MARRIAGE AND CHOICE OF LAW: CALLING A TRUCE IN THE CULTURE WARS

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ABSTRACT

The debate over covenant and same sex marriage is marked by the clash of irreconcilable ideas about social institutions. In this Article, we suggest a pragmatic solution that sidesteps the debate and focuses instead on how the rules of different jurisdictions interact. We suggest that, even if a state does not recognize covenant and same sex marriages entered into under its laws, it might reasonably recognize the contractual aspects of such marriages when they have been entered into under the laws of another state that does recognize them. The external rules of illegality a state applies under its conflict of laws rules might reasonably be narrower than the internal illegality rules it applies to domestic contracts.

Our proposal would usefully provide the benefits of state competition in the provision of law. There are many unanswered questions about covenant and same sex marriage, and our proposal would assist in answering some of these. By contrast, assigning victory to one side only in the debate would leave such questions unanswered. Thus, we would resist constitutional solutions that impose a national solution upon the states.

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CONCLUSION
Across the chasms of our cultural wars, there is broad disagreement about our fundamental institutions. There are perhaps no more fundamental institutions than marriage and the family. The debate over covenant and same sex marriages illustrates the depth of divisions over legal policy. Social conservatives are likely to support covenant marriages, in which the parties waive their rights to a quick, no-fault divorce, as a return to traditional family values, and to reject proposals for homosexual marriage as an extreme example of lifestyle liberalism and a threat to marriage. For their part liberals will tend to regard covenant marriage as a reactionary step that reintroduces notions of fault and responsibility in divorce proceedings, and support the legal recognition of homosexual unions as a means of permitting a minority group to flourish. When these values clash, the rhetoric may be hot. For example, one lifestyle liberal described a Congressional attempt to prevent the spread of same sex marriage as "an embarrassment to have been offered and an absolute scandal to have been signed into law."

The debate over marriage continues to attract attention, most recently focusing on same sex marriage, and specifically on the choice of law issue. Hawaii court decisions in 1993 and 1996 indicated that Hawaii would be the first state to recognize same sex marriage. Commentators immediately saw that the next step in the battle for recognition would be enforcement of Hawaii marriages elsewhere in the country, including the celebrants' home state. Since the first Hawaii decision in 1993 there have been more than 70 law review articles on this subject. A conservative backlash has resulted, and many states have enacted laws that purport to deny local recognition. These include recent referenda passed by wide margins in Alaska and Hawaii. All of this activity on the choice of law issue is particularly remarkable in the absence of any recognition of same sex marriage creating a choice of law.

The debate is not likely to end soon. Proponents of same sex marriage are

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1 See infra Part II.A.


3 See infra note 56 and accompanying text.

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 60 and accompanying text.

7 The vote was 68-32% in Alaska and 69-20% in Hawaii. See Lyle Denniston, *Voters in Alaska, Hawaii defeat initiatives on homosexual marriage; Washington state quashes affirmative action effort*, BALT. SUN November 5, 1998 at 15A.
pressing their fight in the courts\textsuperscript{8} and at the ballot box.\textsuperscript{9} Moreover, whatever the outcome of the debate on same sex marriage, it is only the latest of what promise to be an endless series of battles in the culture wars that have also included such matters as abortion, divorce and the role of women.

Our contribution to the already voluminous literature is an attempt to help the two sides find common ground. Many commentators (though by no means all) simply preach to the converted. They would enforce same sex marriages on the basis that they are no more objectionable than other non-standard marriages or they would ban them as more objectionable than other marriages. The truest believers claim to have the Constitution on their side.\textsuperscript{10} But that will leave the other side wholly unpersuaded. On the other hand, more agnostic commentators recognize the complexity and ambiguity of the issue. They would give judges the power to decide the same sex marriage issue in light of their own state's public policy.\textsuperscript{11} This approach defers resolution of the issue by giving power to judges, and therefore satisfies neither side. Moreover, by focusing on same sex marriage, it leaves unanswered the inevitable questions that will arise when new issues come along.

We offer a third alternative. Like the agnostic commentators, we eschew moral absolutes and do not take sides. At the same time, unlike these commentators, we do not merely leave the ultimate decision for another day. Rather, we look for a way that courts and legislators can resolve the issue by giving both sides in the debate as much as possible. And rather than stopping with same sex marriage, we offer an approach to other issues, specifically including covenant marriage -- the other side of the political coin.

The search for resolution begins by articulating as carefully as possible what separates the two sides. We take seriously the arguments on both sides, from the most quantifiable economics-based arguments to those at the most emotional or symbolic levels. We then look for a way to accommodate the competing positions within a multi-jurisdictional regime.

The key to resolving the marriage debate is to consider the extent to which marriages appropriately can be analogized to contracts for choice of law purposes. From this perspective, the question is whether and to what extent State A should enforce legal arrangements made in State B, where State A’s internal law bans such contracts but State B’s internal law would enforce them. A state will always apply its rules of internal illegality to in-state contracts, but might shrink from impugning out-of-state contracts through a rule of external illegality. Rules of external illegality would thus be narrower in scope than rules of internal illegality. If marriage were an ordinary contract, it would

\textsuperscript{8} See infra note 59.

\textsuperscript{9} 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.

\textsuperscript{10} See, e.g., William N. Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (Free Press. 1996); Mark Strasser, LEGALLY WED--SAME-SEX MARRIAGE AND THE CONSTITUTION (1997).

likely not be impeached under rules of external illegality. Most contracts that are valid in under the law selected by the parties are valid everywhere else. But is marriage to be treated like an ordinary contract? In particular, should we permit the parties to avoid internal barriers by marrying in a more liberal (or conservative) state?

Before answering this question, we must analyze the case for non-enforcement under rules of either internal or external illegality. Covenant marriages might give rise to paternalism and over-signaling concerns. Paternalist barriers to covenant marriage might be thought to protect parties from marriages that are difficult to exit. Barriers to covenant marriage might also prevent the parties from falling into the trap of signaling too strong a commitment, for fear that the failure to waive no-fault divorce rights would communicate doubts about the marriage. For their part, barriers to same sex marriages might serve to maintain the state's investment in the existing stock of "standard form" rules that govern the marriage. A state’s marriage regime also communicates societal views about the worth of relationships, and this may shape preferences about marriage. Recognizing same sex marriage places a stamp of approval on them, but the gains to homosexuals must be balanced against any costs that arise when heterosexuals see this as a devaluation of marriage.

These problems reflect the special importance of marriage in our society. But while they might inform the content of internal rules, they have less purchase in the design of external rules. In what follows, we show why there is less reason to overrule the parties’ choice when it would have been respected in the state whose laws they invoked. Thus, we recommend a choice-of-law regime that would let parties take advantage of any state's marital regime and give effect to their choice in other states. This would largely assimilate the marriage contract to general contract choice of law rules, which generally enforce the law the contracting parties have chosen. In this way, even a state that restricts the choice of matrimonial rules within its borders might offer an expanded menu of options through choice of law rules. The exception would be subsidies and tax breaks that each state should be able to decide for itself under its own definition of marriage.

Part I of the article discusses its philosophical foundation. In general, we offer a pragmatic approach that does not insist on a single answer to each of the issues in marriage law. Part II lays the foundation for this approach by discussing the debate over the most contentious marriage issues of no-fault divorce and same sex marriage. Part III introduces our suggested solution by discussing the law and theory of contractual choice of law and then applying that discussion to marriage. Part IV proposes that covenant and same sex marriages validly formed in another state be enforceable in the forum state, whatever its law of internal illegality on the matter.

Part V reinforces our suggested system by showing that, in application, it would not differ greatly from the existing law. The private, contractual aspects of marriage, such as the division of property rights, are already enforceable, even if marriage’s extra-contractual effects are not. Although marriage itself is seen as a special type of contract that requires special choice of law rules, more standard types of contracts lurk within marriage. Part VI moves from prescription to a prediction that, as with other contracts, jurisdictional competition will develop that will lead to efficient marriage rules.

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12 See infra text accompanying notes 116-128.

Part VII discusses the key limit on our proposal concerning subsidies and tax breaks. The idea that governments should have the power to decide how to dole out tax breaks and subsidies subject to constitutional restrictions would be uncontroversial but for the highly politicized nature of marriage, and particularly same sex marriage. Whether distinguishing between same sex and heterosexual marriage is appropriate depends fundamentally on the appropriate state policy toward homosexuality. Relegating same sex marriage to a lower status undoubtedly sends a signal about the acceptability of homosexuality. This symbolism, rather than the specific government action involves, seems to go to the heart of the issue. We show why this is not an appropriate reason for compelling all other states and the federal government to give full effect in this respect to a state's decision to permit same sex marriage.

Finally, Part VIII emphasizes that we should prefer to see states adopt the rule we propose through a process of jurisdictional competition, and do not advocate mandating this approach by constitutional rule or federal law. Thus, we would oppose constitutional barriers that fetter the ability of states to deny recognition to same sex or covenant marriage.

I. TWO KINDS OF MORAL THEORIES

This Part considers what the true believer will think a fatal objection to our proposal: there is no need to grant a right to opt into another legal system through choice of law principles when the one, true way is already known. It is then a simple matter of legislating away choices within one’s borders and, and refusing to enforce out-of-state contracts that conflict with internal rules. This would eliminate any difference between the scope of internal and external illegality rules.

We reject the true believer’s claim of omniscience, and argue for a less tendentious approach to legal reasoning. In general, we prefer pragmatists to absolutists, when it comes to the moralist as hypothetical legislator.

Pragmatists are willing to admit that their theories might need revision and therefore may deliberate with others, even over matters of morality. Confronted with different beliefs, pragmatists will pause before condemning them. They will pause longer when the beliefs are held by an entire society and have proven stable over a long period of time. Pragmatists might question their own beliefs in light of different beliefs held by virtuous and honorable people or search for circumstances or history that explain the differences. Even if they do not revise their own beliefs, pragmatists might be slow to recommend changes in the law. They might also conclude that the issue remains in doubt, and await further information from future experience.

For the absolutist, this is all chaff. The pause before condemning the other society betrays a want of confidence in one’s beliefs, and this is a moral fault in itself. Not infrequently, absolutists get rather personal when talking about pragmatists. “If they forgive others, then they’ll also forgive themselves. You can’t trust them.” The absolutist is also quick to see, in what others might regard as slender and benign change, a slippery slope descent into tyranny and oppression.

The distinction between pragmatist and absolutist is not always clear. Pure absolutists would be moral maniacs, refusing instruction even from their own religious leaders or colleagues. Similarly, the extreme pragmatist is a moral relativist, unable to condemn any other moral code, however unjust. If that were what the terms meant, we should want to reject both, and the distinction would not be a very useful one.
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To make the distinction useful, therefore, we would characterize as absolutists those who, while not moral maniacs, are quicker than pragmatists to judge other moral codes. Pragmatists, on the other hand, are not moral nebbishes or nihilists, but are still more cautious than absolutists in criticizing other moral codes. They are willing to learn from others without surrendering their critical faculties. In other words, their moral discourse resembles a debate they enter with strong principles but with less than complete certainty about the outcome. We therefore reject one of the absolutist’s central arguments, that a move to laxity in one respect means the abandonment of moral standards in all respects.

A dash of pragmatism might be quite useful amid the absolutism of political and legal discourse in fin-de-siècle America. There is little real debate today about issues that have moral overtones. Instead, positions are staked on either side of a cultural clash, and opponents anathematized. Many moral issues, such as abortion, homosexual rights, and affirmative action, are beyond discussion, in that few are willing to pay their opponents what Emily Dickinson called the compliment of reasoned opposition. Anti-abortion arguments generally get the same kind of hearing in faculty lounges as a defense of homosexual rights amongst born-again believers. Those who speak across the chasm of contrary opinion are rarities.14

One way to express absolutism is by turning debatable political issues into non-debatable constitutional certainties. Removing contestable issues from the table eliminates the hard work of assembling and reviewing evidence, balancing conflicting claims, and debating one’s opponents. Constitutionalizing an issue also sends a signal that opposing views are illegitimate. It is one thing to argue that opposing views are wrong, and quite another that they have no place in the political arena.15 In a debate over abortion, for example, we must expect disagreement. But we communicate something

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15 See Carter, Civility, supra note 14. Charles Taylor also notes that social conservatives will object to the ideas of their opponents. “But I suspect that a good part of the anger comes not from the measures themselves, but from what they see as the attitudes lying behind these measures. That’s because they identify the “liberal” philosophy which has dictated these measures as in its very essence dismissive, and even sometimes contemptuous of what their lives are centered on. They are not only being asked to make a sacrifice. They are being told that they are barbarians even to see this as a sacrifice.” Charles Taylor, Living with Difference mimeo at 5, Georgetown Law Center (1997). For an example of these dismissive attitudes, see Ronald Dworkin, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993). Dworkin argues that competing interpretations of life's intrinsic value are religious under the Religion Clauses of the First Amendment, and that legislating a position that overlaps with Catholic belief would amount to the establishment of that religion. The opposite is not true, however, when it is the secular humanists who win.
much stronger than mere disagreement when we argue that opposing views represent an improper attempt to establish a religion, and are thus somehow un-American. This implies that those with religious views about abortion (or same sex marriage) have a less privileged place in the political debate. This breeds contempt for one’s opponents and destroys the civility needed for political dialogue.

The distinction between absolutist and pragmatist is political and not philosophical. Kantian philosophers are more likely to be absolutists than are utilitarians, since one whose views are derived without the assistance of contingent facts will pay less attention to differences in norms. Indeed, it was precisely the fear that contingent rules might differ from one society to the next that led Kant to insist on non-contingent rules that apply universally in every society. The utilitarian is more likely to be sensitive to local conditions, since the way to maximize societal utility will often depend on a variety of circumstances that differ from one society to the next. However, a Kantian might derive a small stock of tort or criminal law rules from deontological first principles, and take a pragmatic position on most other issues. Similarly, the utilitarian who scorns other societies or rules that depart from those of his clique is an absolutist. Robespierre was a utilitarian, after all.

Our pragmatist need not be wedded to a particular epistemology, such as that of Charles Sanders Peirce. Legal pragmatism has been defined as “solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy.” This may resemble the pragmatism we describe. Our pragmatist will indeed be suspicious of theorizing. But one who sees his viewpoints as informed by a variety of sources might still be dogmatic.

Our pragmatism might instead be called Burkean. Burke preferred practical and


18 Burkean principles are seldom encountered in American law. The rise of federal civil rights encourages absolutist moral theorizing, in which an optimum set of rights is to be guaranteed across the country. From a conservative, originalist perspective, these rights are to be derived from the abstract principles to which the Founders subscribed; from a more liberal perspective, these rights are more likely to be discovered through abstract, egalitarian theories. Neither approach much resembles the way in which a Burkean might resolve issues of fundamental policy.

There are nevertheless some signs of a revival of interest in Burkean principles. See 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). In addition, the elegiac traditionalism of Mary Ann Glendon’s paean to an older generation of Harvard Law School teachers forcibly reminds us that we stand on the shoulders of giants. Mary Ann Glendon, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (Farrar, Straus & Giroux, 1994). For the views of one the most prominent modern Burkeans, see Alexander Bickel, THE SUPREME COURT AND THE IDEA OF
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historical experience over abstract theorizing, and the local and particular institutions of the “little platoons” over top-down rules. Our defense of contractual choice of law clauses also rests on principles of private ordering and devolution. Pragmatists are less ready than absolutists to impose their views on others and more willing to give them the liberty to arrange their affairs, including through private bargains. The pragmatist is also more likely to support devolution than the absolutist. To be sure, most Burkesians are social conservatives who would balk at flaunting tradition by upholding same-sex marriage. But the pragmatist need not be agnostic about desired end-states either. He might have strong views about the design of rules of internal illegality, while still supporting a measure a free choice through contractual choice of law. The pragmatist is not so certain about desired outcomes that he is unwilling to look to state competition for evidence.

II. THE CURRENT DEBATES OVER MARRIAGE

In the debate over marriage, the challenge for the pragmatist is to find a common ground in which both sides may find their concerns addressed. This must begin with a precise identification of the arguments for each position. In this Part, we discuss the case for and against covenant and same sex marriage, and in Part III we review general principles of free choice in conflicts of law. In Part IV we distinguish arguments that support regulation of marriage in a domestic context from those that support limitations on the parties’ freedom to choose the applicable law.

A. WAIVING NO-FAULT DIVORCE RIGHTS

Since 1975, every state has permitted divorce without proof of fault. Recently enacted laws in Louisiana and Arizona give the parties the option to elect a more


21 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 . . .


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).
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. Because courts do not enforce promises not to
divorce, 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. We next consider possible objections to
covenant marriage laws. Part IV discusses whether these objections justify barriers of
external as well as internal illegality.

1. Reasons for the covenant marriage option

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," 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 having
children, offering each other material support or buying a house) affected by divorce.
These pathologies mutually reinforce one another.

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. One or both of the spouses likely will make investments in raising
children. Those who invest in children may forego valuable opportunities to develop

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

25 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.

26 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

27 Brinig & Buckley, supra note 24.


29 They may, of course, contract out the work to nannies or day care. Such couples will make
fewer marriage-specific investments and therefore have less need for covenant marriage.
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.\(^{30}\)

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.\(^ {31}\) 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.\(^ {32}\)

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,\(^ {33}\) they probably do not fully compensate the homemaker for her opportunity costs.\(^ {34}\) 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.\(^ {35}\)

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


\(^{31}\) See Becker, *supra* note 28.


\(^{34}\) See Cohen, *supra* note 30.

that it reduces divorce rates, for children are often the principal victims of divorce.\footnote{36} 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.\footnote{37} Covenant marriage 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.\footnote{38} 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.

Even with the covenant marriage option, many couples will prefer to retain no-fault exit rights. However, it is not proposed that covenant marriages be made mandatory. Instead, the case for covenant marriage rests on the simple proposition that it offers a useful option.\footnote{39} The question is whether there is any reason why couples should be denied this choice. The following subsections address this question.

2. Paternalism

Some 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. However, such gains must be balanced the benefits of covenant marriages for parties whose marriages are thereby made more durable, and who might have


\footnote{37} See Jon Elster, \textit{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, \textit{A TREATISE ON HUMAN NATURE}, III.II.v (1739).


\footnote{39} 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.
divorced under a no-fault regime. The question is therefore 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, as a presumptive rule.

Nevertheless, there might seem to be special reasons for concern, when the choice is over divorce rights at the time of marriage. Young adults make the election when they are (one hopes) deeply 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.

It is 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. In addition, survey data about divorce expectations are inconclusive, since couples may appreciate the risks of divorce even if they misreport them.

Ironically, feminist writers sometimes argue for paternalistic barriers to free contracting in marriage. Many feminists believe that men are better bargainers than women, and that free bargaining promotes one-sided agreements. Women are also thought to be more risk averse, and therefore more willing to make concessions in negotiations. But it is permitted to doubt how strong such arguments are. 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. Secondly, 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. If women need paternalism, one might more plausibly withdraw the no-fault option from them.

Thirdly, 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

40 See Rasmusen & Stake, supra note 21, at 470-72.

41 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).


44 See Wax, supra note 43.

45 See Brinig & Buckley, supra note 24.

46 See Rasmusen & Stake, supra note 21 at 473.
position at that time and therefore might reap a greater advantage than men from the
opportunity to bargain.\footnote{47} Fourthly, 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.\footnote{48} It also might require the parties
to attend counseling sessions before signing on to a covenant marriage, as under the
Louisiana statute.\footnote{49} 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. External costs of preserving bad marriages

Apart from paternalism, a second argument against covenant marriage is that it
can impose costs on parties other than the spouses. Preserving a bad marriage may hurt
the children.\footnote{50} But these effects are, at worst, ambiguous, for children are the primary
beneficiaries if covenant marriages reduce divorce rates. Moreover, there is little reason
to suppose that the spouses will not take prospective costs as well as benefits to their
children fully into account in deciding whether to have a covenant marriage.

Rocky marriages also impose a strain on the court.\footnote{51} 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.\footnote{52} If covenant marriages reduce
divorce levels, they might then reduce litigation levels.

\footnote{47} Id.

\footnote{48} See Elizabeth Scott & Robert Scott, supra note 36.

\footnote{49} See supra note 21.

\footnote{50} 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 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

\footnote{51} See Ann Laquer Estin, Economics and the Problem of Divorce, 2 U. CHI. L. SCH.

\footnote{52} See Rasmusen & Stake, supra note 21 at 470-72.
4. Over-signaling

One of the advantages of covenant marriage discussed in subsection 1 – 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.53

Over-signaling concerns offer a weak 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. However, the case for covenant marriage is strong enough that, even if State A residents do not wish to offer a covenant marriage option for State A marriages, they might reasonably wish to recognize covenant marriages contracted in other states that uphold them.

B. SAME SEX MARRIAGE

Lifestyle liberals, and particularly homosexual activists, have long advocated that gays should have the right to marry.54 The debate about same sex marriage has continued for some time55 but recently became more pressing when a Hawaiian court held that the refusal to recognize same sex marriages constituted unlawful discrimination56 and a judge in Alaska held that individuals have a fundamental right to choose a "life partner."57 No states have yet authorized same sex marriage. The Hawaii and Alaska court decisions

53 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).

54 See generally, Eskridge, supra note 1010.


56 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 "furthers 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.

were recently overturned by referenda. 58 Other decisions are pending.59 Meanwhile, a majority of states have passed anti-same-sex-marriage laws, sometimes referred to as "little DOMAS," a reference to the federal Defense of Marriage Act.60

For conservatives who propose expanded choice through covenant marriage, same sex marriage is the reverse of the medal. Covenant marriage permits a heterosexual couple to opt into a stronger kind of union than is available at present. Recognizing same sex marriages would permit homosexual couples to do the same. But the arguments for and against the two kinds of marriage are different, and support for one does not entail support for the other. The principal difference is that recognizing same sex marriages would place a seal of societal approval on homosexual relationships, and this remains controversial goal. 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. But if symbolic effects count, such gains must be weighed against the costs of diminishing the institution of marriage in the eyes of traditional heterosexuals. Applying the same set of rules to two very different kinds of relationships might also be thought to render marriage rules incoherent.

1. Reasons for allowing same sex marriage

Proponents of same sex marriage have emphasized the benefits for homosexual couples. In other words, the asserted benefits of same sex marriage are, to some extent, the same as those for heterosexual marriage. First, 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.61

Second, letting same sex couples marry allows them to opt into the elaborate standard form framework that is now available to heterosexual couples.62 This includes, among many other things, rules regarding ownership and inheritance of property and dissolution. These rules are particularly suitable for a long-term domestic relationship. Perhaps most importantly, they make break-up costly. 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

58 See supra note 7 and accompanying text.


60 The current tally is on the websites www.pono.net and www.ftm.org. For analyses of these state laws, 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); 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 11 at 965-70 (noting that the statutes are vague and leave substantial room for judicial interpretation).

61 These benefits are discussed in more detail in infra Part VII.

62 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).
relationship, and this will reduce the probability of a subsequent break-up. 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.

Third, marriage sends a signal of social approval of homosexual relationships. Indeed, for homosexuals, symbolic effects are perhaps the chief benefit of same sex marriage, a final obstacle in the pursuit of social acceptance. 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 preferences in more detail below.

These are obviously all advantages for same sex couples. The rest of this Section discusses whether such gains exceed the costs that conservatives attribute to same sex marriage.

2. Tradition

Recognizing same sex marriages would represent a sharp change in a major social institution, and this argues for prudence. As Burke 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.” The existence of a settled tradition, concerning a fundamental institution, should give one pause before welcoming radical changes. “Instead of exploding general prejudices,” theorists might better “employ their sagacity to discover the latent wisdom which prevails in them.” Where such traditions appear to have some social benefit, they should be accorded a respectful hearing. Claims that such institutions have no essential meaning, and are simply defined over time by society, simply ignore this point. As we learned from Jules and Jim, it


64 Although couples might bind themselves by contract (e.g., house purchases), see infra text accompanying notes 164-165, 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.


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

67 Id. at 87.


69 For similar reasons, we reject the epistemological turn when it is employed by conservatives, as where it is argued that the essential meaning of "marriage" is a union between a man and a woman. See Jay Alan Sekulow & John Tuskey, Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible, 12 B.Y.U. J. PUB. L. 309 (1998). All such arguments commit a variant of the naturalistic fallacy: from the proposition that an institution might be defined differently, it does not follow that it should be defined differently; and from the proposition that an institution is defined
often does not make sense to "start from zero and rediscover the rules."  

As potent as the argument from tradition might be, its limitations must be recognized. A settled tradition might strengthen the conservative position, but does not provide an independent reason to reject proposals for change. 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.

3. Effect on the marriage standard form

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. 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, some people may have to incur the costs of bargaining around, or being bound by, ill-fitting rules.

Recognizing homosexual marriages might exacerbate the problem of ill-fitting default rules. 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. 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 in a particular way, it does not follow that it should be defined in that way.


72 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).

73 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).

74 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 grater understanding of the need for extramarital outlets between two men than between a man and a woman." Sullivan, supra note X, at 202.
costs in foregoing a career, and reflect the bargain the parties would likely have struck at marriage.

Second, the different types of marriage 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. But this is merely to say that, like every rule, matrimonial law is both under- and over-inclusive. Laws regulating the speed limit suffer from the same defect: while some people can drive safely at 100 mph, others cannot do so at 50 mph. The value of, say, a 75 mph speed limit, is that it avoids a judicial inquiry into driving ability. If most heterosexual marriages result in children, and very few homosexual couples would raise children, then different standard forms 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.

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 would want same sex unions blessed by the full state imprimatur.

4. The preference-shaping function of marriage law

The argument in subsection 3 takes as given the parties’ preferences and seeks 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.  

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75 See generally, Gary S. Becker, ACCOUNTING FOR TASTES (1996) (arguing that a person's "meta-preferences" at any given time have been shaped by many influences, although once formed are
Marriage law functions in two ways to change preferences.\textsuperscript{76} In a direct sense, by changing costs and benefits of certain relationships, marriage law encourages individuals to prefer the relationships that most benefit society.\textsuperscript{77} By changing the costs and benefits of certain behavior. Through subsidies, tax benefits and other preferences benefiting legal spouses, marriage law encourages cohabitation and child-bearing in a particular type of long-term partnership -- companionate marriage.\textsuperscript{77} This has been referred to as the "channeling" function of marriage law.\textsuperscript{78}

Less directly, marriage law expresses society's approbation of certain behavior,\textsuperscript{79} such as heterosexual sex and companionate marriage, and thereby helps to make that behavior a norm.\textsuperscript{80} People engaging in the approved behavior gain benefits, as by sending favorable signals about their reliability or socialization\textsuperscript{81} and more generally by earning the esteem of others in their group.\textsuperscript{82} In this way marriage law defines the "social meaning" of a particular type of cohabitation.\textsuperscript{83} 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.\textsuperscript{84} From this perspective, activists' push for same sex marriage function can be seen as a move by "norm entrepreneurs"\textsuperscript{85} to legitimize homosexuality. This is part of what has been termed the social construction of attitudes about homosexuality.\textsuperscript{86}

\textsuperscript{76} Although these functions of marriage law suggest a role for the state in marriage, other views are possible. See Carter, Defending, supra note 14 (arguing that state involvement in marriage is harmful to marriage values).

\textsuperscript{77} The attributes of this relationship are described in Posner, supra note 74.


\textsuperscript{82} See McAdams, supra note 80.


\textsuperscript{84} As discussed infra at note 223, 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.

\textsuperscript{85} See Sunstein, supra note 79.

\textsuperscript{86} See Eskridge, supra note 10.
Choice of Law and Marriage

The normative implications of this analysis are ambiguous. On the one hand, this analysis furnishes a conservative argument for same sex marriage to the extent that it encourages heterosexual 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 homosexuals, desirous of "civilizing," of embourgeoising, the homosexual community--turning homosexuals into the Republicans they ought to be."\(^{87}\) At the same time, the analysis supports a conservative argument against homosexual marriage on preference-formation grounds to the extent that it encourages homosexual relationships by conferring the benefits of marriage. But this argument has force only to the extent homosexuals make choices about their behavior. Data suggesting that they do not thus bears on this argument.\(^{88}\)

The preference-formation argument for refusing to recognize same-sex marriage is on more solid ground to the extent that emphasizes the need to reinforce heterosexual marriage, rather than heterosexuality. This argument assumes that heterosexual unions benefit society more than same sex unions and therefore deserve more recognition. The benefits of heterosexual marriages are those of the children to which they are born and in which they are raised. The conservative would argue that it is better that couples who raise the children are of different sexes. A mother and father give the child two gender role models that contribute to its psychological development. More importantly, only in a heterosexual union are both parents genetically related to their children. This motivates parents to act altruistically toward their children. These benefits extend beyond the children themselves to society at large, for well-functioning families form part of a society’s "social capital."\(^{89}\)

This assumes that a state might reasonably take an interest in the quality of its rising cohort of children. In addition, the state might also be interested in the quantity of children, and offer procreation subsidies to promote births. To the extent that state monetary subsidies are tied to marriage, they may therefore be seen as a device to incentivize parents to have children. Such subsidies might seem entirely reasonable, given the costs of child-rearing today relative to the past.\(^{90}\) If procreation and child-rearing subsidies commend themselves, offering a similar subsidy to childless same sex couples would be inappropriate.\(^{91}\) To be sure, procreation subsidies will be struck down if

\(^{87}\) Richard A. Posner, Should There Be Homosexual Marriage? And If So, Who Should Decide?, 95 Mich. L. Rev. 1578, 1582 (1997). See also Carter, Defending, supra note 14 at 227 (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).

\(^{88}\) See Posner, supra note 74 at 572, n.25; Posner, supra note 87 at 1583-84.

\(^{89}\) 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 most 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 Becker, supra note 75 at 12-16; James S. Coleman, FOUNDATIONS OF SOCIAL THEORY (Harvard, 1990).

\(^{90}\) The increased costs of child-raising are a function of a variety of factors, including (1) the decline of family-based enterprises such as farming, (2) the rise of an information economy and the need for large human capital investments, and (3) the decline in public schools.

\(^{91}\) See Posner, supra note 74 at 313 (arguing that permitting same sex marriage confers
they discriminate on the basis of race or religion. But this is not a problem for a subsidy that is neutral as to the child’s identity, and discriminates only between those households that can and those that cannot have children.

This does not make the case for the ban on same sex marriages, however, unless their recognition would weaken heterosexual unions. Recognizing same sex marriage would weaken the sacramental respect accorded marriage by those who think homosexual sex wrongful. Once the bounds of traditional marriage are erased, where are we to stop? Why homosexual and not polygamous marriage? For many, recognizing non-companionate unions would devalue marriage. Yet recognizing homosexual but not polygamous marriages promotes the former and stigmatizes the latter. Although polygamous unions are condemned by religious norms, this should not matter in a religiously neutral state, and in any event does not distinguish polygamy from same-sex marriage. After all, several major religions still regard same sex marriage as sinful. Any reduction of incentives to marry, as by weakening the sacramental respect accorded marriage, might have serious repercussions when combined with other recent developments that have depressed marriage rates and raised divorce rates. This potentially hurts everybody. While the present generation of homosexuals might be indifferent to the institution of heterosexual marriage, future generations of homosexuals have a stake in the marriages in which they will be raised.

Apart from its basis in the science of homosexuality, this approach makes more sense from the standpoint of norm formation. Laws usually are more effective when they reinforce a long-standing tradition that instills a habit of obedience than when they try to change existing norms. Thus, it may be less practical to try to change the existing marriage norm than to reinforce it.

Preference-formation considerations become important in light of arguments that recognition of same-sex marriage is constitutionally compelled on equal protection grounds. Recognizing preference-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.

Advocates of same sex marriage can hardly disagree with the existence or importance of symbolic effects since their strongest arguments for recognition assume them. First, the denial of recognition signals the state’s disapproval of homosexuality, which gay rights advocates say imposes substantial costs upon homosexuals whether or inappropriate subsidies).}

92 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 not 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.

93 The argument based on religion might cut the other way, against state recognition of any marriage. This would not only avoid offending religious groups by sanctioning types of marriages they do not embrace, but would place marriage on a more secure spiritual footing. See Carter, Defending, supra note 14.

94 See infra text accompanying notes 243-247.

95 The trial court in Baehr found no such state interest on remand. See supra note 56. However, the court did not consider preference formation arguments.
not they might seek to marry. Second, expressing a preference for permanent relationships by authorizing same sex marriage might stabilize homosexual relationships. Third, over the long run, recognizing same sex marriage might facilitate changes in existing social roles that some have argued are necessary in order to reduce the loss of individual autonomy caused by the institution of the family. Fourth, consistent with the strict egalitarian grounds embraced by the Canadian Supreme Court, anti-homosexual sentiments could be regarded as a similar to racial prejudice, a kind of personal preference the law should seek to change.

In general, we do not take sides in the debate over whether states should allow same sex marriage. In the construction of internal rules, the two positions are irreconcilable and essentially unverifiable. Absolutists in both camps would see little reason for external rules of illegality to differ from internal rules. However, in the next two Parts, we suggest that moderates who disagree about rules of internal illegality might find room to agree about external rules.

III. THE PRAGMATIC APPROACH: CONTRACTUAL CHOICE OF LAW

Contractual choice of law offers a pragmatic solution to the competing positions discussed in Part II. This Part introduces the contractual choice of law model, while the next two Parts develop its implications. Section A of this Part places marriage in the general framework of the law and policy of permitting parties to choose the applicable law in their contract. Section B then focuses on marriage.

A. ENFORCEMENT OF CHOICE OF LAW CLAUSES

In marriage as in other legal settings the parties have some ability to choose their legal regime. 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. To the extent that states compete for citizens, 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, but was first discussed by Frederick Jackson Turner at the end of the last century (when states more clearly perceived increased population as a

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96 See supra text accompanying 65.

97 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 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.”

98 See supra text accompanying notes 244-245.

Substantial locational sorting occurs, as indicated by the fact that more than 40% of Americans live in states other than the one in which they were born.

Requiring migrants to choose all the laws that govern their affairs through a single jurisdiction choice unnecessarily constrains them. 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 are permitted to specify by contract the law that governs their contracts, corporations, or marriage. It is somewhat more costly if the parties actually have to visit the foreign state, and contract in it before its law can apply, and costlier still if one had to reside in the foreign state. For major contracts such as marriage, however, such costs might not be unduly burdensome, particularly when states design lax residency requirements in part with an eye to the hotel and tourist trade.

When choice of law decisions are effectively costless, the parties may easily undo a state’s internal illegality rules. Provided third party effects do not intrude, this is desirable, since free choice of law can be expected to result in a race to the top that yields the benefits of more efficient laws with fewer error costs. States can be expected to compete for legal consumers, with the winner of the competition being the state with the best set of laws. But 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.

It is often difficult to accommodate these competing considerations. One method, adopted by the Canadian Supreme Court on homosexual rights, is to impose a national solution that overrides provincial laws and limits what the parties may bargain over through broad illegality rules. This approach commends itself when one is certain of the right result, and does not need the information jurisdiction choices might provide about desirable outcomes. But since we should like to have precisely such information before offering policy prescriptions, we reject absolutist solutions of this kind. Another approach is to bypass sovereignty concerns by minimizing public policy differences among states or other jurisdictions. For example, Larry Kramer deals with the choice of

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

102 See generally Ribstein, supra note 13.

103 There was little to suggest, when the Charter was adopted, that it would one day be employed in aid of homosexual rights. Section 15 specifically proscribes nine kinds of discrimination, but does not list discrimination on the basis of sexual orientation. Nor would one have guessed that the courts would expand the list to include homosexuals, given Canada’s conservative tradition of statutory construction. Moreover, section 1 of the Charter provides that §15’s equality rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Yet in Miron v. Trudel, 124 D.L.R. (4th) 693 (1995), the Court held that the Ontario Insurance Act’s denial of spousal benefits to unmarried heterosexual partners violated §15. More recently, the Court held that, under the Charter, the Alberta Human Rights Code should be deemed to ban discrimination on the basis of sexual preference, even though the Code was silent on the matter. Vriend v. Alberta 1998 Can. Sup. Ct. LEXIS 19 April 2, 1998.
law issue in same sex marriage by positing similar value systems across the states. This would sweep under the rug the sharp differences of opinion regarding many aspects of same sex marriage discussed in Part II. Moreover, an ad hoc approach that focuses on same sex marriage does not provide a way to resolve other types of controversies. It is far from clear that a lifestyle liberal who sees no problem with same sex marriage would reach the same conclusion regarding covenant marriage.

The question when to enforce a choice of law clause, such as an agreement to be bound by the marriage laws of another state, requires an analysis of the benefits and costs of enforcing jurisdictional choice. We turn to this analysis in subsections 1 and 2 below. Subsection 3 reviews the current legal restrictions on contractual choice of law.

1. The benefits of jurisdictional choice

There are four main benefits of allowing the parties freely to choose the applicable law. First, there is a certainty effect. Enforcing the parties' choice eliminates 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.

A second benefit is the sorting effect. Enforcing party autonomy regarding the applicable law 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. This benefit is important to the extent that there is no clear "winner" or "loser," but rather a number of suitable regimes. 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, a critical qualification as we shall see, people can choose where to live and where to marry based on their differing preferences for family law.

The third benefit is the referendum effect: jurisdictional choice provides a mechanism for "voting" on various legal approaches. This is important for the pragmatist who seeks evidence about optimal legal regimes. Choice of law acts as a mechanism for discovering superior rules by observing society's selections from a menu of jurisdictional choices.

Finally, there is a competition effect. 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. Legislators can earn political

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105 See generally Ribstein, supra note 13.


107 For commentary making this point regarding choice of law rules in marriage, see Solimine, supra note 11 and Koppelman, supra note 11. For commentary relying on sorting as a reason to emphasize state over federal law in this area, see Dailey, supra note 79.
rents, such as a campaign contributions,\footnote{108}{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).} by redistributing wealth among interest groups that have different costs of organizing to promote or defeat laws.\footnote{109}{See generally, Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (1965).} The history of polygamy is a possible example of this in marriage law. Gary Anderson and Robert Tollison write that anti-polygamy laws were passed because they favored men over women at a time when women did not have the vote.\footnote{110}{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.} 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.

2. The costs of enforcing choice of law clauses: the race to the bottom

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.\footnote{111}{See Lea Brilmayer, CONFLICT OF LAWS at 206 (2d ed. 1995).} 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.\footnote{112}{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).} 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.\footnote{113}{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.
example, those who say that Delaware has won a race to the bottom in corporate law note that out-of-state shareholders bear the costs of any inefficient corporate laws. If the choice of Delaware law controlled only for firms most of whose shareholders lived in Delaware, however, Delaware legislators would be more likely to be concerned about the effect of its laws on shareholders. Analogously, a state might become a marriage mill by selling licenses to those who plan to live out of state, and who indeed might not even enter the celebration state.

One way to deal with this problem is to restrict choice of law clauses to states with which the parties have significant contacts. But there are several problems with this approach. First, 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. Requiring contacts between the contracting parties and the enacting jurisdiction might then be unnecessary to ensure that states internalize the costs of their laws. For some kinds of laws, such as insolvency, this may be insufficient, since the gains from exporting costs are substantial even if local costs in the enforcing state are also high. But in marriage the costs of inefficient laws will be largely internalized within the enacting state and the danger of spillovers minimal.

Second, even if very few of the contracting parties have contacts with the enacting jurisdiction the legislators may be adequately disciplined by markets in which their laws compete. This is plausibly the case, for example, for Delaware corporate law, since shares in publicly-held Delaware firms are priced in efficient securities markets and must therefore be made attractive to investors, Otherwise corporate managers could not raise capital cheaply. There is evidence that this has happened, and that the corporate race was to the top. This is not, however, likely to be a significant consideration regarding marriage laws.

Third, even if local contacts help ensure that jurisdictions internalize the costs of their laws, requiring such contacts may not be efficient because barriers to contractual choice of law impede the efficiency-promoting aspects of jurisdictional choice. The more difficult it is for contracting parties to exit wealth-redistributing laws, the greater is legislators' ability to enact these laws. In the case of marriage, as we will see, the requirement of local celebration is not likely to seriously impede competition, while it provides some assurance that the competition is efficient.

Finally, requiring the couple to have significant contacts with the celebration state may be insufficient as well as unnecessary since marriage law necessarily has external effects in the state where the married couple lives. As discussed more fully in Part IV, an alternative approach is to ask what types of external effects should justify a jurisdiction in refusing to enforce another jurisdiction's law.

3. Enforcement of choice of law clauses

The dominant rule in American choice of law today is to enforce the law


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

U.S. courts did not, however, always take this position. At the time of *Vita Food*, American courts were unwilling to enforce contractual choice of law clauses. In this, they followed Joseph Beale, who had argued that, as contracts were not binding without legal recognition, it was illogical to permit the parties to contract concerning the law governing contract validity. There were, however, some inconsistencies in Beale's analysis. Since the vested rights theory gave individuals the power to determine the applicable law by choosing the place of contracting, it arguably follows that they should be able to do so by specifying a foreign law in their contracts. Nevertheless, Beale was concerned about the impracticability of allowing the parties "even if they acted *bona fide*, to select some strange foreign law to govern the obligation merely because it seemed to the parties that such a law was just or desirable."

American law eventually came around to the *Vita Food* position. Ironically, this occurred despite the ascendancy of "interest" analysis, which emphasizes the interests of governments rather than (as did Beale) the rights of private parties. 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. 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." 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 absence of an effective choice of law by the parties." This exception is consistent with *Vita*

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119 Id. at 1081 (referring to the laws of China and the countries of Central America).

120 See Brilmayer, *supra* note 111 at 110. 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).

121 See Ribstein, *supra* note 13 at 261-66 (discussing these exceptions).

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

123 *See* *RESTATEMENT (SECOND) OF CONFLICTS, §187(1)(b) (1971).*
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Food itself, as well as with the conflicts rules of every country. However, the scope of the exception is unclear. 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." 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.

In sum, the principle of free choice of law is well recognized in American conflicts of law. Such rules usefully promote the race to the top discussed in Part A above.

B. CHOICE OF LAW IN MARRIAGE

Marriage is a contract, but raises more issues concerning enforcement than most contracts. As noted in Part II, there must be a heightened concern for symbolic effects in so fundamental a law as marriage. In addition, the spouses might be overly optimistic when making their commitment, so as to pose paternalism concerns. Enforcing various types of marriage might also affect the signal sent by marriage. Finally, the status of marriage may confer special regulatory prizes or burdens on the parties, through tax, pension, and welfare laws. These problems do not mean that marriage cannot be viewed as a contract, but only that a special regard must be had for such problems when deciding whether to recognize a marriage. What matters is not the “contract” characterization, but rather the reasons why a rule of incapacity or illegality might be imposed.

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. Although the public policy exception seems to provide a potential escape route, the courts frequently uphold marriages that are valid where made but barred by the internal domicile law, and this authority is reinforced by statutes that specifically provide that a marriage valid where entered into is valid everywhere. Thus, courts generally distinguish internal and external illegality, reflecting a strong policy favoring certainty regarding the validity of a

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


126 See generally Monrad Paulsen and Michael Sovern, Public Policy in Conflict Of Laws, 56 COLUM. L. REV. 969 (1956); Ribstein, supra note 13 at 264-66.

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

128 Dicey Rule 182. Dicey and Morris, supra note 125 at 1202.

129 See RESTATEMENT (SECOND) OF CONFLICTS, §284 (1971); RESTATEMENT OF CONFLICTS §132 (1934); Scoles & Hay, supra note 106 at 438.

130 Id. at 444-45.

131 Id. at 439; Kramer, supra note 104 at 444-45.
Would external rules 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, 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. 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. Thus, the public policy exception might sharply limit the interstate recognition of same sex marriage, depending on what non-recognition entails. The rule would at least leave the issue for case by case adjudication. 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. This is analogous to the treatment of corporations for choice of law purposes. The status approach to marriage has some important implications for choice of 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

132 Id. at 445.

133 See Bartholemew, Recognition of Polygamous Marriages in America, 13 INT. & COMP. L.Q. 1022 (1964); Dicey & Morris, supra note 125, at 629; Scoles & Hay, supra note 106 at 458-59.

134 See Koppelman, supra note 11; Solimine, supra note 11 at 98.

135 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 11 (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); Posner, supra note 87; Solimine, supra note 11 at 95-6.

136 See Koppelman, supra note 11 at 985-86 (suggesting that such litigation may be the best resolution short of a political solution).

137 See Maynard v. Hill, 125 U.S. 190, 210-11 (1888); Scoles & Hay, supra note 106 at 430.

138 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 (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.
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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). Thus, monogamous heterosexual marriages valid under the law of the celebration state 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. 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, although others do recognize domestic partnerships or are ambiguous on contractual incidents of marriage.

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. Thus, a Nevada divorce might end a Louisiana covenant marriage even if the divorce is contrary to Louisiana law. This suggests a limited future for covenant marriage laws, short of a new federal law or constitutional amendment, 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. 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.

The application of contractual choice of law to marriage is, therefore, unsettled. The critical question is whether this would lead to a race to the bottom. In general, interstate enforcement of marriage rules has led to liberalization of statutory restrictions on such matters as common law marriage and minimum age requirements. In the end, legislatures coordinated around lowest common denominator uniform laws such as the

139 See Scoles & Hay, supra note 106 at 433.
141 For a detailed summary of the statutes on this issue, see Coolidge & Duncan, supra note 60.
142 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).
143 As of this writing, only two states had passed covenant marriage laws, although 17 have considered doing so. See Whelan, supra note 42 (suggesting that "people are waiting for role models" who have chosen covenant marriage before deciding to do so themselves).
144 See infra text accompanying notes 236-239.
Uniform Marriage and Divorce Act and the Uniform Pre-marital Agreement Act.\textsuperscript{146} But this may indicate a race to the top rather than to the bottom, as indicated by the liberalization of miscegenation barriers.\textsuperscript{147}

On the other hand, the choice of law rules regarding marital dissolution clearly are conducive to a race to the bottom in divorce law. States can compete for migrants through lax divorce laws as they once competed for deadbeat debtors through lax insolvency laws. Divorce laws were always more lax in western states such as Nevada, which sought migrants from more restrictive eastern states.\textsuperscript{148} The competition for migrants may explain why all states liberalized their divorce laws.\textsuperscript{149} Even current migration patterns are consistent with the hypothesis that lax divorce laws attract migrants.\textsuperscript{150} 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 divorce state from the original family in the marriage state. Moreover, states such as Nevada sought to become divorce havens in just the same way that Delaware become the choice for incorporation. In both cases, attracting legal business had important benefits within the state while imposing some costs on divorced families elsewhere. For example, local lawyers and hotels benefited directly when Nevada won the race to laxity.

In sum, barriers to free contracting may be inefficient. In Whether enforcement is conducive to a race to the bottom depends on whether a state has sufficient incentives to enact efficient legislation because costs are internalized within the state rather than exported to other states. The next Part explores this question.

IV. THE CASE FOR INTERSTATE ENFORCEMENT OF MARRIAGE RULES

The contractual choice of law model discussed in Part III offers a pragmatic solution to the seemingly intractable marriage debate discussed in Part II. This Part applies this model to marriage by proposing a rule of interstate enforcement of the spouses' chosen marriage regime. Under this rule, rules of external illegality would be narrowly drawn, and most aspects of the parties' marriage would be enforced everywhere if legal in the marriage state. This Part and the next lay out the general analysis. Part VI takes a positive approach, showing that interstate enforcement is, indeed, likely. Part VII discusses the limitations of this approach--that is, the aspects of marriage that should not necessarily be entitled to interstate enforcement. In general, the difference concerns the elements of marriage that are contractible as distinguished from those that necessarily arise as a matter of regulation, taxes or subsidies.

This choice of law approach accommodates the various approaches to marriage

\textsuperscript{146} This is consistent with the work of the National Conference of Commissioners on Uniform State Laws in other areas of the law. See Larry E. Ribstein & Bruce H. Kobayashi, Economic Analysis of Uniform State Laws, 25 J. LEG. STUD. (1996).

\textsuperscript{147} See infra text accompanying notes 203-208.


\textsuperscript{149} See Scoles & Hay, supra note 106 at 452-3.

\textsuperscript{150} See Brinig & Buckley, supra note 24.
issues discussed in Part II through the diversity of approaches offered in a federal system. States might enforce covenant and same sex marriages entered into in states that recognize them even if they do not recognize such marriage domestically. In other words, illegality in choice of law might not be the same thing as illegality in private domestic law because a state’s public policies have a weaker purchase in foreign contracts. In the language of French private international lawyers, the scope of the order public externe may be narrower than the ordre public interne.\textsuperscript{151}

The question we pose is whether a state’s public policy barriers against covenant or same sex marriage should be considered a matter of external as well as internal illegality. The problem in resolving this issue is that interstate recognition of marriage necessarily involves some out-of-state spillovers, and therefore a potential race to the bottom. The consequences of marriages, such as those to children and to the spouses themselves, and more subtle effects on marriage law, are felt where the family lives rather than where the marriage is performed. Indeed, states may compete for the local benefits of performing marriages, such as tourism, while exporting the costs to domicile states. Even without a perverse competition, states may have different views on the costs and benefits of marriage, and thus the views of the domicile state arguably should count for more.

Despite the possibility of spillovers, we show that a state might reasonably draw a distinction between rules of internal and external illegality in marriage, and uphold foreign marriages that it would not enforce if contracted within its borders. To be sure, this approach will not satisfy those who object to recognition of same sex and covenant marriages. Part V shows how such objections are greatly weakened by the parties' ability to obtain many of the interstate effects we advocate in this Part simply by private contracting. On the other hand, the limits of interstate enforcement in our approach noted above and discussed in Part VI may not satisfy those who want a more complete recognition of same sex marriage. This is a more intractable problem but, as we show in Part VI, one that pragmatists will wish to leave for each state to solve.

A. COVENANT MARRIAGE

In Part II, we examined the case for restrictions on covenant marriages, as a matter of internal illegality. Here we examine the same arguments, but from the perspective of external illegality.

1. Paternalism

One of the arguments against covenant marriage is that the spouses might need to be protected against an imprudent decision to waive no-fault divorce rights. As noted in Part II, such arguments are not particularly compelling. 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. 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.

It makes sense to permit the parties to skirt internal barriers in this way. First, 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. Second, the laws as to capacity to marry are fairly uniform across the United States, so that recognizing the marriage will rarely shock the conscience. Third, 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. This suggests that the covenant marriage option is a reasonable choice for many couples. Third, 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. Over-signaling

The second objection to covenant marriage is that a couple might seek to over-commit when presented with a choice between hard and soft marriage laws. Assuming this is so, this argument is considerably weaker when the parties must travel to a another state to waive no-fault divorce rights. Because the likelihood that the parties will oversignal depends on the availability of the option, the concern is greater for Louisiana couples than it is for, say, Virginia couples who travel to Louisiana to marry. As noted

152 See Dicey and Morris, supra note 125.

153 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 106 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 106 at 437.

154 See Scoles & Hay, supra note 106 at 452.

155 See supra §II(A)(1).
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above, couples normally marry at home, where their family and friends are. Most non-Louisiana couples will 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 a covenant marriage because of cost and inconvenience without appearing to reject durability. To be sure, the decision may reflect some reluctance to commit. But even if making an interstate option available makes some over-signaling possible, its minimal costs are likely to be less than the significant benefits of offering the covenant marriage option.

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 considerably weaker when it comes to the design of external illegality rules.

1. The coherence of the marriage standard form

As we noted in Section II(B)(1), recognizing same sex marriage would weaken the coherence of marriage rules by forcing them to deal with two very different types of marriages. 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. The preference-shaping function of law

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

Again, whatever a state’s internal rules, it should recognize same sex marriages validly celebrated under the laws of a foreign jurisdiction. In the design of external rules, the stakes are lowered all around, since the seal of approval is weaker. The supporter of same sex marriage gains less, and the religious conservative loses less, when their state promotes heterosexual marriage by banning same sex marriage within the state, while still enforcing a same sex marriage validly contracted elsewhere.

When absolutes collide, a Solomonic solution often commends itself. First, a state might reasonably decide that its concern for symbolic effects does not extend so far as to trump another state’s standards of internal illegality. Secondly, distinguishing between internal and external illegality would permit a kind of referendum that provides valuable information about the benefits of same sex marriage and the actual expressive
effect of laws. If, for example, none of the state's same sex couples bother to marry in a state that allows such marriage, the state might take this into account in deciding whether to give additional recognition to same sex marriage. Conversely, if many same sex couples travel elsewhere to be married, the state might decide to accord full recognition to such marriages.\textsuperscript{156}

A further question concerns what recognition of same sex marriage entails. The usual rule is that the incidents of marriage are recognized along with the marriage.\textsuperscript{157} Under our rule, however, as elaborated more fully below in Part V, the states' recognition of same sex marriage would entail enforcement only of those aspects of marriage that are roughly equivalent to what the parties could contract for. One might argue that any official recognition of same sex marriage, even if this does not entail much more than providing a standard form contract, necessarily expresses the state's approbation of such marriage.\textsuperscript{158} It would follow that giving same sex marriage any external legality would have the same preference-shaping effect as a rule of full internal legality. But the strength of the symbol depends at least to some extent on the actual effect of the state's recognition. Thus, enforcing the contractual elements of the marriage (such as property division and support), while stopping short of recognizing the public elements (such as welfare subsidies and tax breaks), would clearly express society's relative valuations of the two types of relationships. Although the couple might earn some social respect as a "married" couple, they would lack 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.

In sum, the arguments against covenant and same sex marriage are considerably weaker when the marriage is celebrated out-of-state. Even if the state bans celebration of such marriages, it might reasonably recognized such marriages when entered into elsewhere.

\section*{V. REFINING THE DEBATE: MARRIAGE AND CONTRACT}

Our proposed compromise does not wholly eliminate the kinds of difficulties with covenant and same sex marriage that discussed in Part II. Couples might still make commitments without adequate reflection, and same sex couples are still accorded what some might regard as excessive legitimacy. However, this Part shows that the debate is narrower than one might suppose. Interstate recognition of non-standard forms of marriage gives the parties only slightly more than they would get from enforcement of contracts as a matter of internal law. Thus, the question of interstate enforcement of marriage and divorce laws might reduce, to a significant extent, to a somewhat more manageable question of interstate enforcement of contracts. A contractual approach is now more feasible than ever, given the increased use of ante-nuptial agreements and

\textsuperscript{156} The possible result of a state competition on same sex marriage is discussed below in Part __.

\textsuperscript{157} See \textit{supra} text accompanying note 139.

\textsuperscript{158} See Koppelman, \textit{supra} note 11 at 990-91 (noting that any recognition has symbolic value and serves to establish "social facts").
enforcement of *Marvin* agreements.\(^{159}\)

**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 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 burden of supervising performance, by analogy to personal service contracts or partnerships,\(^{160}\) or because of paternalism concerns about holding the parties to onerous obligations.\(^{161}\) However, both concerns might be alleviated under a contract that merely imposes fault conditions or time requirements rather than forbidding divorce.\(^{162}\) It is by no means clear that these conditions will be upheld, since they fetter divorce rights that are generally assumed to be mandatory.\(^{163}\) However, the expansion of free contracting rights suggests that such barriers might be relaxed 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.\(^{164}\) 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.\(^{165}\) 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 ante-nuptial agreements. The main legal issue would be whether the liquidated damages constituted a penalty.\(^{166}\) 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


\(^{161}\) See Elizabeth Scott and Robert Scott, *supra* note 36.

\(^{162}\) See Haas, *supra* note 160.

\(^{163}\) See Brinig & Buckley, *supra* note 24.

\(^{164}\) See Haas, *supra* note 160 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.

\(^{165}\) See Brinig & Buckley, *supra* note 24.

\(^{166}\) See Haas, *supra* note 160 at 911-14.
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.\footnote{See \textit{Eric Posner, Family Law and Social Norms}, in \textit{Buckley}, supra note 36.}

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.\footnote{Standard forms may be provided by private parties such as bar groups as well as by statute. See \textit{Ribstein}, supra note 71 (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 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, \textit{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.}

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 \textit{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 \textit{ex parte} divorce would not 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.

Thus, private contracting for durable marriage offers an alternative route to covenant marriage. Whether courts actually enforce such contracts, and whether legislatures will be willing to enact statutory standard forms, will be discussed in more detail in Part VII. For present purposes it is enough to point out that the potential availability of these alternatives argues for our proposed conflicts rule. To the extent that durable marriages are possible, it might not be much of a leap to the interstate enforcement of covenant marriage itself. Indeed, as discussed in Part VII, these contractual alternatives may pave the way for full-fledged recognition.

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. They would be analogous to cohabitation (or "Marvin") contracts, now enforceable in most states. Indeed, courts give even polygamous marriage this kind of recognition. 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 contracting costs. Since marriage is a complex long-term relationship, it may be costly to contract for many incidents of marriage, particularly divorce. 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

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170 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 Weitzman, *supra* note 159 at 395-415.

171 See Posner, *supra* note 74 at 208-09.

172 See Brown, *supra* note 169, at 784-5 (pointing out that the parties to a marriage need standard forms to save transaction costs).
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.\textsuperscript{173} 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 may 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. A few jurisdictions offer some sort of "domestic partnership" ordinance or statute.\textsuperscript{174} 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.\textsuperscript{175} Such statutes offer many of the advantages of marriage, including secure property rights, without compromising the preference-shaping function of giving marriage special status.\textsuperscript{176} Marriage substitutes also facilitate recognition of same sex relationships by private parties without extending the full panoply of government subsidies. For example, the San Francisco Domestic Partnership Ordinance\textsuperscript{177} provides a way for same sex couples to show that they have a stable, long-term marriage-type relationship for purposes of obtaining marital benefits from private employers that do not want to extend these benefits to more casual relationships.\textsuperscript{178}

The above discussion focuses on legal alternatives within a given state. As with covenant marriage, even if a state does not enforce contracts that offer close equivalents to marriage, it might enforce a contract that provides for application of the law of an

\begin{footnotes}
\item[173] See supra text accompanying notes\textsuperscript{\textcircled{2}}.
\item[174] These are listed on the web site, www.cs.cmu.edu/afs/cs/user/dtw/www/companies.htm/#municipalities.
\item[176] See supra \textsection II(B)(3).
\item[178] The ordinance applies to "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses" (\textit{id.} \textsection 62.2(a)) and who declare that they have agreed to be jointly responsible for basic living expenses incurred during the domestic partnership, that neither had a different domestic partner less than six months before they signed the declaration, and that they met the definition of domestic partnership when they signed (\textit{id.} \textsection 62.2(a) and (d)).
\end{footnotes}
enforcing state. It also might enforce the local adoption of another state's standard form, subject to the other state's law. This would be a less drastic approach than recognizing the same sex relationship to be a "marriage."

In sum, 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 is possible, it also weakens any objections to our proposed conflicts of law solution.

VI. THE MOVE TOWARD JURISDICTIONAL CHOICE

Part IV proposes interstate enforcement of many aspects of non-standard marriages and Part V supports this approach by showing its links to private contract. This Part discusses the likelihood that states actually will move toward interstate recognition. Sections A and B discuss judicial and legislative incentives regarding recognition. Sections C and D discuss other factors that may play a role, including the positive role of legal evolution and the constraining role of lock-in. Section E discusses possible insights that can be gleaned from the history of multi-racial and polygamous marriage.

This analysis supports our conclusion concerning the efficiency of jurisdictional choice of marriage rules. If individuals are willing to subscribe to these new forms of marriage, the law will accommodate these preferences. This is consistent with the sorting, referendum and competition benefits of jurisdictional choice discussed in Part III(A). Our analysis also suggests that there will not be a costly race to the bottom along the lines discussed in Part III(B). Jurisdictional choice will not inevitably lead to the abolition of all standards. Rather, it provides a mechanism not only to permit acceptance of some new ideas but to demonstrate the rejection of others.

A. JUDICIAL INCENTIVES

We have suggested that, when considering covenant and same sex marriages, courts might fashion narrower external than internal illegality rules. However, this might seem puzzling. Without constitutional compulsion, why would a state whose interest groups have produced a rule of internal illegality that bans covenant or same sex marriage nevertheless enforce such marriages, or close contractual equivalents, as a matter of external illegality? Conversely, if interest groups can secure the recognition of an out-of-state covenant or same sex marriage, why would they stop there? Would they not seek to have such marriages recognized when entered into within the state?

At first blush, it would seem that interstate recognition is unlikely without federal statutory or constitutional compulsion. Judges have a strong incentive to enforce statutory restrictions (for example, by not allowing exit from such restrictions), because legislators control judges' salary and tenure and can act to reduce the discretion of errant

179 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."

180 See Ribstein, supra note 13.
courts by enacting more explicit statutes.\textsuperscript{181} Enforcing choice-of-law clauses also may be inconsistent with judges' own preferences. It deprives judges of the prestige and power they derive from making new law on the relevant issue. Moreover, litigation-maximizing courts would not want to enforce the clauses where this would be against the interests of those, usually the plaintiffs, who make the initial venue determination.

Despite these considerations, judges do have incentives to enforce foreign marriages that their own law does not recognize. First, judges who want to enhance their power and prestige or have strong personal views on marriage may welcome an opportunity to bypass their own law. Enforcing another state's law offers an opportunity to do so, without taking the more extreme step of invalidating local law.

Second, courts would not necessarily be acting contrary to the legislature's wishes by enforcing the other state's law. The application of local legislation to out-of-state marriages is often ambiguous.\textsuperscript{182} The legislature's silence may have been deliberate. Upholding the parties' choice of law provides relief from, and therefore reduces political opposition to, a law some voters strongly dislike, without directly disappointing the voters who favor the status quo. Enforcing choice of law thereby provides a way out of a political dilemma on a contentious issue. Moreover, legislators might prefer that courts take the political heat for providing an exit. Judges may be willing to do so because they are normally less accountable to voters than are legislators.

Third, enforcement of a foreign marriage may further the enforcing state's statutory policy if it provides a basis for reciprocal enforcement by the foreign state of the enforcing state's laws on marriage or other issues.\textsuperscript{183} For example, Louisiana may enforce a Hawaii same sex marriage in the expectation that Hawaii will recognize the durability of a Louisiana covenant marriage.

Fourth, interest groups may be able to exercise greater power by litigating the application of foreign law than by changing the law in a given state. They might exercise this power by, among other things, funding litigation. Thus, Paul Rubin argues that whether a rule is litigated depends on whether the group can capture the benefits of legal change.\textsuperscript{184} With regard to marriage, homosexual rights or pro-family groups might gain from supporting litigation to promote extraterritorial application of same sex or covenant marriage. The interest group that has successfully swayed the legislature may

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., In re May's Estate, 305 N.Y. 486, 114 N.E. 2d 4 (1953) (holding that statute that made it a misdemeanor to perform incestuous marriages did not invalidate incestuous marriage performed in another state).
\end{enumerate}
\end{footnotesize}
nevertheless lose in court. For example, homosexual rights groups have coordinated legal research on state marriage laws in preparation for litigating the choice of law issue once a state officially recognizing same sex marriage.\footnote{See Barbara J. Cox, Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does it Really Exist?, 16 QUINNIPIAC L. REV. 61, 61 (1996) (noting the work of the "Lambda Legal Defense and Education Fund in developing a practice manual for attorneys who will bring marriage recognition cases once same-sex couples win the right to marry in Hawaii").}

**B. LEGISLATIVE INCENTIVES**

Legislatures also may play a significant role in enforcing jurisdictional choice. First, as discussed in Part V, they might pass statutory standard forms that significantly reduce the costs of contracting for covenant or same sex marriage. These laws would then be available for use by couples who live in other states but travel to the legislating state to marry. Second, legislators might pass laws that clarify the local enforcement of other states' marriage laws. In either case, legislators will pass the laws law only if they derive enough benefits from doing so to make it worth their scarce time and political capital.\footnote{See generally, Susan Rose-Ackerman, Risk-Taking and Reelection: Does Federalism Promote Innovation? 9 J. LEG. STUD. 597 (1980).}

That depends at least partly on a significant interest group's demand for the law.

Legislators may be motivated to pass laws authorizing same sex marriage by the familiar mechanisms of voice and exit.\footnote{See Albert O. Hirschman, EXIT, VOICE AND LOYALTY (1970).} Local residents and national interest groups can express their demand for new laws by political activity, and residents can migrate to other states to take advantage of their laws, thereby reducing the tax base of the exit state. The parties' willingness to engage in these activities depends on whether their benefits of searching and contracting for a particular law outweigh the costs. This in turn depends to some extent on other states' willingness to recognize the marriage. Even if covenant and same sex marriage are not given full extraterritorial effect, the contracts in Part V might be enforced to some extent in other states. Moreover, enforceability within the geographic boundaries of a particular state might be enough for many people, since this would cover most aspects of the spouses' lives, including their work and home.\footnote{The consequences of recognition are discussed in more detail in Part VIII.}

Legislative incentives have been particularly evident regarding same sex marriage. There is considerable political activity by national homosexual rights groups associated with the Hawaii same sex marriage referendum\footnote{See supra note 7 and accompanying text.} although the referendum would authorize a marriage that might not be recognized anywhere else. Legislators also have some incentive to authorize same sex marriage or its contractual equivalent at the instance of business groups that would gain from tourism generated by couples seeking to take advantage of the law.\footnote{See Brown, supra note 169.}

Legislators also may pass laws specifically regarding interstate recognition. They
have, indeed, passed statutes on the enforceability of choice of law clauses. States also have clarified the local enforcement of governance rules of foreign business associations. An equivalent law for marriage would let legislators respond to lobbying pressure to liberalize local laws while avoiding at least some of the political costs of actually changing the law.

But interstate recognition of same sex marriage has not fared so well. A state can have little effect legislating enforcement of its own marriage law because it cannot easily control where the law will be litigated, and other states may invoke their public policy exceptions. This gives an advantage to groups opposed to interstate recognition. Indeed, state legislators mainly have been active in passing laws denying recognition of foreign same sex marriage. Thus, conservative interest groups can counteract at the legislative level what homosexual rights groups win at the judicial level. The next step in the process is sure to be efforts by homosexual rights groups to overturn the state laws on constitutional grounds.

C. LEGAL EVOLUTION

There may be a kind of evolutionary dynamic at work in judicial and legislative recognition of covenant and same sex marriage. The evolution may take place within each state and among states. Within each state, incremental moves may open the way for further developments. As discussed in Part V, there are only relatively small differences between current contract law and close contractual equivalents to same sex and covenant marriage. As judges and legislators span these gaps by enforcing private contracts and passing statutory standard forms such as domestic partnership statutes, objections to further increments may narrow. Similarly, if courts enforce foreign contracts or recognize foreign marriages, through narrow rules of external legality, this may reduce opposition to internal legalization.

Among the states, jurisdictional choice may lead to a "referendum" on new types of marriage. State experimentation could indicate the social acceptability of increased durability or same sex marriage. The outcome will depend on the demands of couples who want to take advantage of the new forms of marriage as well as on political opposition. Based on the information provided by other 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.

It is important to emphasize that the evolutionary dynamic need not lead to full-fledged recognition. Unbundling various aspects of marriage, as discussed in Part V, permits more finely-tuned jurisdictional choices than the binary election between

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192 See supra note 60 and accompanying text.

193 Constitutional arguments are discussed in infra Part VIII.

194 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).

195 See supra §III(A)(1).
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accepting or rejecting full-fledged marital status. For example, alternative standard forms of marriage durability would permit spouses to signal varying levels of commitment.\textsuperscript{196} This might produce a consensus for somewhat less durability than covenant marriage. Interest groups favoring no-fault divorce may have enough clout in particular states to prevent adoption or recognition of durable marriage, but not necessarily to prevent enforcement or adoption of the alternative standard forms or enforcement of contractual substitutes.

Similarly, with respect to same sex marriage, states may come to recognize the advantages of delinking same sex and heterosexual marriages. Alternative standard forms therefore may become an equilibrium position. For example, states might recognize some but not all of the status and incidents of marriage, as under the Danish law and San Francisco ordinance.\textsuperscript{197} States might decide not to enforce those aspects of the marriage that involve government subsidies, such as tax breaks, while they enforce others, such as the application of inheritance,\textsuperscript{198} bigamy and adultery laws. Of course, same sex couples may not even want some of the inheritance or property effects of marriage.

D. LOCK-IN

The demand for same sex and covenant marriage, which in turn helps determine whether judges and legislators will adopt these proposals, might be affected by the "lock-in" or "network externality" problems that have been identified for other types of standard forms.\textsuperscript{199} It has been argued that new standard form contracts, like other types of products, have "network" benefits. The degree to which a standard form provides these benefits depends on the number of users of the form. The "externals" enter the picture

\begin{itemize}
  \item \textsuperscript{196} Elizabeth Scott & Robert Scott, supra note 36.
  \item \textsuperscript{197} See supra notes 174-178.
  \item \textsuperscript{198} There is mixed precedent for such limited recognition in the analogous context of mixed race marriages. Mississippi allowed inheritance by a surviving white husband, while Louisiana did not. See Robert J. Sickels, \textit{Race, Marriage, and the Law}, 138-39 (1972).
\end{itemize}
because new adopters of a standard form consider only their own benefits and not those of other users. An alternative standard form that would be superior if it were to attract the same number of users nevertheless might not be able to attract those users. In marriage, for example, spouses might not adopt new forms of marriage even if these are inherently superior to existing forms until others have experience with the potential problems of such marriage, and there are legal forms and case law clarifying the rules. This may explain why, a year after adoption of the Louisiana law, only one percent of the marriages in Louisiana are covenant marriages.200

Arguments based on lock-in or network externalities are necessarily speculative because it is difficult or impossible to identify the precise benefits associated with the number of users and to disentangle these benefits from other attributes of the standard form. Moreover, the externalities are not clear. Lawyers can overcome lock-in by capturing some of the benefits of developing new standard forms, as they have with respect to new types of business associations.201

E. THE HISTORY OF STATE COMPETITION ON SUPPLY MARRIAGE LAW

The potential impact of choice of law on marriage can be discerned from historical precedents. With regard to marriage generally, it is clear that some states have competed to be marriage havens, probably because they are seeking associated tourist business. While marriage rates are fairly constant across jurisdictions, a few states, particularly including the prominent tourist destination of Nevada, are clear outliers.202

Important lessons also can be learned from controversial types of marriage that were recognized in one or more places and then tested elsewhere.203 The first example is inter-racial marriage. In 1952, thirty states, mostly in the West and South, banned multiracial marriages.204 These states not only refused to enforce multiracial marriages but also imposed criminal penalties. Some, like the Virginia statute involved in Loving v. Virginia,205 penalized those who married elsewhere and returned to Virginia. Thus, the rule was one of external as well as internal illegality. Nevertheless, by 1967, when the Supreme Court in Loving struck down such laws under the Equal Protection clause, about half of these laws, mostly in the West, already had been repealed, leaving the bans in place mainly in the South.206 The shift seems partly due to the growing belief, beginning

200 See Whelan, supra note 42.

201 See Ribstein, supra note 71 at ___; Larry E. Ribstein & Bruce H. Kobayashi, Contract and Jurisdictional Competition, in Buckley, supra note 36.

202 See Solimine, supra note 11 at 88-89, 103 (including data showing that Hawaii, Nevada and Tennessee are the outliers).

203 See generally Grossberg, supra note 145.

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

205 388 U.S. 1 (1967).

206 See Loving, 388 U.S. at 6, n. 5.
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with a 1948 California decision,\(^{207}\) that these laws violated the Equal Protection clause. But the referendum effect of varying state laws on interracial marriage cannot be dismissed. 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, may have contributed to the Supreme Court's rejection of miscegenation laws.\(^{208}\) A shift in opinion on same sex marriage indicated by state legal developments may have a similar effect on constitutional recognition of the right to same sex marriage.\(^{209}\)

The second example is polygamy. Unlike interracial marriage, no state ever has enforced polygamous marriages. Jurisdictional choice was briefly available in this context, as Mormons seeking the right to polygamous marriage migrated to the territory of Utah. They were ultimately frustrated by the intervention of a federal prohibition on polygamy and the desire for statehood, which was contingent on rejection of polygamy.\(^{210}\) 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.\(^{211}\) But unlike inter-racial marriage, the referendum failed because no state was willing to "vote" for polygamy. To be sure, the federal government put its thumb on the scale by legislating against polygamy. But federal legislators, like the Court in *Loving*, might have acted otherwise had the votes of the states, in refusing to recognize polygamy, not been so clear.

The jury is still out on same sex marriage which, despite *Baehr*, still is not recognized anywhere. Notably, however, there is a kind of competition with respect to non-recognition of same sex marriage. Although most states have passed statutes providing for non-recognition, there are significant variations in the statutes\(^{212}\) and a

\(^{207}\) See Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).

\(^{208}\) See *Loving*, 388 U.S. at __, n. 5. The result was not constitutionally self-evident since the statutes treated the races equally and harmed whites seeking black partners as well as blacks seeking white mates. The Court had to accept the argument that any statute that creates a racial category violates equal protection even if it does not discriminate. There is an analogous issue regarding gender and same sex marriage. See *infra* text accompanying note __. 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).

\(^{209}\) 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").

\(^{210}\) The history is recounted in Grossberg, *supra* note 145 at __ (noting that this was a Civil War era test of the federal government's power).

\(^{211}\) This argument was rejected in Reynolds v. U.S., 98 U.S. 145 (1878).

\(^{212}\) See Coolidge & Duncan, *supra* note 60.
VII. LIMITS OF JURISDICTIONAL CHOICE IN MARRIAGE

We have argued that marriage rules should be given interstate effect, and that this is, indeed, likely to happen. We have deferred to this and the next Part consideration of the appropriate limits on interstate enforcement of marriage rules. Our analysis of this issue is in two parts. Subpart A discusses the substantive limits on enforcement, while subpart B discusses issues relating to the appropriate decision-maker. Specifically, we would emphasize legislative, rather than judicial, constraints on interstate recognition of marriage.

A. LIMITS ON ENFORCEMENT: CONTRACTS VS. SYMBOLS

In general, we have stressed as a basis for our rule the comparability of marriage and contract. Consistent with that emphasis, our rule would provide for interstate recognition of those aspects of marriage that are most comparable to contract, while deferring to internal state policy as to other aspects of marriage.

Our proposal gives advocates of covenant marriage most of what they want, since we propose simply to let the spouses have the durability they have contracted for. The most important remaining issues concern 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. The list in the Hawaii Supreme Court's 1993 Baehr opinion is typical and at least representative of the possibilities, and may become prominent in light of Hawaii's leading role in same sex marriage:

(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, . . .; (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 . . .

We would classify all but numbers 1, 2, 12, 13 and 14 as at least 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 and property division, and might even be able to affect custody by contract. 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. They may not get an automatic name change from marriage, but can petition for change of name. Among the items omitted from the Baehr list is benefits that non-governmental entities, particularly including private employers, give to married couples. But these obviously are subject to contract between the spouses and their employers.

The Baehr list does not include a couple of incidents of marriage that deserve further discussion. First, same sex spouses cannot contract for application of the polygamy laws. Should a same sex spouse who remARRies in a state that does not recognize same sex marriage be subject to these laws? One writer has argued that the ban on remarriage is a critical incident of recognizing same sex marriage. However, contracts are an alternative way to enforce the marriage, just as they may preserve a covenant marriage in a no fault state. Both partners in same sex marriages are likely to be wage earners and therefore have substantial property. Contracts providing for liquidated damages on remarriage might constrain exit even if the polygamy laws do not apply. In any event, the polygamy laws are unlikely to provide much of a constraint, particularly since an errant same sex spouse is even less likely to face prosecution under adultery laws than a heterosexual spouse.

Second, the parties cannot contract around laws that restrict sex to certain types of marital relationships. Thus, sex between same sex partners might still be illegal even if the partners are married. But this result depends on the sodomy law rather than the marriage law, and is not very important in any event in view of declining enforcement of such laws.

What same sex married couples would not get under our proposal is the right to tax and other benefits (including, for example, preference under immigration laws), that states (and the federal government) give married people irrespective of contract. Some


216 See Koppelman, supra note 11 at 987 (arguing that this would treat the marriage as a nullity).

217 See supra text accompanying note 167.


220 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 11 at 988.
of these benefits 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.\footnote{221}

Nevertheless, marriage undeniably has tangible benefits that the parties cannot obtain by contract. Perhaps more importantly, even those aspects of marriage that do not matter to most couples are important because they express society's approval of the relationship. Indeed, same sex marriage may be mostly about such symbols. This raises the question of the extent to which we should be concerned about symbols rather than tangible effects.

There are several dangers in employing the law to send new signals. The effects of such laws are hard to predict, and using the government for symbolic ends might trigger wasteful rent-seeking.\footnote{222} Same sex marriages might also create a more serious over-signaling problem than that for covenant marriage.\footnote{223} 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.\footnote{224}

A more important objection to giving weight to the symbolic or expressive effects of marriage law in the interstate context is that this would forego the benefits of jurisdictional choice regarding such effects. Under our approach it is still possible for partisans on each side to find jurisdictions conducive to their views. Same sex couples want a place to get married, while some opponents of same sex marriage want to live where marriage retains its original meaning. Thus, allowing states to withhold non-contractual aspects of marriage from same sex couples accommodates both types of preferences by allowing states to compete regarding marriage law and "vote" in the referendum on same sex marriage. On the other hand, if states had to fully recognize both types of marriage under celebration state law, social liberals would have won acceptance everywhere, while social conservatives would find no states that preserve the privileged status of heterosexual marriage. This may be the wrong outcome, and in any event might

\(\text{(suggesting that the states determine such incidents as homestead exemptions and the right to file a joint tax return).}\)

\footnote{221} 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).

\footnote{222} See Posner, supra note 81. A similar argument applies to recent demands to stigmatize violent acts against homosexuals. See George F. Will, Washington Post, October __, 1998, p. __. For an argument favoring such stigmatization, see James B. Jacobs & Kimberly Potter, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS (199_).

\footnote{223} See supra ¶II(A)(2).

\footnote{224} 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.
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exacerbate rather than resolve the conflict between the opposing sides in the debate.\footnote{See Sunstein, supra note 14 (discussing lessons learned from the consequences of the Dred Scott decision).}

This solution is consistent with the pragmatic type of moralism discussed in Part I as a way of resolving the marriage debate. Many of those on either side of the political divide who oppose covenant or same sex marriage ought to be able to accept a compromise based on private contracts, particularly since our proposals do not differ radically from what is enforceable under current law. To be sure, social conservatives might want the stronger statement about same sex marriage that would be made by not enforcing even contractual aspects. But this would work against social conservatives on covenant marriage and other proposals for returning to more traditional marriage rules. Even some conservatives might object to covenant marriage on symbolic or signaling grounds by arguing that alternative forms of marriage dilute the marriage concept and thereby pave the road for same sex and even polygamous marriage.\footnote{See Whelan, supra note 42 (citing conservative opposition to covenant marriage).} For their part, social liberals might object that our proposal denies gay relationships the full-fledged recognition they deserve. But then they would have to drop their objection to covenant marriage.

In short, the impossibility of resolving a debate over symbols is why a pragmatic approach is needed. Such an approach moves to a point at which compromise is possible. While both sides would presumably endorse Coasian bargains that leave both consenting parties better off, neither is likely to endorse the other side's symbols. Pragmatism takes symbols off the table because they interfere with the prospect of compromise without yielding measurable gains for the parties.

\section*{B. WHO DECIDES? COURTS VS. LEGISLATURES}

Having addressed the extent of extraterritorial enforcement of marriage rules, we now turn to the details of how this system should be effectuated. Specifically, what are the respective roles of courts and legislatures? Subject to federal statutory and constitutional limitations discussed in the next Part, a state limitation on the effect of a foreign marriage would, of course, be enforced. Indeed, as already noted,\footnote{See supra note 60 and accompanying text.} state legislatures in more than half the states have prescribed the effect of foreign same sex marriage. The specific question concerns what a court should do in the absence of explicit legislative guidance. The court could, of course, either enforce the foreign marriage law entirely or not recognize it at all. On the other hand, the court might find a middle course by enforcing some aspects but not others. In adopting this course, the court might follow our system and draw the line between contractual and non-contractual aspects of marriage. Or the court might find some other way of dividing up the marriage.

We believe the court's best course is to enforce the foreign law entirely except to the extent explicitly limited by a local law concerning the effect of foreign marriage law.\footnote{As discussed above in §VI(A), this is also may be the most likely outcome.} In other words, the court should presume unless otherwise instructed by its

\footnotetext[225]{See Sunstein, supra note 14 (discussing lessons learned from the consequences of the Dred Scott decision).}

\footnotetext[226]{See Whelan, supra note 42 (citing conservative opposition to covenant marriage).}

\footnotetext[227]{See supra note 60 and accompanying text.}

\footnotetext[228]{As discussed above in §VI(A), this is also may be the most likely outcome.}
legislature that local law does not apply to foreign marriage.\textsuperscript{229} This would place the issue in the political arena rather than leaving it to judges who are much less subject to popular will than legislators and who may be influenced by interest groups that sponsor litigation.\textsuperscript{230}

Although this approach might constrain jurisdictional choice, it might be the right result. That interest groups have enough clout to enact a restriction on recognizing foreign marriage law indicates popular support for the measure that would be circumvented by enforcing jurisdictional choice. Our rule would require interest groups that favor extraterritorial application marriage law to have enough clout, and therefore enough popular support, to have the legislature make this application explicit. As argued in Part VI, support for extraterritorial application probably will be insufficient in most cases to plug every gap in the law. Thus, there will still be room for enforcement of contracts. But if the law is strong enough even to prevent local contracts, this suggests strong local endorsement of the symbolic or signaling aspect of marriage rules.\textsuperscript{231} Choice of law rules should not thwart this sort of local option. Jurisdictional choice involves not only offering the choice of marital rules, but also offering a choice of places to live that restrict marital choices.

VIII. FEDERAL STATUTORY AND CONSTITUTIONAL LIMITATIONS

Although there are strong arguments for our choice of law rule, we would not mandate it, or any other choice of law rule, by enforcing state compliance through constitutional principles or federal statutes. We are pragmatic about choice of law rules, even as we are pragmatic about the substantive law of marriage. As discussed in Part VI, state conflicts law is likely to accommodate diverse preferences even without legal mandates. Moreover, as discussed in Part VII, mandating interstate acceptance of same sex or covenant marriage may even reduce jurisdictional choice by reducing states' ability to express diverse views on the family. It follows that it is unwise to use the constitution to freeze into place particular choice of law rules.\textsuperscript{232}

This position is not only pragmatic but also realistic in light of current law. Federal statutory and constitutional law does not significantly constrain states' 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."\textsuperscript{233} The Court has propounded very broad constitutional

\textsuperscript{229} This is similar to a proposal by Michael J. Whincop and Mary E. Keyes, Statutes' Domains in Private International Law: An Economic Theory of the Limits of Mandataory Rules, 20 SYDNEY L. REV. 435 (1998). Like us Whincop and Keyes would have the courts assume that mandatory rules have no extraterritorial effect. They rely primarily on a general preference for private ordering. It is also consistent with one commentator's suggestion that the scope of the public policy exception be determined by marriage evasion statutes. See Koppelman, supra note 11 at 987-88.

\textsuperscript{230} See supra §VI(A).

\textsuperscript{231} The strength of the local support is indicated by the votes on the recent Alaska and Hawaii referenda. See supra note 7.

\textsuperscript{232} For similar positions see Posner, supra note 87; Solimine, supra note 11.

\textsuperscript{233} Sun Oil Co. v. Wortman, 486 U.S. 717, __ (1988).
guidelines for interpreting both due process and full faith and credit that rely on such elastic and easily met standards as "fairness."\textsuperscript{234}

The most important constitutional limit on choice of law would appear to be the full faith and credit clause of the Constitution,\textsuperscript{235} which requires the states to recognize "public Acts, Records, and judicial Proceedings of every other State." This clause gives wide latitude to the states in deciding choice of law issues,\textsuperscript{236} and therefore probably does not require a state to recognize the validity of a same sex marriage under another state's law.\textsuperscript{237} Marriages almost certainly are not entitled to the higher level of protection the Clause accords public acts or judicial decrees.\textsuperscript{238} The full faith and credit clause similarly does not protect a covenant marriage, but rather requires interstate recognition of a divorce decree even if entered in violation of the covenant.

Congress has the power under the full faith and credit clause to "prescribe. . . the effect" of act, records and proceedings. Congress might in this way settle the issues concerning interstate enforcement of marriage and divorce.\textsuperscript{239} But Congress has moved in the other direction, enacting the Defense of Marriage Act, which denies full faith and


\textsuperscript{235}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.

\textsuperscript{236}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).


\textsuperscript{238}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. 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 Doma: 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 236.

\textsuperscript{239}See Kramer, supra note 104 (recommending application of full faith and credit to same sex marriage without discussing the durable marriage problem).
credit to same sex marriages.\textsuperscript{240} This leaves the issue of interstate recognition where it belongs, with the states.

Our approach might clash in one respect with current Constitutional law. As discussed in Part VII, we would not compel states or, for that matter, the federal government, to give subsidies or tax breaks based on a particular state's recognition of the marriage. The main question this raises is whether such recognition is constitutionally required as a matter of equal protection of women or homosexuals or the due process interest in the right to marry.\textsuperscript{241} The equal protection argument has been accepted under U.S. law by the Hawaii supreme court in \textit{Baehr} and in dictum a lower court in Alaska,\textsuperscript{242} and has been advocated by several commentators.\textsuperscript{243} A series of recent decisions by the Supreme Court of Canada struck down laws that distinguish between same sex and heterosexual couples as contrary to the equality clause of the Canadian Charter of Rights.\textsuperscript{244} Cory, J. stated that, “In its attempt to prohibit discrimination, the Charter seeks


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

For articles questioning the constitutionality of this act on the ground that it discriminates against homosexuals, see Koppelman, supra note 236 (also arguing that the Act exceeds Congress' power under the full faith and credit clause); Paige E. Chabora, \textit{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, \textit{Doma and the Two Faces of Federalism}, 32 CREIGHTON L. REV. 457 (1998); Evan Wolfson & Michael F. Melcher, \textit{The Supreme Court's Decision in Romer v. Evans and Its Implications For the Defense of Marriage Act}, 16 QUINNIPIAC L. REV. 217 (1996). The constitutionality of DOMA depends on whether it has any effect at all. Its main effect may be in its application to decrees as well as public acts. See supra text accompanying note 239.

\textsuperscript{241} For a survey of constitutional arguments on same sex marriage, see Strasser, supra note 10. For an argument favoring a constitutional right to marry, but without specifying the limits of this right, see Lynn D. Wardle, \textit{Loving v. Virginia and the Constitutional Right to Marry, 1790-1990}, 41 HOW. L.J. 289 (1998).

\textsuperscript{242} 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").


\textsuperscript{244} Can. Const. (Constitution Act, 1982) pt I.
to reinforce the concept that all human beings, however different they may appear to the majority, are all equally deserving of concern, respect and consideration.\textsuperscript{245} The discrimination argument is indirectly supported by the Supreme Court's holdings in \textit{Loving} that anti-miscegenation laws violate equal protection,\textsuperscript{246} and in \textit{Romer v. Evans} that Colorado could not prohibit anti-homosexual discrimination by the state or subordinate jurisdictions.\textsuperscript{247} It has also been held that denial of the right to same sex marriage violated the right to privacy under the Alaska constitution.\textsuperscript{248}

Without attempting to resolve these constitutional issues here, we note that our arguments bear on them. The \textit{Loving} analogy assumes that there is no good reason to bar same sex marriage, and therefore that the reasons for the distinction are antigay animus and to relegate homosexuals to second-class status, just as \textit{Loving} was intended solely to preserve white supremacy.\textsuperscript{249} But as shown above, prohibiting same sex marriage can be justified on several grounds, including the need to preserve the exclusivity of heterosexual marriage.\textsuperscript{250} Thus, unlike in \textit{Loving}, there is more here than anti-gay animus.\textsuperscript{251} Nor is \textit{Romer} a basis for a discrimination argument against same sex marriage bans. \textit{Romer} was based on the state's inability to justify singling out a group for such a total disability. This is supported by an important post-\textit{Romer} decision upholding a municipal ordinance that removed only special protections for gays, distinguishing \textit{Romer} in part because the latter involved a more blanket restriction on homosexuals' rights.\textsuperscript{252} It arguably follows that mere denial of the right to marry would not be proscribed under \textit{Romer}, particularly in light of the subtlety of the distinction between marriage and contractual alternatives.

While we would not constitutionalize choice of law rules, it is important to note that at least one form of protection is potentially important – the contract clause.\textsuperscript{253}


\textsuperscript{246} See supra text accompanying notes 203-208.

\textsuperscript{247} 116 S. Ct. 1620 (1996).

\textsuperscript{248} 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."

\textsuperscript{249} See Sunstein, supra note 243 at 16.

\textsuperscript{250} See supra §II(B).

\textsuperscript{251} See Hogue, supra note 135 at 36.

\textsuperscript{252} 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 certioriari in this case, though three Justices wrote to caution against giving the denial precedential value.

\textsuperscript{253} Article I, Section 10 of the Constitution states: "No state shall . . . pass any . . . Law impairing the obligations of contracts." For a discussion of the modern relevance of the contract clause with
pragmatic approach emphasizes the contractual aspects of marriage. It follows that these aspects should be constitutionally protected. Most importantly, states should not be able to allow evasion of obligations in covenant marriages. Unlike no-fault divorce, covenant marriage or equivalent ways of achieving durable marriage can be regarded as express contracts for durability that are therefore entitled to constitutional protection.

CONCLUSION

The debate over covenant and same sex marriage is marked by the clash of irreconcilable ideas about social institutions. In this Article, we suggest a pragmatic solution that sidesteps the debate and focuses instead on how the rules of different jurisdictions interact. We suggest that, even if a state does not recognize covenant and same sex marriages entered into under its laws, it might reasonably recognize the contractual aspects of such marriages when they have been entered into under the laws of another state that does recognize them.

The first step in the analysis is to view marriage as a largely contractual relationship. In general, contracting parties can and often do contract for the applicable law. The question, then, is how covenant and same sex marriages might differ from conventional contracts, and whether these differences argue for restrictions on free contracting. Covenant and same sex marriages might raise special concerns about paternalism, over-signaling, the coherence of internal rules, and the law's expressive or symbolic effect, and reasonable men might differ on whether this justifies barriers to such marriages in the internal law of a state. When it comes to recognizing foreign marriages, however, these concerns need not be accorded much weight. Thus, a state that rejects both covenant and same sex marriages in its internal rules might nevertheless recognize their contractual terms of such marriages when they are celebrated in states that do recognize them.

The law of the state where the parties live should nevertheless control in questions concerning the non-contractual aspects of marriage, such as tax breaks and subsidies. Here the expressive effect of marriage law looms large. These results are consistent with current law, under which marriages are enforced under the law of the celebration state, with only limited exceptions for local "public policy," and then only for some incidents of the marriage.254

Our proposal would usefully provide the benefits of state competition in the provision of law. There are many unanswered questions about covenant and same sex marriage, and our proposal would assist in answering some of these. By contrast, assigning victory to one side only in the debate would leave such questions unanswered. Thus, we would resist constitutional solutions that impose a national solution upon the states. The exception is divorce law, since state competition over covenant marriages will not develop if one party can readily obtain a unilateral, quick-and-dirty no-fault divorce in another state. Because of the possibility of interstate exploitation, we should prefer to see covenant marriages protected through the Contracts Clause of the Constitution.

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254 See supra text accompanying note 140.