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State Interests in Marriage, Interstate Recognition, and Choice of Law

Brian H. Bix
University of Minnesota Law School, bixxx002@umn.edu

STATE INTERESTS IN MARRIAGE, INTERSTATE RECOGNITION, AND CHOICE OF LAW

BRIAN H. BIX†

The Conference topic is the implication for interstate recognition of marriage of recent court decisions that have led to legally recognized same-sex marriages.[1] This article will approach the topic tangentially, considering more generally some of the issues relating to state regulation of marriage and family life. The article's initial focus will be on federalism, and how it interacts with domestic relations policy, bracketing for the moment both current family law doctrinal rules and constitutional constraints. Those latter concerns will then be brought in, showing how certain additional complications result. The article will then consider the ways in which recognizing party choice of law might respond to some—but by no means all—of the problems in this area.

One caveat: I do not purport to be an expert on constitutional issues or on conflict of laws, and I generally defer on such matters to those who are (including many at this Conference). The purpose of this article is more to raise certain analytical and policy considerations that underlie the current (and likely future) debates.

I. FEDERALISM, CONFLICT OF LAWS, AND NATIONAL CITIZENSHIP

A. FEDERALISM: EXPERIMENTATION, LOCAL CONTROL AND COMPETITION

A certain view of federalism seems a natural fit with the regulation of marriage and family life. This approach to federalism sees it as a means of simultaneously allowing local control and encouraging the development of alternative (and competing) approaches to a subject. It is a commonplace that different communities—including different communities within the United States today—have sharply different ideas about marriage and family. We would not be surprised to hear

† Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota. This paper was presented at the Conference, "The Implications of *Lawrence* and *Goodridge* for the Recognition of Same-Sex Marriages and the Validity of DOMA," held at Catholic University in May 2004. I am grateful to the comments of participants at the Conference.

1. *See, e.g.*, Pam Belluck, *Hundreds of Same-Sex Couples Wed in Mass.*, N.Y. TIMES, May 18, 2004, at A1.

different attitudes expressed in New York City's Greenwich Village, suburban Minneapolis, and Provo, Utah. It would seem natural, if not inevitable, that the rules established for these different communities would be as distinctly different as the communities themselves.

This ties in with a second argument often made for federalism: that it encourages (or at least allows) states to act as "social laboratories."[2] If some communities have doubts about the claims being made about the positive or negative consequences of a proposal (whether it be recognizing same-sex marriage, allowing no-fault divorce, or changing the presumptions in custody cases), they can gain evidence on the matter from nearby communities that have tried the proposal (not that the "lessons" of real-world policies are always clear and uncontroversial: *e.g.*, social scientists continue to debate what the effects have been of no-fault divorce and capital punishment, just to name two prominent examples).[3]

As a policy matter, there is much to be said for decisions made at a local level: it makes more sense to speak of the self-definition of a small group than that of a much larger group (geographically or numerically). It is far more likely that a township will closely share values and attitudes on cultural matters than an entire state. Additionally, the costs of such self-definition would be less. If a person or couple did not fit into a small community's self-definition, those excluded might only have to relocate a small distance away, in the next community. If the definition were statewide, the relocation to the next state would likely not be feasible for most people, given their work or family obligations.

However, the history of American family law (in particular, American marriage law) *has* been one of *state* control,[4] though one should also note some significant recent moves to federalize, directly or indi-

2. The standard reference here is Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

3. On the economic consequences of the change to no-fault divorce, *see, e.g.*, Douglas W. Allen, *The Impact of Legal Reforms on Marriage and Divorce*, in ANTONY W. DNES & ROBERT ROWTHORN, EDS., THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 191-211 (Cambridge U. Pr. 2002) (summarizing and evaluating the empirical data). On the deterrent effect of the death penalty, *see, e.g.*, Jon Sorensen, et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQUENCY 481, 481-83 (1999) (summarizing competing studies on deterrence).

4. As one commentator stated: "[f]rom the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995) (footnote omitted); *see also* Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930) (Holmes, J.) (relying on the "common understanding" that domestic relations matters belonged exclusively to the states to uphold the jurisdiction of a state court to hear a divorce suit brought against

rectly,[5] aspects of domestic regulation. This state-focus for American family law might be seen as a contingent matter, an accident of history, though there may be historians who argue differently. In any event, it would not have been entirely unworkable or contrary to the express language of the Constitution for domestic regulation to have been centered primarily at the national level or dispersed to the local level, rather than placed at the state level, as it has been. Locating lawmaking for marriage and divorce at the state level creates specific policy advantages and policy problems, which should be kept in mind when evaluating the options for interstate recognition of unusual marriage laws.

As federalism involves different governments being allowed to (and perhaps even encouraged to) develop different rules, one question within discussions of federalism is whether "competition" will ensue between the different governments, and what will be the consequences of such competition[6]—the extent to which federalism here might create a dynamic of either "a race to the top" (competition for the qualitatively best or most efficient rules, with no negative effects on third parties) or "a race to the bottom" (competition which leads to negative effects, as when states competing for employers do so in a way that decreases tax revenues for the state or that reduces protections for citizens, consumers or employees).[7]

Sometimes discussions of competitive federalism in marriage laws is offered in terms of the financial incentives for offering a legal regime that other states do not offer. Just as Nevada may have attracted some visitors by the speed and the ease with which marriage licenses and divorce judgments are granted,[8] so too Jennifer Brown long ago suggested that a state recognizing same-sex marriages might

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an ambassador); Sosna v. Iowa, 419 U.S. 393, 404 (1975) (describing domestic relations as "an area that has long been regarded as a virtually exclusive province of the States").

5. "Indirect" regulation occurs primarily through Congress's Spending Powers, where the federal government makes the states' receipt of certain funds contingent on meeting certain conditions. This has occurred, for example, with child support guidelines and adoption of UIFSA. *See, e.g.*, Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 17 (2000) (summarizing some of the federal interventions in domestic relations law).

6. The economic literature on federalism tends to focus on the way that competition among local governments arguably permits public services to be dispersed more efficiently. *See, e.g.*, Truman Bewley, *A Critique of Local Public Expenditures*, 49 ECONOMETRICA 713 (1981); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For an excellent article tying this tradition to discussions of federalism in family law, see Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83 (1998).

7. *See, e.g.*, Solimine, *supra* note 6, at 87-93 (summarizing races to the top and bottom).

8. *See id.* at 88 (noting Nevada's high marriage rate, and tying it to that state's efforts to promote marriage tourism).

gain a tourist-based financial advantage from doing so.[9] The flip side of this sort of competition is a different sort of "race to the bottom," whereby the competition between jurisdictions creates negative consequences (or at least what are perceived by some to be negative consequences) for parties outside the lawmaking states.[10] Thus, Utah might consider it a negative externality of Massachusetts' decision to authorize same-sex marriages if same-sex couples from Utah go to marry in Massachusetts, and then return to Utah demanding recognition of the union.[11] However, it is important to note that Massachusetts has legal rules significantly limiting the out-of-state spillover effects of its same-sex marriages: under Massachusetts law, few out-of-state residents would qualify for a same-sex marriage license.[12] Similarly, in the context of divorce laws, some states have added long residency requirements (to the minimal jurisdictional requirement of domicile), in part to "avoiding officious intermeddling in matters in which another State has a paramount interest . . . ."[13] As will be discussed in Part II, the "competitive federalism" aspects of permitting party choice of law are significantly different.

B. Constitutional and Doctrinal Constraints

State policy-making in this area is, on one hand, constrained by constitutional limitations that encourage national citizenship,[14] and, on the other hand, both constrained and undermined by current rules and practices relating to conflict of laws.

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9. Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995); *cf.* Gary Lee, *Gay Travel: Where the Rites Get Respected / Toronto Develops a Thriving Business Climate Catering to Same-Sex Weddings*, NEWSDAY, March 21, 2004 (discussing how Toronto has gained tourist dollars through Ontario's legalization of same-sex marriage).

10. *See, e.g.*, Solimine, *supra* note 6, at 87 (discussing that form of "race to the bottom").

11. For a discussion of this aspect of federalism, using the examples of physician-assisted suicide, same-sex marriage, and medical marijuana, see Brian H. Bix, *Physician-Assisted Suicide and Federalism*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53 (2003).

12. *See* MASS. GEN. LAWS ANN. ch. 207, § 11 (2003 & Supp. 2004). This law forbids access to same-sex marriage for out-of-state residents if the marriage would be void if contracted in their home jurisdiction—a list of jurisdictions which would seem to include at least the 39 states that have barred, through legislation or state constitutional provision, recognition of same-sex marriages. *See* Bob von Sternberg, *Foes of Gay Marriage Press for More Bans*, MINNEAPOLIS STAR-TRIBUNE, Dec. 26, 2004 (noting that Minnesota is one of 39 states that have passed state "mini-DOMAs").

13. Sosna v. Iowa, 419 U.S. 393, 407 (1975) (upholding Iowa's one-year residency requirement).

14. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1986 (1997) (describing the Full Faith and Credit Clause as "one of a bundle of provisions incorporated into the Constitution to bind states more closely together").

The general rule—grounded primarily in principles of conflict of laws, only occasionally codified in state statutes, and usually not thought to have constitutional status—is that a marriage will be recognized if it was valid where contracted.[15] This means that a state's efforts to make marriage policy by restricting who can marry or by putting conditions on marriage can often be circumvented by the simple expedient of marrying in another state, and then having that out-of-state marriage recognized in-state.[16] There are some limits on this general principle, limits that restore some of the home state's authority. Under traditional conflict of laws rules, states have the right to refuse to recognize marriages celebrated in another state or country, if that marriage is contrary to the forum state's strong public policy.[17] Additionally, a handful of states have a "marriage evasion act," which works to refuse recognition to an out-of-state marriage if the couple went to another state with the purpose of evading the restrictions within the home state's marriage laws.[18] An inverse regulation, not allowing out-of-state residents to marry if the marriage would be void if contracted in the couple's home jurisdiction, is law in Massachusetts, and has played a role in recent debates about same-sex marriages in that state.[19] Such rules reflect the general principle that the moral case looks different: (1) for the recognition of marriages contracted elsewhere when the couples seeking recognition were marrying under their home state rules, and are now seeking recognition elsewhere only because career or family has required them to relocate; and (2) as against people who are seeking recognition of out-of-state marriages despite long-term connections to the forum state and the clear contrary policy of the forum state.[20]

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15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (stating the general rule that a "marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized"); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 289-95 (4th ed. 2001) (summarizing the general rule).

16. *See id.* The fact that states celebrating marriage need not have any connection with the parties marrying—as contrasted with states performing divorce, where at least one of the parties must be a domiciliary of the state—is thought to justify the greater respect due foreign divorce decrees as contrasted with foreign marriage ceremonies. *See, e.g.*, Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 194-95 (1996).

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 15, at § 283(2); WEINTRAUB, *supra* note 15, at 289-95.

18. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 207 § 10 (2003 & Supp. 2004); *see generally* EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS § 13.13, at 564-565; § 15-16, at 626-27 & n.5 (3d ed. 2000).

19. MASS. GEN. LAWS ANN. ch. 207, § 11 (2003 & Supp. 2004); *see* Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, April 25, 2004, at 1.

20. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 15, at § 283(2) (stating an exception to the general validity of out-of-state marriages, valid where cele-

Divorce can occur, as a matter of jurisdiction,[21] in any state in which one of the two spouses is domiciled, even if the current domicile state(s) do not coincide with where the couple was married or lived together.[22] Additionally, the practice of states applying their own divorce rules to cases before them, even if the cases involve marriages where the couples were married and lived almost their entire married life in another state, undermines the ability of states to pursue their policies.[23] Where a state's view on marriage is expressed in large part through its rules for when divorce will be granted and the terms on which it will be granted, those policies are weakened when parties can effectively change the terms of divorce by simply moving to another state. This issue has been discussed, for example, in the context of covenant marriage laws: a couple could enter a covenant marriage in Louisiana, Arkansas, or Arizona,[24] thereby agreeing to certain restrictions on the grounds and terms for seeking divorce, but it appears that, under current doctrinal practices and understandings, another state would not be bound to hold the parties to those terms.[25]

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brated, for marriages that "violate the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage"); *see also* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 949-62 (1998) (noting a similar distinction historically in the treatment of miscegenation cases when interstate recognition questions arose); Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 185 (1998) (expressing the view that in such cases "many states will give some effect to same-sex marriages even if they don't give them full effect"). One can complicate the question further, and add examples of a couple seeking recognition of its marital status for events occurring during a brief vacation in another state, or a couple validly married in one state bringing a lawsuit in a second state that would not recognize the marriage and the marital status is central to some aspect of the suit, see Borchers, *supra*, at 180-81 (using that example in the context of a discussion of DOMA). Such examples are meant to modify our thinking about this situation: to show how it will sometimes not so much be a Massachusetts (or Vermont or Hawaii) imposing its views on other states, but other states interfering with the legal decisions made by Massachusetts regarding its own citizens.

21. Most states also have statutory waiting periods, that require petitioners to have been resident in the state for some period of time (frequently, six months or a year) before they can bring a divorce action. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527, 580 (2004) (summarizing the statutory waiting periods in all jurisdictions).

22. *See* Williams v. North Carolina (Williams I), 317 U.S. 287 (1942).

23. *See* WEINTRAUB, *supra* note 15, at 296 (summarizing the usual practice).

24. *See* ARIZ. REV. STAT. §§ 25-901 to 25-906 (2000 & Supp. 2004); ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (2002 & Supp. 2003); LA. REV. STAT. ANN. §§ 9:272 to 9:276 (2000 & Supp. 2005).

25. *See, e.g.*, Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Law*, 32 CREIGHTON L. REV. 1085, 1100-20 (1999) (summarizing current practices and understandings, but urging reform).

The constitutional constraints include, most prominently, the Full Faith and Credit Clause,[26] but also the right to interstate travel found in the Fourteenth Amendment (which at least one Court decision has grounded in the Privileges or Immunities Clause of that amendment).[27] The Full Faith and Credit Clause seems to encourage the recognition and enforcement in other states of rights granted in a sister state.[28] The right to interstate travel has been held to discourage states from treating recent immigrants from another state differently from the way long-time residents are treated.[29]

The extent to which the Full Faith and Credit Clause actually constrains state action in this area is notoriously unsettled. What is settled is that divorce judgments in one state are binding on another state, at least where the first state properly had jurisdiction over the marriage.[30] As already noted, because jurisdiction comes with the domicile of either partner, it is possible for a state that had no significant connection with the celebration of the marriage or the life of the couple to have jurisdiction to grant the divorce. What is not clear is whether the clause has *any* application to marriage.[31] It is well settled that states are strictly bound regarding the treatment of out-of-state judgments, but relatively free regarding the application of out-of-state law to a dispute before them.[32] Marriage is something less than a legal judgment, entered by a third-party adjudicator after hearing interested parties present adversarial positions[33] (most marriages

26. The Constitution states: "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." U.S. CONST. art. IV, § 1.

27. Saenz v. Roe, 526 U.S. 489, 502-04 (1999) (barring states from paying new residents lower welfare benefits than longtime residents).

28. I recognize that there is historical evidence that the Framers may have intended a narrower, merely evidentiary role for the Full Faith and Credit Clause. *See, e.g.*, Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (offering detailed evidence for the Framers' having had a narrow understanding of the clause). However, whatever the merits of this reading of history, the Supreme Court very early began to read that clause much more broadly. *See* Borchers, *supra* note 20, at 158-59 (discussing the cases).

29. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that state cannot deny welfare assistance to residents who lived in a state less than one year); Saenz v. Roe, 526 U.S. 489 (1999) (barring states from paying new residents lower welfare benefits than long-time residents).

30. *See* Williams v. North Carolina (Williams II), 325 U.S. 226 (1945).

31. *See, e.g.*, Borchers, *supra* note 20, at 164-72 (arguing that the clause does not apply to marriages); Kramer, *supra* note 14, at 1976-99 (indicating that the clause does apply to marriages, albeit in a limited way).

32. Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494-95 (2003); Borchers, *supra* note 20, at 158-79.

33. *See* Borchers, *supra* note 20, at 164-67 (discussing the justifications for treating judgments differently under Conflict of Laws and Full Faith and Credit purposes).

are not adversarial—at least at the beginning, at least at the stage of filing for a license). However, marriage is something more than the question of which state's laws should apply to some case before the court. Marriage is a status conferred by a prior action of an authorized official. As a question regarding a status conferred by a sister state, the claim for recognition is stronger than asking a second state to recognize a hunting or fishing license granted in the first state.[34] We rightfully think of hunting and fishing licenses as permission to undertake a certain activity only within a geographical area; we usually do not think of our marital status as rights and duties that apply only within a confined geographical area—though maybe, with current developments, this is exactly how we will have to begin to think. Another unsettled issues is whether the Defense of Marriage Act ("DOMA")[35] is consistent with (and authorized by) the second part of the Full Faith and Credit Clause.[36] These questions, though of obvious importance, are beyond the scope of this article.

The right to interstate travel also has its limits. In *Sosna v. Iowa*,[37] the Supreme Court held that Iowa's interest in not interfering with marriages from other states was sufficient to justify a one-year residency requirement for divorce actions, even though such a requirement could be said to burden a citizen's "right to interstate travel."[38]

In summary, and to put the matter in the broadest terms, the values of federalism, including local control and experimentation, are in an ongoing tension with the values of national citizenship.

II. STATE INTERESTS AND PARTY CHOICE OF LAW

In a previous article, I argued that recognizing party choice of law in marriage and divorce law might, paradoxically, increase states' ability to serve their chosen objectives in family law.[39] The idea of party choice of law is that the parties to some transaction or interaction are allowed to choose which state's laws govern those transac-

34. *Cf. id.* at 167, 171 (using that example).

35. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C.A. § 7 (1997 & Supp. 2004); 28 U.S.C.A. § 1738C (2000)).

36. *See, e.g.*, Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same Sex Marriage*, 117 HARV. L. REV. 2684 (2004) (summarizing arguments against the validity of DOMA); Whitten, *supra* note 28, at 346-91 (summarizing and responding to arguments that DOMA is unconstitutional); *cf.* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing for the unconstitutional status of DOMA because of its intent, rather than on the basis of a reading of Full Faith and Credit Clause).

37. 419 U.S. 393 (1975).

38. Sosna v. Iowa, 419 U.S. 393, 409 (1975).

39. Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255 (2001) [hereinafter, Bix, *Choice of Law*].

tions or interactions.[40] While the ability to choose a set of laws coming from a state that might have no other connection with the parties or the transaction may at first seem unusual, this can be seen as merely a variation on the parties' right to choose (at least in commercial transactions), through express contractual language, individual standards to govern their own transactions (*e.g.*, the definition of key terms, standards for determining when another party would be in breach, limitations on recoverable damages, and agreements to send disputes to arbitration).

The idea of allowing party choice of law for marriage and divorce regulation also has an obvious connection with the significant amount of party choice already recognized in different kinds of marriage-centered agreements. Premarital agreements that seek to affect the financial terms in case of divorce were once considered void as against public policy, in part because they altered the state-established status rules for marriage.[41] However, such agreements are now enforceable in all jurisdictions (though many jurisdictions subject the agreements to tests of substantive and procedural fairness).[42] Parties about to marry now have considerable power—though far from plenary power—to alter the property rules that apply to their marriage, and the principles of property division and alimony that will apply should they get divorced.[43] This power generally ends when the agreement extends to financial obligations between the parties and tries to affect, for example, child custody, visitation, child support, or the grounds for divorce.[44]

Separation agreements, by which parties about to end their marriage agree beyond the financial (and other) terms upon which their union will be dissolved, have always received favorable treatment by the courts,[45] as they save court time, decrease the rancor of divorce,

40. For a good overview of party choice of law in a commercial law setting, see Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003).

41. The other (and related) justification given for non-enforcement was that such agreements, if enforceable, would encourage divorce. On the history of the enforceability of premarital agreements, see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WILLIAM & MARY L. REV. 145, 148-58 (1998) [hereinafter, Bix, *Bargaining*].

42. *See id.* at 153-58.

43. *See* LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS 361-481 (ABA 2001) (offering an overview of the enforceability of premarital agreements); Bix, *Bargaining*, *supra* note 41, at 150-58.

44. *See* MORGAN & TURNER, *supra* note 43, at 379-93 (summarizing some of the "public policy" limitations to premarital agreement enforceability).

45. However, in most jurisdictions, a distinction is drawn between the terms covering property division and alimony, on one hand, where the separation agreement's terms will usually be held to bind the court, and be subject to revision only in extraordinary circumstances, and, on the other hand, terms regarding child custody, visitation,

and have the potential of establishing terms that the parties themselves will be more content to live with. With premarital and separation agreements, parties about to marry or about to end their marriage are given significant authority to set or to alter the default terms of marriage set by the state.

My discussion in the earlier choice of law article considered the possibility that couples about to marry would have the right to choose the set of rules governing marriage and any dissolution (divorce or annulment), from among the rules passed in any American jurisdiction, with this choice of law being enforced even if the couple subsequently moved to another state, and even if one partner later filed for divorce in another jurisdiction.[46] The advantages of allowing couples to choose a package of rules, rather than potentially having different state's rules cover the various aspects of their married life, is that (1) a more consistent set of principles would apply, rather than potentially having one state's divorce policies undermine another state's marriage policies,[47] and (2) couples could more effectively choose the set of rules that best fit their needs and preferences.

As others have argued,[48] the current approach of most courts, conflating jurisdiction with choice of law (that is, courts generally applying the forum state law for marital cases once they determine that a domestic relations case is properly before them), creates unfortunate consequences and should be rethought. Express choice of law provisions, if generally enforced, would ensure that domestic relations policies—the domestic relations policies of some U.S. jurisdiction—were consistently applied, while also responding to the virtues of party choice.

While the rules of marital property (including the control over property during the marriage, and the principles of division upon dissolution) are thought to have significant effects on choices relating to marriage and divorce (as well as gender equality),[49] under current doctrine and practice, determining the rules to apply is notoriously

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and child support, where the court will usually be held to have a duty to review the agreement, without deference, to make sure that the best interests of the child(ren) are being protected. *See, e.g.*, MORGAN & TURNER, *supra* note 43, at 33-63 (offering an overview of some enforcement issues for separation agreements).

46. Bix, *Choice of Law*, *supra* note 39, at 262-71. To be put into effect, this proposal would likely require federal legislation or uniform state legislation. *See id.* at 265-66.

47. As would occur, for example, were a covenant marriage to be dissolved under state laws that did not enforce the commitments entered under that marital form. *See supra* notes 23-25 and accompanying text.

48. *See* Spaht & Symeonides, *supra* note 25, at 1102-17.

49. *See, e.g.*, Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004) (arguing for a change in marital property rules to encourage more egalitarian marriages).

messy when a couple has lived in more than one state and those states have differing marital property regimes.[50]

The point of confining the parties' choice of laws to rules enacted by some American jurisdiction is the guess that requiring that the policies have been passed by some American legislative body will offer some level of protection from exploitation for weaker parties, and will also offer some protection to third parties—particularly children.[51]

A strategy comparable to free choice of law among established state laws has been suggested by Larry Ribstein at this Conference:[52] for couples about to marry to be able to choose between a series of "standard forms," each of which would bundle marital rights and obligations in a way that would serve the interests of some couples while protecting individuals entering such relationships from exploitation.[53]

It is important to contrast the "competitive federalism" aspects of party choice of law with those under systems with more limited choice of law. As discussed in Part I.A., above, federalism systems often have to worry about the "spillover" effects of one state's laws on other states, and whether a dynamic might develop that will create a "race to the bottom." Spillover effects can be minimized where there are requirements of domiciliary status or durational residency requirements.

However, there is a different type of cost one might consider: the cost that inefficient or unjust laws, perhaps supported by some well-organized interest group, can impose on the citizens (and businesses) of the state where the laws are passed. As two prominent commentators have noted: "[a]n important effect of permitting free choice of law is to improve state rules and regulations by reducing interest groups' incentives to promote inefficient laws."[54] Recognizing party choice of

50. For a brief overview, see SYMEON C. SYMEONIDES, ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL—CASES AND MATERIALS 404-10 (2d ed. 2003); SCOLES, *supra* note 18, at 577-606. There is also a problem where a couple is married under one set of laws, and the state later changes its stance on policy matters and greatly modifies the law (*e.g.*, when states moved from fault to no-fault divorce). Courts nearly always apply the marriage and divorce law then in effect, not the law under which a couple was wed. *See* Bix, *Choice of Law*, *supra* note 39, at 261.

51. *See* Bix, *Choice of Law*, *supra* note 39, at 269-70.

52. *See* Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005).

53. *See id.* For a discussion in the context of commercial law of why a small number of standard forms would have advantages over a wider range of party-constructed choices, see, *e.g.*, Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U.L.Q. 369 (1995); Larry E. Ribstein, *Making Sense of Entity Rationalization*, 58 BUS. LAW. 1023 (2003).

54. Bruce H. Kobayashi & Larry E. Ribstein, *Contract and Jurisdictional Freedom*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 325, 325 (F. H. Buckley ed. Duke, 1999); *see also* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000) (offering a similar argument).

law empowers transactors to avoid laws that would be harmful or inappropriate for their case, and to seek out more appropriate or more just laws.

Of course, a regime of broad party choice of law cannot distinguish parties avoiding inefficient or unjust forum state laws from parties avoiding fair, necessary and protective forum state laws. If one is concerned about the protection of parties who cannot protect themselves (most obviously children, but also some vulnerable spouses and spouses-to-be), then one must either trust (or hope) that no state's laws fall below the minimal standard of protection, or have some mechanism for refusing party choice of law where the effects would be too dire.[55]

Whether one constrains the menu of options by available legislatively enacted alternatives or by established "standard forms" (approved at some point, one assumes, by a legislature, court, or agency), it does not mean that one necessarily puts all trust in legislatures or other public officials. It is too late in the day to believe that such sources are always immune from incompetence or improper influence. However, one can assume that a public evaluation of alternatives will at least be likely to exclude the most one-sided or exploitative arrangements, arrangements that might otherwise be entered by some couples and later enforced if there were no limits on private agreements.[56]

There is of course an obvious sense in which recognizing party choice of law might undermine certain federalism values. It would be obvious that a state could not impose its ideas about marriage on all of its citizens. However, as already discussed (above, in Part I.B.), the conflict of laws rules for marriage and divorce mean that state control over the marital rules for its citizens is already limited. By contrast, proposals that recognize a couple's "choice of law" might in some ways strengthen the states' ability to promote certain ideas about marriage and family. It seems particularly useful to support the ideas and interests behind proposals like the covenant marriage laws.[57] However,

55. Even O'Hara and Ribstein, in their strong advocacy of party choice of law, find a place for restrictions on party choice. Controversially, however, they believe that such "public policy" judgments should be made by legislatures, not courts. *See* O'Hara & Ribstein, *supra* note 54, at 1194-96.

56. One might argue that one does not need to constrain choice in this way, because the normal doctrinal defenses of contract law—unconscionability, undue influence, duress, misrepresentation, and lack of good faith—would be available to defeat enforcement of egregiously one-sided agreements. *See, e.g.*, Bix, *Bargaining*, *supra* note 41, at 182-92 (considering the availability of conventional contract defenses for regulating premarital agreements). However, as these doctrines are often construed quite narrowly, some might think them insufficient protection against one-sided premarital agreements.

57. *See supra* notes 24-25 and accompanying text.

whatever its other merits, this approach has no ready answer to the problem of states having sharply different ideas about *what sorts of unions* to recognize; *e.g.*, where one or more states recognizes same-sex unions or polygamous groups, or marriages by a couple quite young or who are first cousins, but other states strongly oppose such recognition. I turn in the next section to consider these sorts of situations.

III. MIGRATORY COUPLES: FEDERALISM VS. NATIONAL CITIZENSHIP

What of the same-sex couple who wish to marry, but who live in a state that strongly opposes the recognition of same-sex marriage? In what sense would a "party choice of law solution" work to resolve the conflict between what the couple seeks and the state's policy? To allow a couple in North Dakota, who are not allowed to marry under its laws (because one of them is 15 years old, because they are first cousins, or because they are both men) to gain marital status by simply agreeing to be subject to the laws of another state where they could marry, would simply allow vast and simple evasion of state policy.

If there is an insight of the party choice of law approach that can survive the reality of states having sharply differing ideas about which unions to recognize, it is that there is a contractual element to marriage—an important element of marriage, though far less than the full public status and traditional institution that is "marriage"—and that this element perhaps should be more available, as a limited set of legal rights and obligations, to couples who choose them.

Consider a stronger set of facts for recognition: couples who validly marry under the rules of one state, but then relocate[58] to a state in which their marriage would not have been allowed. As already discussed, considerations of national citizenship and the right to travel argue strongly in favor of recognizing their union, while considerations of federalism seem to argue against. Frank Buckley and Larry Ribstein recently offered a compromise solution, whereby states would recognize the "contractual" or "*inter se*" aspects of marriage, but could refuse marital-based claims upon the state.[59] This carries a certain logic to it: that one can view the same-sex (or polygamous) union entered in another state as being, at a minimum, a kind of (form) con-

58. For the purpose of this discussion, I will assume "neutral" or "legitimate" reasons for relocation, like a job relocation, a job opportunity, family obligations, or the like. It is possible that some motivations for relocation (e.g., a kind of reverse "marriage evasion"—a move merely to challenge the state policies in another state) might raise different questions or justify different policy conclusions.

59. F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561.

tract entered between the parties, and that this contract should be recognized by other jurisdictions.

As a matter of policy (extending between current contractual and choice of law doctrinal analysis), one might argue for a slight extension of the Buckley/Ribstein category of minimal recognition. If one views simple inter-party claims as being on one side of a spectrum, and the right to certain governmental benefits (rights that would cost the state(s) money) as being on the other side, there are certain claims in the middle that need consideration: claims recognized by third parties *because of* the government's recognition of a couple's status. These include matters like whether one gets to visit a life companion in the hospital, and, if necessary, make medical decisions for that companion. One can achieve some of these sorts of claim-rights through contract, or contract-like documents (living wills, durable powers of attorney, etc.), but some of these rights may be hard or impossible to create through private documents, because they involve another institution's (in this case, a hospital's) deference to the state recognition of a relationship.

Of course, the argument for extending recognition to this additional set of rights and obligations depends on a balancing between the objection the state has to (recognizing) a type of relationship and the interests protected in a partial recognition. This is a balance that, in principle, might vary from jurisdiction to jurisdiction, and even from one type of right to another (and needless to say, different observers might come to a different balance over the same set of facts). For example, one might think the "humanitarian" argument strong enough for rights of hospital visitation and decision-making to overcome all but the strongest public-policy oppositions to same-sex relationships, but that the balance might come out differently with an argument requesting companies to offer insurance coverage to partners or to make such partners presumptive beneficiaries.

Additionally, most states do not consider parental rights and obligations as something that can be created, modified, or waived by contractual agreement alone.[60] This is reflected by the reluctance of many state courts to recognize parental rights for a member of a same-sex couple who has helped to raise a child, but who is not the child's biological parent, even if the couple had entered a detailed agreement that both partners should have the rights and obligations

60. The effect of separation agreements is frequently to modify, or at least clarify, parental rights regarding custody, visitation, and child support, but these agreements are subject to judicial approval or disapproval, with the general understanding that the provisions regarding children are to be tested for reasonableness, with no deference given to the parties' choices. *See, e.g.*, MORGAN & TURNER, *supra* note 43, at 33-163 (offering an overview of rules regarding the enforcement of separation agreements).

of a parent.[61] Recognizing this status (from a valid same-sex marriage or civil union in another state) is not a matter of state benefit (at least not directly or primarily), but is a matter of state recognition of a status agreed between the parties, and recognized in another jurisdiction.

To be clear: I am not arguing that any of the solutions discussed in this section (or generally in this paper) are *required* by a proper reading of the United States Constitution (on its own, or in combination with Conflict of Laws principles and various federal and state statutes). The arguments I present are mostly at the level of policy and principle.

CONCLUSION

As indicated, the discussions in the prior section, and throughout the paper, are not advocated as solutions required by current law and doctrine. Rather, they are meant to respond to the values of federalism and national citizenship that underlie relevant constitutional provisions, even if the proper application of those provisions (based on the historical understanding of those provisions, their development through judicial interpretations, or the like) would require something less or something different. Additionally, the conclusions are meant to respond to the additional values of autonomy and efficiency that party choice of law has been shown to serve, while still respecting, to a considerable extent, the right of state communities to define themselves.

61. *See, e.g.*, *In re* Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991) (refusing to enforce co-parenting agreement on the grounds that it violated public policy).