefits of covenant or same sex marriage. To the extent that this contracting is possible even in states that do not permit same sex or covenant marriage, it supports recognition in those states of at least the contractual elements of those marriages. This subpart distinguishes such contractual elements from other elements, including government-created consequences of marital status, as to which local law should control. Thus, it seeks to unbundle marriage, and thereby discard the rule that incidents of marriage necessarily follow marital status.¹⁷¹

1. Same sex marriage

Since the same sex marriage issue emerged courts and commentators have considered the various incidents of marriage that recognition of same sex marriage might entail.¹⁷² As the Vermont supreme court said in *Baker*, "the marriage laws transform a private agreement into a source of significant public benefits and protections."¹⁷³ However, marriage is more contractible than might first appear.

The list of marriage benefits in the Hawaii Supreme Court's 1993 *Baehr* opinion is typical and at least representative of the possibilities:

(1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, . . . ; (2) public assistance from and exemptions relating to the Department of Human Services . . . ; (3) control, division, acquisition, and disposition of community property . . . ; (4) rights relating to dower, curtesy, and inheritance . . . ; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, . .

¹⁶⁹ See 1999 CA A.B. 26.

¹⁷⁰ The Danish statute, however, apparently did not contemplate use in other jurisdictions. Among other things, it applies specifically to Danish citizens. See *id.* Some statutes provide that contractual rights granted by virtue of a marriage entered into in another state are unenforceable. See Alaska St §25.05.013(a); Ark. Code §9-11-208(c); Ga. Code §19-3-3.1(b). These statutes apparently would not make unenforceable a contract for marriage-type rights that is not recognized by the chosen state as a "marriage."

¹⁷¹ See *supra* note 45.

¹⁷² See Van Dyck v. Van Dyck, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring); Baehr v. Lewin, 74 Haw. 530, 560-61, 852 P.2d 44, 59-60 (1993); Eskridge, *supra* note 89 at 66-70 (1996); Bonauto, *supra* note 107 at 415-17; Jennifer R. Brannen, Note, *Unmarried With Privilege? Extending The Evidentiary Privilege To Same-Sex Couples*, 17 REV. LITIG. 311 (1998); Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 Law & Sexuality 97, __ (1991). Brown, *supra* note 160 at 782-83.

¹⁷³ See *Baker*, slip at 34.

.; (6) award of child custody and support payments in divorce proceedings . . . ; (7) the right to spousal support . . . ; (8) the right to enter into premarital agreements . . . ; (9) the right to change of name . . . ; (10) the right to file a nonsupport action . . . ; (11) post-divorce rights relating to support and property division . . . ; (12) the benefit of the spousal privilege and confidential marital communications . . . ; (13) the benefit of the exemption of real property from attachment or execution . . . ; and (14) the right to bring a wrongful death action . . .¹⁷⁴

All of the above categories except numbers 1, 2, 12, 13 and 14 are generally comparable to contractual rights, even if not strictly controlled by contract under current law. As discussed above regarding covenant marriage, the spouses can broadly contract for divorce rights, including spousal support, property division and liquidated damages,¹⁷⁵ and might even be able to affect custody by contract.¹⁷⁶ They can, of course, sue to enforce these rights. They can also contract for many inheritance rights or obviate these rights by inter vivos gifts. Although they may not get an automatic name change from marriage, they can petition for change of name. Finally, in addition to these rights are others explicitly available by contract, including employee benefits such as group insurance.¹⁷⁷

States should enforce foreign marriages at least as to these basically contractible elements. In other words, spouses who are legally married under some state's law would be entitled in the state of their domicile to all of the elements of the contractual standard form of marriage under the law of the state of celebration. That should be so even if the domicile state's law would not make these elements available to locally celebrated marriages.

The remaining incidents of marriage listed by *Baehr* to which same sex married couples would not be entitled include tax and other benefits that married people cannot obtain solely by contract.¹⁷⁸ The *Baker* decision in Vermont lists similar rights, including those to consortium, workers' compensation survivor benefits, spousal benefits for public employees, statutory rights of inclusion in employee group insurance policies, homestead rights and protections, presumption of joint rights of ownership and survivorship, and rights incident to medical treatment of a family member.¹⁷⁹ This allocation of benefits is a critical aspect of marriage law's function of channeling people into relationships favored by society.¹⁸⁰ Some of these benefits

¹⁷⁴ *Baehr v. Lewin*, 74 Haw. 530, 560-61, 852 P.2d 44, 59-60 (1993).

¹⁷⁵ See *supra* text accompanying note 158.

¹⁷⁶ The parties cannot, however, contract for application of polygamy laws to a partner in a same sex marriage who marries an opposite-sex partner in a state that does not recognize the same sex marriage. Although it has been argued that this nullifies the marriage (see Koppelman, *supra* note 22 at 987) that is hardly the case given significant remaining contract rights and the unlikelihood of a heterosexual marriage.

¹⁷⁷ Although private parties can contractually define their rights, they might use the state's definition of marriage to determine when the rights are available. See *ExxonMobil*, *supra* note 110 (providing for marital benefits only in to relationships legally defined as marriage under state law).

¹⁷⁸ These may be what some statutes refer to as "benefits of marriage" to which same-sex relationships are not entitled. See Alaska St. §25.05.013; Ark. Code §9-11-208; Ga. Code §19-3-3.1. Alaska St. §25.05.013. For another writer reaching a similar conclusion as to the incidents of same sex marriage without making an explicit distinction along contract lines see Koppelman, *supra* note 22 at 988 (suggesting that the states determine such incidents as homestead exemptions and the right to file a joint tax return). See McCaffrey, *supra* note 119 (discussing society's allocation of burdens and benefits among favored and disfavored family relationships).

¹⁷⁹ See *Baker*, *supra*, slip at 34.

¹⁸⁰ See *supra* §II(B)(3).

may not be very important to most couples. The average couple will never have to be concerned with evidentiary privileges or wrongful death actions. The supposed tax benefits of marriage matter mainly to one-earner households, while homosexual couples are likely to be two-earner households.¹⁸¹

In short, while states would enforce out-of-state contracts, they would retain the power to shape the meaning of marriage by denying some of the government-created incidents of marriage to same sex couples.

2. Covenant marriage

The main questions regarding covenant marriage under our approach are whether a covenant marriage should be dissolved contrary to the law of the celebration state and whether any such divorce should be entitled to recognition outside the dissolution state. Although, as we have discussed, contracts for durable marriages may be generally enforceable, there are likely to be unenforceable elements. Moreover, the parties clearly may not contract to make unlawful sexual relations outside the marriage notwithstanding a purported divorce. Thus, it is important to consider what the rules should be concerning entry and recognition of any such divorce.

It would arguably follow from our approach to same sex marriage that domicile state courts should recognize the contractual incidents of durability. This would include continued support obligations. The question is whether the domicile state should have to give full-fledged recognition to the covenant marriage, and thereby is precluded from divorcing the couple on petition of the spouse seeking divorce and permitting that spouse to remarry.¹⁸² Such effects might include subsidies and tax breaks that apply to new spouse rather than to the "covenant" spouse and non-application to the divorcing spouse of polygamy and adultery laws. The domicile state might prefer to provide this extra encouragement only to marriages involving currently viable relationships, rather than stressing the need for family stability even in an unhappy marriage. Since the effects of such remarriage may be felt primarily in the divorcing spouse's domicile (as long as the original family is protected under the durability contract), permitting that state to regulate local incidents would minimize spillovers.

V. BUILDING A CONSENSUS IN THE MARRIAGE DEBATES

The approach outlined in Part IV provides for interstate enforcement of contracts while giving states the option to determine the local non-contractual effects of non-standard marriages. Like all compromises, this approach does not fully satisfy either side of the debate. Social conservatives might want complete recognition of covenant marriage in non-covenant states, including a federal ban on divorce and remarriage in violation of the covenant. They also might favor a federal law banning same sex marriage. At the same time, proponents of same sex marriage might object that our proposal denies homosexual relationships the complete recognition they deserve, and therefore urge that recognition of same sex marriage be constitutionally mandated. But declaring victory for one side would no more settle the marriage debates than *Roe v. Wade* ended the abortion controversy or *Dred Scott* the fight over slavery. Thus, we would oppose a Constitutional rule that mandates state acceptance of same sex

¹⁸¹ This will not always be so. If both members of the same sex union are employed, the marriage penalty that arises when joint filings are mandated in a regime of progressive taxation will provide a significant disincentive to marriage. Thus, same sex couples might delay marriage until one of the parties retires (and the pension subsidies to marriage begin to kick in).

¹⁸² Note that a similar issue may arise in sex marriage as to whether a second local marriage takes precedence over a first foreign marriage. See *supra* text accompanying notes ____.

marriage.¹⁸³

In contrast to an absolutist approach that would prolong the controversy, enforcing choice of law promises to build a consensus and thereby to reconcile the two sides of the marriage debate. First, it is an approach that Americans with divergent views on marriage can endorse because they gain at least as much from the freedom to choose as they lose by granting the freedom to others. This should be apparent from the juxtaposition in this article of same sex and covenant marriage. As repugnant as each side of the marriage debate might find the other's preferred form of marriage, both sides may choose to live by a principle that accommodates both forms of marriage. Same sex couples want a place to get married and that tolerates their lifestyle while some opponents of same sex marriage may want to live where marriage retains its original meaning. Allowing states to withhold non-contractual aspects of marriage from same sex couples or to confer non-contractual aspects on a couple despite their subsisting covenant marriage accommodates both types of preferences. On the other hand, if states had fully to recognize marriages valid in their states of celebration, social liberals would have won acceptance everywhere as to same sex marriage, while social conservatives would win everywhere on covenant marriage while finding no states that preserve the privileged status of heterosexual marriage.

Second, jurisdictional choice promises not only to accommodate competing views but also to widen the acceptance of the various rules within each jurisdiction. Giving lawmaking responsibility to smaller governmental units brings lawmakers closer to the governed, and thereby may lend greater legitimacy to the resulting laws than would be the case for federal laws. Devolution draws on loyalties to local communities that can supplant more polarizing loyalties to larger groups.¹⁸⁴ And local laws can build on local preferences.¹⁸⁵

Third, permitting states to offer a variety of marriage rules can lead to an evolution toward consensus. State experimentation can indicate the level of social acceptability of increased durability or same sex marriage.¹⁸⁶ Based on the information provided by other

¹⁸³ The Constitutional law relating to marriage is discussed below in Part VI. By contrast, the Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C & 1 U.S.C. § 7), is consistent with the approach in this article. The Act provides that states need not give effect to same sex marriages recognized in other states, and defines marriage as heterosexual for purposes of federal law. Thus, the Act permits states to define marriage as they wish, but does not compel either other states or the federal government to accept this definition. Several commentators have questioned the constitutionality of this act on the ground that it discriminates against homosexuals. See Koppelman, *supra* note 202 (also arguing that the Act exceeds Congress' power under the full faith and credit clause); Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997); Mark Strasser, *Doma and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457 (1998); Evan Wolfson & Michael F. Melcher, *The Supreme Court's Decision in Romer v. Evans and Its Implications For the Defense of Marriage Act*, 16 QUINNIPIAC L. REV. 217 (1996).

¹⁸⁴ See J. Harvie Wilkinson III, *Fear of Federalism*, Washington Post, November 26, 1999 at A45.

¹⁸⁵ See *id.* (noting that "[t]o allow different places to give different answers to difficult social questions is to recognize that neither Scotts Bluff nor Greenwich Village has any monopoly on enlightenment").

¹⁸⁶ Social acceptability might turn on economic effects. If jurisdictions can offer varying regimes, they are free to compete for commercial benefits. For example, legislators have some incentive to authorize same sex marriage or its contractual equivalent, or at least less incentive to oppose it, if authorizing homosexual marriage generates benefits to constituents from tourists seeking to take advantage of the law. See Brown, *supra* note 160 (discussing the tourism dimension in Hawaii's recognition of same sex marriage); James Bandler, *Gay Weddings Inspire Some Reservations, Or So Hoteliers Hope*, Wall Street Journal/New England, November 24, 1999 at NE1 (discussing potential boom in tourist business if Vermont Supreme Court authorizes homosexual marriages, and noting that opposition to same-sex marriage in Vermont dropped significantly in the past year).

jurisdictions, legislators might decide to expand enforcement by extending greater levels of durability for covenant marriage or by recognizing more incidents for same sex unions. And opposition to full internal legalization may be reduced as judges incrementally narrow the differences between legal and illegal relationships by enforcing the contractual aspects of relationships recognized under foreign law.¹⁸⁷ Even if legal evolution does not change views over time, state experimentation may lead to the development of a consensus approach that accommodates both sides of the marriage debate. This reflects Hayek's observation that "if left free, men will often achieve more than individual human reason could design or foresee."¹⁸⁸

The choice-of-law approach contrasts with the method of achieving compromise prominently espoused by Cass Sunstein.¹⁸⁹ Sunstein relies on "incompletely theorized agreements" through which courts eschew high theory in favor of achieving consensus on narrow principles and particular outcomes.¹⁹⁰ In this way, courts can let democratic processes operate rather than imposing judicial solutions. But Sunstein has little to say about how to produce consensus in the face of such fundamental disagreements.¹⁹¹ Although he relies heavily on the power of analogical reasoning,¹⁹² finding the right analogy may be the key problem. For example, whether society should embrace homosexuality as it has racial equality is at the heart of the debate over marriage. If the court should select a narrow principle on which people can agree, why should this be that same sex couples can marry despite statutes everywhere to the contrary? And what should courts do when legislatures refuse to subscribe to their principles?¹⁹³ A test may come soon in Vermont, where the supreme court explicitly adopted Sunstein's reasoning in deferring to the legislature as to the precise nature of the same sex relationships that should be authorized¹⁹⁴ in the face of a clear indication of legislative hostility to its approach.¹⁹⁵

The Sunstein approach is, in the end, just a kinder and gentler way of declaring a victor rather than a way of reconciling the two sides of the debate. By contrast, rather than adopting a

¹⁸⁷ For a discussion of similar dynamics at work in corporate law see Larry E. Ribstein, *Politics, Adaptation and Change*, 8 AUST. J. CORP. L. 246 (1998).

¹⁸⁸ Friedrich A. von Hayek, INDIVIDUALISM: TRUE AND FALSE, IN INDIVIDUALISM AND ECONOMICS ORDER 1, 11 (1948). See also Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950); Martti Vihanto, *Competition between Local Governments as a Discovery Procedure*, 148 J. INSTITUTIONAL & THEORETICAL ECON. 411 (1992).

¹⁸⁹ See Cass R. Sunstein, *LEGAL REASONING AND POLITICAL CONFLICT* (1997). For another important work advocating compromise, see Stephen L. Carter, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (Basic Books, 1998).

¹⁹⁰ See Sunstein, *supra* note 189 at 37.

¹⁹¹ Sunstein notes that deeper theory sometimes may be necessary to resolve disagreement, but says little about what to do when even deeper theory does not produce agreement other than that some turbulence may be unavoidable and productive. See *id.* at 58-59.

¹⁹² See *id.* at 62-100.

¹⁹³ See Zywicki.

¹⁹⁴ See Baker, slip at 44.

¹⁹⁵ See Baker, concurring and dissenting opinion at 4, n. 1 (noting that "while the instant case was pending before this Court, fifty-seven representatives signed H. 479, which sought to amend the marriage statutes by providing that a man shall not marry another man, and a woman shall not marry another woman"). The concurrence/dissent argued that the court should follow its principles to their logical conclusion and declare the right of same sex couples to marry.

single, possible arbitrary, compromise, enforcing jurisdictional choice accommodates many different approaches and permits a consensus to develop that reflects peoples' actual preferences. Democratic processes remain viable at the state level as more than just a way to effectuate the court's pre-ordained result. This approach is consistent with a Burkian emphasis on local and particular institutions of the "little platoons" over top-down rules.¹⁹⁶

VI. CHOICE OF LAW, MARRIAGE AND THE CONSTITUTION

Several commentators advocate mandating validity of same sex marriage and prohibiting state courts and legislators from banning local recognition of such marriages.¹⁹⁷ This article joins with others that have rejected this absolutist position.¹⁹⁸ This Part shows that the choice of law approach is consistent with current Constitutional law in this area, and helps point the way toward future Supreme Court decisions.

Current federal constitutional law generally gives states significant power to decide choice of law issues. As the Court has said, "long-established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional."¹⁹⁹ The Court has propounded very broad constitutional guidelines for interpreting both due process and full faith and credit that rely on such elastic and easily met standards as "fairness."²⁰⁰

The full faith and credit clause of the Constitution,²⁰¹ which requires the states to recognize "public Acts, Records, and judicial Proceedings of every other State," is arguably the most directly relevant provision. This clause gives wide latitude to the states in deciding choice of law issues,²⁰² and therefore probably does not require a state to recognize the validity of a same sex marriage under another state's law.²⁰³ Marriages almost certainly are not entitled to the

¹⁹⁶ Edmund Burke, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 47 (Oxford 1993) (1790). For other advocates of this Burkean philosophy, see Alexander Bickel, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (suggesting a Burkean understanding of the legal system); Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. (1990).

¹⁹⁷ See, e.g., Eskridge, *supra* note 89; Kramer, *supra* note 41; Mark Strasser, *LEGALLY WED--SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997).

¹⁹⁸ See Posner, *supra* note 127; Solimine, *supra* note 22.

¹⁹⁹ *Sun Oil Co. v. Wortman*, 486 U.S. 717, ___ (1988).

²⁰⁰ See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).

²⁰¹ See U.S.CONST. art. IV, §1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

²⁰² See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (permitting forum to apply its rules of law if there is a reasonable relationship exists between the forum and the transaction or parties).

²⁰³ See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages* 32 CREIGHTON L. REV. 147 (1998); David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997); Ralph U. Whitten *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

higher level of protection the Clause accords public acts or judicial decrees.²⁰⁴ The full faith and credit clause not only would not protect a covenant marriage, but seemingly would require interstate recognition of a divorce decree even if entered in violation of the covenant.

The main Constitutional challenge to the choice of law approach comes with respect to the treatment of same sex marriage under provisions intended to protect individual rights.²⁰⁵ Several commentators have argued that same sex marriage is protected under the equal protection clause of the U.S. constitution.²⁰⁶ This argument has been accepted by the Hawaii supreme court in *Baehr* and in dictum by a lower court in Alaska.²⁰⁷ It is also indirectly supported by the Supreme Court's holdings in *Loving v. Virginia*²⁰⁸ that anti-miscegenation laws violate equal protection,²⁰⁹ and in *Romer v. Evans*²¹⁰ that Colorado could not prohibit anti-homosexual discrimination by the state or subordinate jurisdictions.²¹¹ A series of recent decisions by the Supreme Court of Canada struck down laws that distinguish between same sex

²⁰⁴ As to judicial proceedings *see generally* *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that even a mistaken application of Mississippi law by a Missouri court nevertheless was entitled to enforcement in Mississippi); Restatement (Second) Conflict of Laws § 117 (1971); Brainerd Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 Sup. Ct. Rev. 89. *But see* Kramer, *supra* note 41 (recommending application of full faith and credit to same sex marriage).

The main issue is whether a judicial decree establishing a marriage would entitle the marriage to full faith and credit. It seems clear that commemorating the marriage by a collusive judgment solely for full faith and credit purposes probably would not satisfy the clause. *See* Andrew Koppelman, *Dumb and Dora: Why The Defense Of Marriage Act Is Unconstitutional*, 83 Iowa L. Rev. 1, 16-17 (1997). Beyond this, the issue seems to have been settled by the Defense of Marriage Act, discussed immediately below, which denies all full faith and credit protection to same sex marriage. *See* Maurice J. Holland, *The Modest Usefulness of Doma Section 2*, 32 CREIGHTON L. REV. 395 (1998). Because marriage is not entitled to the higher level of protection accorded judicial decrees, dictum in *Baker v. General Motors*, 118 S. Ct. 657 (1998) concerning the irrelevance of the public policy exception in this context is irrelevant to same sex marriage. *See* Borchers, *supra* note 202.

²⁰⁵ For a survey of these arguments, *see* Strasser, *supra* note 198. For an argument favoring a constitutional right to marry, but without specifying the limits of this right, *see* Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*. 41 HOW. L.J. 289 (1998).

²⁰⁶ *See Baehr*, discussed in *supra* note 91; Eskridge, *supra* note 89 at 1507-10; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187; Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 Yale L.J. 1783 (1988); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994). *See also* Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145 (1988). *But see* Myers, *supra* note 40 (arguing for rejection of discrimination argument).

²⁰⁷ *See Brause v. Bureau of Vital Statistics*, 1998 WL 88743, Slip at 4 (Alaska Super. Feb. 27, 1998) (holding that denial of the right to same sex marriage violated the couple's right to privacy and stating that "[w]ere this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, the court").

²⁰⁸ 388 U.S. 1 (1967).

²⁰⁹ *See infra* text accompanying notes 220-224.

²¹⁰ 517 U.S. 620 (1996).

²¹¹ 116 S. Ct. 1620 (1996).

and heterosexual couples as contrary to the equality clause of the Canadian Charter of Rights.²¹² However, in *Shahar v. Bowers*²¹³ a divided U.S. appeals court indicated that there was no first amendment free-association right to a religiously recognized intimate association between members of the same sex.

This article's analysis bears on these constitutional issues. Equal protection arguments depend on the state's reasons for distinguishing same sex and heterosexual marriage. The law condemned in *Loving* was intended solely to preserve white supremacy.²¹⁴ By contrast, the state may have legitimate interests in preserving the exclusivity of heterosexual marriage that are not based on simple anti-homosexual bias.²¹⁵ Recognizing preference/norm-formation as a compelling state interest provides a basis for refusing to recognize such marriages, even for courts that regard sexual-orientation discrimination as actionable.²¹⁶

With respect to *Romer*, although the Court implicitly held that some discrimination against homosexuals impermissibly denies equal protection, this applies only to laws singling out homosexuals for a *total* disability.²¹⁷ Mere denial of the right to marry probably is not so fundamental as to approach the total disability involved in *Romer*. By unbundling marriage into its contractual and non-contractual components, this article's analysis further clarifies the answer under *Romer*. A state that recognizes a foreign same sex marriage and permits the enforcement of the contractual elements of that marriage would clearly not be imposing a total disability even if it denied the spouses the same subsidies and tax breaks accorded heterosexual couples.

Less directly, *Romer* invites use of a compromise choice-of-law approach. Sunstein characterizes *Romer* as embodying a "minimalist" approach that seeks to build a national consensus on homosexuality rather than prematurely making the kind of sweeping statement that might trigger a counterproductive reaction.²¹⁸ As noted above,²¹⁹ Sunstein does not offer a precise mechanism for resolving producing consensus in the face of deep disagreement. For the reasons discussed in Part VI, private contracts and heterogeneous state regulatory approaches provide such a mechanism. To be sure, the Court retains an important role in protecting

²¹² Can. Const. (Constitution Act, 1982) pt I. See ; *Vriend v. Alberta* 1998 Can. Sup. Ct. LEXIS 19 April 2, 1998; *Egan v. The Queen*, 124 D.L.R. (4th) 609, 670 (1995) (S.C. Can.); *Miron v. Trudel*, 124 D.L.R. (4th) 693 (1995).

²¹³ 114 F.3d 1097 (11th Cir. 1997, en banc). This case involved weighing such a right against a state official's power to fire a state employee for engaging in such a relationship. It is not clear whether any right to intimately associate would carry with it a right to have the state confer the status of marriage on the association.

²¹⁴ See Sunstein, *supra* note 206 at 16.

²¹⁵ See *supra* §II(B).

²¹⁶ The trial court in *Baehr* found no such state interest on remand. See *supra* note 91. However, the court did not consider preference-formation arguments.

²¹⁷ A post-*Romer* decision enforced a municipal ordinance that removed only special protections for homosexuals, distinguishing *Romer* in part because the latter involved a more blanket restriction on homosexuals' rights. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* 128 F.3d 289 (6th Cir. 1997), *cert. den.* 66 USLW 3749 (October 13, 1998). ---It may be significant that the Court denied certiorari in this case, though three Justices wrote to caution against giving the denial precedential value.

²¹⁸ See Cass R. Sunstein, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, 159-62 (1999); Sunstein, *supra* note 189 at 181; Cass Sunstein, *The Dred Scott Case, With Notes on Affirmative Action, the Right to Die & Same-Sex Marriage*, 1 GREEN BAG 2d 39, 51 (1997).

²¹⁹ See *supra* note 191 and accompanying text.

fundamental individual rights. However, on a contentious issue like the acceptance of homosexuality, the Court should be sensitive to the potential advantages of state law in achieving consensus.

Choice of law ultimately may mesh with a Constitutional approach. The Court might decide that there is a Constitutional right to same sex marriage, or that full faith and credit does not mandate complete recognition of a decree dissolving a covenant marriage, but only after a state law consensus has developed through jurisdictional choice. Indeed, this may already have occurred with respect to other controversial types of marriage.²²⁰ The first example is inter-racial marriage. In 1952, thirty states, mostly in the West and South, banned multiracial marriages.²²¹ These states not only refused to enforce multiracial marriages but also imposed criminal penalties. Some, like the Virginia statute involved in *Loving*, penalized those who married elsewhere and returned to Virginia. Thus, the rule was one of both external and internal illegality. Nevertheless, by 1967, when *Loving* struck down such laws under the Equal Protection clause, about half of these laws already had been repealed, leaving the bans in place mainly in the South.²²² The shift seems partly due to the growing belief, beginning with a 1948 California decision,²²³ that these laws violated the Equal Protection clause. But varying state laws might also have had the effect of a referendum on interracial marriage. As racial attitudes changed, so did the interstate enforcement of the statutes. Ultimately the statutes themselves disappeared. The outcome of the referendum, which was becoming apparent in 1967, made the time ripe for the Supreme Court to reject miscegenation laws.²²⁴ A shift in opinion on same sex marriage indicated by state legal developments might similarly affect constitutional recognition of the right to same sex marriage.²²⁵

The second example is polygamy. Unlike interracial marriage, no state ever has enforced polygamous marriages.²²⁶ Jurisdictional choice was briefly available in this context, as Mormons seeking the right to polygamous marriage migrated to the territory of Utah. However, the federal government prohibited polygamy and made Utah's statehood contingent on rejecting

²²⁰ See generally Michael Grossberg, GOVERNING THE HEARTH (1985).

²²¹ *Loving v. Virginia*, 388 U.S. 1, 6, n. 5 (1967).

²²² See *Loving*, 388 U.S. at 6, n. 5.

²²³ See *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).

²²⁴ See *Loving*, 388 U.S. at ___, n. 5. The result was not constitutionally self-evident since the statutes facially treated the races equally and harmed whites seeking black partners as well as blacks seeking white mates, although to be sure the background of the laws strongly suggested a racial motive. For an argument against the *Loving* analogy to same sex marriage based on growing state rejection of anti-miscegenation laws prior to *Loving* and the absence of such a trend regarding same sex marriage, see David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 B.Y.U. J. PUB. L. 201 (1998).

²²⁵ See *Storrs v. Holcomb*, 168 Misc.2d 898, 900, 645 N.Y.S.2d 286, 287-88 (1996) (noting that its conclusion about the constitutionality of denying a right to same sex marriage may change because "a new consensus may emerge which the legislatures of the several states will see fit to recognize. Future legislation, perhaps, will authorize civil contracts in which same sex life partners will enjoy the right of survivorship as well as social insurance benefits now becoming available from private and public employers").

²²⁶ It has been argued state prohibitions on polygamy were passed because they favored men over women at a time when women did not have the vote. See Gary M. Anderson and Robert D. Tollison, *Celestial Marriage and Earthly Rents: Interests and the Prohibition of Polygamy*, 37, no. 2 J. ECONOMIC BEHAVIOR AND ORGANIZATION 169 (199_). Specifically, these laws favored average men, the dominant voters, over women and the superior males they would marry but for the laws. The laws tended to be passed in states that had higher ratios of women to men in manufacturing jobs, indicating the balance of desirable marriage partners.

polygamy.²²⁷ The constitutional context is at least theoretically analogous to inter-racial marriage, since Mormons had a constitutional argument based on the free exercise clause of the First Amendment for being allowed a form of marriage that was central to their religious beliefs.²²⁸ But unlike inter-racial marriage, no state was willing to "vote" for polygamy. Although federal law ultimately precluded effective competition, Congress, like the Court in *Loving*, might have acted otherwise had states not rejected polygamy so forcefully.

The jury is still out on same sex marriage, which still is not recognized anywhere. Notably, there is a kind of competition with respect to *non-recognition* of same sex marriage. Thus, conservative interest groups can counteract at the legislative level what homosexual rights groups win at the judicial level. Although most states have passed statutes providing for non-recognition,²²⁹ there are significant variations in the statutes²³⁰ and a significant minority of the states has *not* passed the statutes. It is no accident that these are the more politically liberal jurisdictions.²³¹ Thus, even at this early stage, the states already appear to be sorting on the issue of external legality.

Finally, it is important to keep in mind that the choice of law approach is fully consistent with *state* constitutional and statutory responses to the marriage debates.²³² Denial of the right to same sex marriage was held to violate the right to privacy under the Alaska constitution.²³³ The *Baker* decision in Vermont was based exclusively on a state constitutional provision promising "common benefits" to all Vermonters.²³⁴ A state constitutional decision preserves the viability of jurisdictional choice.

VII. CONCLUDING REMARKS

The debate over covenant and same sex marriage is marked by the clash of irreconcilable

²²⁷ The history is recounted in Grossberg, *supra* note 220 at ___ (noting that this was a Civil War era test of the federal government's power).

²²⁸ This argument was rejected in *Reynolds v. U.S.*, 98 U.S. 145 (1878).

²²⁹ See *supra* note 96 and accompanying text.

²³⁰ See *Coolidge & Duncan*, *supra* note 96.

²³¹ See Solimine, *supra* note 22 at 92-3.

²³² State statutory resolution may, however, be preferable to state judicial resolution under the public policy exception or state constitutional provision. Given the contentious nature of the issues surrounding marriage, it is better to seek resolution by elected legislators than by judges. The interplay of interest groups at the legislative level may help ensure outcomes that are efficient, or at least better reflect public sentiment. See Erin O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, (ms. 1999).

²³³ See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, Slip at 4 (Alaska Super. Feb. 27, 1998). The right to privacy argument was rejected in *Storrs v. Holcomb*, 168 Misc.2d 898, 899, 645 N.Y.S.2d 286, 287 (1996) in which the court noted that: "it would be a very long inferential leap, from this narrow premise, to the conclusion that a denial of a marriage license to a same sex couple destroys a fundamental right so implicit in our understanding of ordered liberty that neither justice nor liberty would exist if it were sacrificed."

²³⁴ The decision also reflected other peculiarities of Vermont law, including Vermont statutory recognition of childraising by same sex couples, which undercut an important state argument for distinguishing same sex and opposite sex couples. *Baker*, slip at 36 (noting that the Vermont legislature had authorized adoption by same-sex couples as well as court-ordered child support and parent-child contact after dissolution of a same sex "domestic relationship").

ideas about social institutions. This Article suggests a compromise based on interaction among different jurisdictions. State courts that do not recognize covenant and same sex marriages under local law might reasonably enforce the contractual aspects of such marriages when they have been validly entered into under the laws of another state. Concerns for paternalism, over-signaling, the coherence of internal rules, and the law's expressive or symbolic effect need not be accorded as much weight when it comes to recognizing the contractual elements of foreign marriages as when states make internal laws. At the same time, states should be able to control the local subsidies and tax and regulatory effects of foreign marriages. Individuals could thereby choose both the marriage rules that apply to them and their preferred cultural environments.

This approach does not satisfy everybody. Because symbols matter, those opposed to covenant or same sex marriage would object to any local enforcement, while those in favor would object to any limitations. But this article offers a compromise that attempts to achieve consensus rather than awarding complete victory to either side through a Constitutional rule. If the Court must ultimately take a stand, consensus-building based on jurisdictional choice is preferable to support-maximizing judicial politics Cass Sunstein advocates.

This approach has potential application to other legal issues that invoke clashes of beliefs similar to those relating to marriage. Numerous public debates, including those over abortion and the right to die, would gain from preserving jurisdictional choice rather than intervention by an absolutist, winner-take-all, Supreme Court decision. We should recognize the virtues of deferring to a multitude of state laws in debates where neither side is likely to be happy with a single rule.