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This Article proposes to modernize the archaic procedures states use to authorize marriages so as to provide legal flexibility, promote efficiency, and enhance individual choice. Almost universally, states require couples' presence within their borders, however briefly, for a ceremony. After considering the historical and policy rationales for this requirement and finding them either obsolete or incoherent, we propose that states offer marriages to those outside their borders. Such distance marriages could occur via video-conference, using the internet or even telephone, with readily available safeguards to prevent fraud. This simple reform would allow certain couples who cannot marry under local law to import the trappings of an official marriage ceremony in "real time," as well as assure access to the legal tie for any couple facing a barrier of physical separation. Our proposal builds upon the historical and present-day precedent of proxy marriage and legal principles such as choice of law for multi-jurisdictional contracts and corporate formation. With this reform, states would be free to compete over marriage procedure efficiency and experiment with alternative regulatory goals or menu options, such as enabling greater disclosure about personal or health histories, permitting more restrictive prenuptial arrangements (as with certain states' development of "covenant marriage") or tying access to certain distance marriages to advance agreement to accept jurisdiction for marriage dissolution. Finally, our proposal would allow same-sex couples (and other couples unable to marry under their home jurisdictions' laws) easier access to marriage authorization and the ability to perform wedding ceremonies before family and friends. Our procedural reform offers a gradualist approach to the controversies concerning the substantive rules of marriage, notably Judge Walker's recent ruling declaring Proposition 8 unconstitutional.

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INTRODUCTION¹

When Iowa courts held that the state must accord equal marriage rights to same-sex couples,² the courts awarded Iowans a new right and simultaneously handed a same-sex destination wedding trade to Iowa merchants. The day marriage rights became official, same-sex couples flocked to the Hawkeye State by the busload to marry. After brief stays, the newly married couples boarded the buses and returned to their homes.³ Such short visits, supplemented by a burgeoning wedding trade in chapels, food, and flowers, continue, to the delight of many Iowans and the consternation of others.⁴ The five other state jurisdictions, plus the District of Columbia, that authorize such unions are also a tourist destination for marrying couples.⁵

These trips illustrate two points, one about law and the other about human behavior: (i) nearly every state requires the physical

1. A note for the record: we posted our first draft of this Article on SSRN on October 22, 2009, and announced a project to encourage states to adopt distance marriage procedures, drawing on the precedent of proxy marriage. An article appeared on SSRN on April 28, 2010, that also drew on the scholarship on proxy marriage that we had compiled, contained certain of the same themes about population mobility and other matters, and used several of the same illustrations and examples. The author acknowledged having reviewed our Article before presenting her article at a faculty workshop that occurred four months after we posted our draft Article. The author described developing an interest in the subject from a news story published one month before our posting. The article cited an interview broadcast on National Public Radio about our project and gave an implausibly tangential *see also* cite to our Article. Given the sequence of posting of the articles and the duplication of a certain amount of our research, we do not regard her article as appropriate for citation. We feel constrained to include this note to explain why we do not cite the article and to place on the record for any reader of both articles the facts about the prior posting of our Article and the admitted review of our Article by the person who prepared the second piece.

2. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

3. See, e.g., Jane Greer, *Nine Same-Sex UU Couples Marry in Iowa*, UUWORLD.ORG (Sept. 21, 2009), <http://www.uuworld.org/news/articles/150927.shtml>.

4. Recent statistics reveal that more than half of the same-sex couples marrying in Iowa are from out of state. Jason Hancock King, *Iowa Has Become Gay Marriage Mecca*, IOWA INDEP. (May 20, 2010, 9:00 AM), <http://iowaindependent.com/34495/king-iowa-has-become-gay-marriage-mecca> (more than half the 2000 marriage licenses issued to gay couples in Iowa went to out-of-state residents).

5. The other states and jurisdictions that authorize same-sex marriages are Connecticut, the District of Columbia, Massachusetts, New Hampshire, and Vermont. A study by the Williams Institute at UCLA estimated that more than 16% of same-sex couples were married “but lived in a state with no recognition.” GARY J. BATES, WILLIAMS INST., SAME-SEX COUPLES IN U.S. CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY I (2010), available at http://www2.law.ucla.edu/williamsinstitute/pdf/WhoGetsCounted_FORMATTED1.pdf. Presumably, most such couples traveled to an authorizing state to marry. In addition, the Gates data show higher estimates for same-sex couples in New York and Maryland. JODY HERMAN, CRAIG KONNETH & M.V. LEE BADGETT, WILLIAMS INST., THE IMPACT ON RHODE ISLAND’S BUDGET OF ALLOWING SAME-SEX COUPLES TO MARRY 5 (2011), available at <http://www2.law.ucla.edu/williamsinstitute/pdf/WilliamsInstituteRIFiscalAnalysis.pdf>.

presence of a couple *within* its territory in order to authorize the couple's marriage; and, (ii) couples value the status and ceremony of marriage *even if it lacks legal force in their home state*. These points suggest a major reform to the law of marriage procedure. States should authorize marriages of those not present within their territorial boundaries. We demonstrate that states have the sovereign power to authorize marriage performed anywhere,⁶ and historically have blessed marriages in distant locations. As to their incentives to provide such benefits outside the state to non-residents, states have, to varying degrees, aspirational goals relating to good government, reputational interests in being innovators, and motives relating to fee income.⁷

The societal benefit of states' adopting such legal regimes is straightforward and immediate. *All* couples would gain more assured access to the marriage status. In our mobile society, the need for improved access is diverse and widespread. Among those benefited would be couples seeking to secure military survivor benefits,⁸ those traveling to "destination marriages" in exotic places who distrust the efficiency of the local marriage recording system, and older couples separated and too ill to travel. Same-sex couples in particular would gain low-cost access to the value that they place on officially authorized marriage, and would be able to import the ceremony to their home state *even if the home state will not recognize such marriages*. The value such couples see in being married,⁹ as

6. We refer to marriages contracted across jurisdictions, or with the parties in separate locations, as "distance," "absentee," or "remote" marriages. These terms have been variously used in writings cited herein about marriage and communication in shareholders' meetings from a distance.

7. We do not suggest in this Article a proposal for a more robust incentive of the kind incorporation provides in the continuing taxing and fee connection between a corporation and the state in which it is incorporated. For a proposal concerning property regimes, in which property owners would deliver payments to states by registering out-of-state property in their former state's property regime and paying fees and even taxes, see Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 104 (2005).

8. The need for access to marriage by couples separated due to military service is greater than ever, given long deployments and assignments abroad. See Monu Bedi, *E-Marriage and the Military*, 2011 MICH. ST. L. REV. (forthcoming 2011). According to Professor Monu Bedi, over the last few years, deployments have increased in length and some military members have been involuntarily extended on active duty. *Id.* Professor Bedi infers that these members will have a greater need for long distance marriage since they won't be home as often. *Id.* He buttresses this conclusion by emphasizing an increase of dual military marriages. *Id.* The pressure for distance marriage has resulted in an occasional marriage by Skype, even without a specific statutory basis. Clare Kennedy, *Marine in Iraq Gets Hitched over the Internet*, MILITARYTIMES.COM (July 8, 2009, 5:40 PM), http://www.militarytimes.com/news/2009/06/ap_marine_wedding_iraq_060809/.

9. Our working paper, posted on SSRN as noted *supra* note 1, helped to give a male Texas couple the confidence to arrange a marriage beamed by Skype from Washington, D.C. to a W Hotel in Dallas, Texas. The couple has attested eloquently to the emotional impact of

shown by the bus trips to Iowa, would be greatly enhanced by experiencing their marriage ceremony among friends and family in their home state. Law, then, has some simple uses, such as offering unfettered access to, as the economists would say, “status goods” that the state uniquely can provide.¹⁰

These immediate gains for individual couples are important, but our proposal goes further. After demonstrating that a tie to geography has limited prudential purpose or effect, we call for opening up marriage procedure to cross-jurisdictional competition and hence encouraging a basic reappraisal of the regulatory goals of marriage formation rules. We propose a new approach to marriage procedure that uses federalism to promote convenience as well as enhance individuals’ and states’ interest in informed choice. This reform renders marriage formation very similar to incorporation—or choice of law provisions in contracts—in that they create legal relationships among individuals who are not physically present within the authorizing jurisdiction. While recognizing key differences between marriage and incorporation, we argue for scrutinizing marriage law, and protecting the associational interests involved, under the same justifications which modern scholars have scrutinized incorporation, i.e., efficiency, disclosure, and jurisdictional competition.

The recent district court decision declaring Proposition 8 unconstitutional¹¹ highlights the potential usefulness of the corporate analogy. Judge Walker’s decision emphasized the norm of equality as a mandate for *all* state laws, which risks judicial imposition of one solution for the entire country to the problem of modernizing marriage. The genius of corporate law¹² is that it harnesses the capacity of federalism to spread improved law consonant with the needs of capital. States have been at liberty to try differing approaches, to copy one another, and to offer improvements to businesses in all states.¹³ State laws fashioned in one state thus benefit interests in all states, while avoiding the hazards of a single national rule. Such an approach may well provide status and practical benefits to same-sex couples, enhance the visibility of same-sex

the ceremony and their wedding celebration, which they have called the “greatest day of their lives.” Dante Walkup & Mark Reed Walkup, *Modernizing Marriage Through E-Marriage*, Panel Presentation at the Michigan State University Law Review Symposium: *Modernizing Marriage Through E-Marriage* (Nov. 11, 2010).

10. For a discussion of marriage as a status good, see *infra* Section IV.A.

11. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

12. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

13. See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1141–43 (2002) (discussing the ease by which Delaware copies other states’ corporate statutes).

marriage with a relatively low level of confrontation, and create a vehicle for new energy in state policy making.

Finally, we examine the cultural implication of widespread “import and export” of the law of intimate relationships.¹⁴ We look at the potential for federalism to spread normative views of the family and provide greater flexibility in family relations. Conversely, we look at the risks involved in a federalism approach, when allowing jurisdictions to offer differing definitions of family can erode the value of universality in legal categories. We examine a rich array of questions about the potential for states to create enhanced efficiency and different choices to couples forming a family tie in a mobile society and a federalist political structure.

This Article proceeds as follows: Section I provides a short brief in favor of distance marriage, arraying critical arguments and themes that support the proposal. Section II examines the current law of marriage formation, describing its unreflective, non-innovative nature. Section III then looks briefly at the history of marriage formation law to conclude that it has lost cognizable purpose, despite whatever regulatory justifications it once had. Section IV puts forth a new vision of marriage formation, in which states could offer marriage to those outside their borders. This may foster competition over efficiency and convenience in marriage and divorce procedures, as well the availability of other choices, such as disclosure, important to marrying couples and of interest to the state as a good that it might help foster. Section V analyzes our proposal in light of the recent district court decisions declaring the Defense of Marriage Act (DOMA) and California’s Proposition 8 unconstitutional. We argue that our approach allows for the spread of new forms of marriage in a way that, in contrast to constitutional litigation, respects state autonomy. Finally, we put forth a brief sketch of goals that legislation for absentee marriage should emphasize, providing a starting point for legislative deliberation.

14. One writer has described how federalism has led to “export” and “import” of law, particularly in the area of civil rights. See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *YALE L.J.* 1564, 1592–93 (2006) (“The jurisdictional interaction of international, national, and local bodies produced changes in American law, sometimes unacknowledged and sometimes with direct attribution.”); see also Bell & Parchomovsky, *supra* note 7, at 78, 98, 103 (analyzing the current “import” of law by temporary migration from one state to another and proposing the creation of a “national menu of property forms”).

I. MAKING THE CASE FOR DISTANCE MARRIAGE

Current marriage procedure is archaic, often strange, and, oddly, rarely questioned.¹⁵ Virtually every state requires the physical presence of a couple within its territory as a requirement for granting the benefits of ceremonial marriage.¹⁶ These rules for ceremonial marriage range from both parties' physical presence within the city or county authorizing the marriage to arbitrary requirements for officiants' identity and residence.¹⁷ These requirements constitute a regulatory relic of more rooted times when marriage procedure had cognizable goals and make little sense in our mobile society.¹⁸

15. A law professor recently (for personal reasons) noticed Virginia's requirements that lay, but not religious, officiants must be Virginia residents and invited blog discussion by other legal professionals. See Ilya Somin, *A Minor but Annoying Example of Unconstitutional Religious Discrimination in Virginia Marriage Law*, THE VOLOKH CONSPIRACY (July 2, 2009, 12:05 AM), <http://volokh.com/2009/07/02/a-minor-but-annoying-example-of-unconstitutional-religious-discrimination-in-virginia-marriage-law/>. Bloggers critically examined the constitutional issues implicated, discussing whether the distinction unfairly discriminated against the non-religious, but never raised the fundamental question: whether the entire regulatory regime had any coherent, recognizable purpose.

To find a sustained, rigorous examination of the purpose of marriage formation law, one must go back to the work of Mary E. Richmond, a founder of American professional social work, who wrote an ignored classic, *Marriage and the State*, with Fred Hall, an eminent family lawyer. It is a remarkable volume, brimming with a progressive faith in reform and social scientific empiricism that catalogues and critiques the swathe of marriage law found in the several states. Richmond warns that reform will be premature "until, for at least another generation, the subject of marriage administration has been dealt with intelligently, systematically, and in careful detail." MARY E. RICHMOND & FRED S. HALL, *MARRIAGE AND THE STATE* 337 n.1 (1929). Her call for examination of marriage regulation went largely unheeded. This strange stasis could be explained anthropologically in that the marriage relationship is so basic that it is part of the unexamined, even unnoticed, social structure. Or, it could be that no one bothers to litigate the matter. Even legal scholars whom the current regulation harms or inconveniences, like Somin, can see no interest in litigating the matter. See Somin, *supra* note 15.

16. See *infra* Section II.

17. See *infra* notes 61–85 and accompanying text.

18. For the last century, state marriage laws have shown little development or analysis. In the late nineteenth and early twentieth century, concern for uniformity led to proposals to amend the Constitution to nationalize the marriage laws, which is the rule in Canada and Australia. Justice Frankfurter cited these efforts and the foreign examples and discussed what the Court could do, within its institutional competence, to contribute to a second best solution of substantial uniformity, particularly in divorce rules. *Williams v. North Carolina*, 317 U.S. 287, 305 (1942) (Frankfurter, J., concurring) (citing S. Doc. No. 93 (1926)); Ames, *Proposed Amendments to the Constitution of the United States during the First Century of its History*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 190 (1896)); see also *id.* (citing various sources concerning efforts to bring national uniformity to divorce laws). Rather than a national law, fairly brittle local procedural rules govern marriage formation, with trends generally favoring a degree of uniformity in the substance of the legal status. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OREGON L. REV. 433, 442–44 (2005).

The goals of marriage authorization law and practice shift from era to era. In pre-modern and early industrial periods, laws requiring parish churches to announce marriage using banns provided publicity and notice, thereby preventing clandestine marriage and encouraging Church and community control over marriage formation. In addition, the banns encouraged detection of bigamy and incest, real risks to guard against in a world of slow, costly communication. In the nineteenth century, marriage rules began to further less benign goals. States used marriage laws to address issues of race (through restrictions on inter-racial marriage), and the federal government drew on rules relating to marriage to regulate immigration (discouraging immigration of individuals from certain, disfavored nations) and to discriminate against women in several respects.¹⁹ The nineteenth century also saw the emergence of waiting periods to prevent impulsive marriage.²⁰ In the twentieth century, the goals shifted to the more defensible attempt to further public health, by requiring venereal disease screening.²¹ In the twenty-first century, with states minimizing or eliminating most health screenings and waiting periods, the fixed form of marriage authorization is little more than a nuisance.²²

What then might be a worthwhile regulatory goal for the twenty-first century? We argue that modern marriage formation law should offer convenience as well as provide some potential for couples to choose a preferred regime for regulating the entry point to marriage. The method for states to achieve this goal is clear and surprisingly simple. States should revise their marriage statutes to make their marriage formation laws accessible to those beyond their physical boundaries.²³ The proposal to modernize these flawed statutes in response to contemporary needs then is the opposite of a radical idea. Rather it builds on deeply rooted

19. See CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 119–20 (1998); PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009).

20. See RICHMOND & HALL, *supra* note 15, at 106–19 (offering a critical discussion of lack of advance notice requirements, with chart showing dates of advance notice rules).

21. See *infra* notes 177–178 and accompanying text.

22. See *infra* Section II. Local clerks' offices have the ability to interpose obstacles to couples' marriages. See, e.g., Peter Daining, *Latino Group Sues Ottawa County Clerk: Discriminating Marriage Licensing Alleged in Lawsuit*, HOLLAND SENTINEL, May 11, 2010, <http://www.hollandsentinel.com/news/x1560854358/Latino-rights-group-sues-Ottawa-County-clerk>; see also *Kent County Clerk Tells What She Really Doesn't Do*, EL VOCERO HISPANO (Oct. 1, 2010, 9:51 AM), <http://www.elvoceros.com/english-version/16130-kent-county-clerk-tells-what-she-really-doesnt-do>.

23. Our proposal builds on well-established precedent in which federalism has led to "export" and "import" of law, particularly in the area of civil rights. See Resnik, *supra* note 14, at 1592–93.

but overlooked precedent in both ancient²⁴ and modern law: marriage by proxy,²⁵ telegraph,²⁶ telephone,²⁷ and mail.²⁸ Removing barriers imposed by geography would lower the cost of access to any marriage where there is a problem of physical separation, as well as offer access to marriages that are withheld from a couple by the laws of another location. Today, the salient example is same-sex marriage, but other possibilities, such as covenant marriage,²⁹ or

24. See *infra* note 106 (discussing proxy marriage in Europe).

25. CAL. FAM. CODE § 420 (b) (West Supp. 2010) (providing for marriage of a member of the U.S. Armed Forces who is serving overseas and in a conflict or war and who is unable to appear to be married by means of a personal appearance by an attorney in fact with a power of attorney that meets standards for witnesses); COLO. REV. STAT. § 14-2-109 (2) (2006) (permitting an officiant to exercise discretion if a third party holds a written authorization to act for one of a couple “unable to be present” and providing for petition to a court if the officiant “is not satisfied”); DEL. CODE ANN. tit. 13, § 120 (2009) (providing procedures for an attending physician to act as proxy if he provides an affidavit that the marriage applicant is at the point of death and may lawfully marry); MONT. CODE ANN. § 40-1-301 (2)–(4) (West, Westlaw through 2009 legislation) (permitting double proxy marriage and requiring that one party to the marriage be “a member of the armed forces of the United States on federal active duty or a resident of Montana at the time of application” and providing for discretion by the officiant and access to court to seek a court order if the officiant “is not satisfied”); TEX. FAM. CODE ANN. § 2.006 (a)–(c) (West 2006) (generally permitting a single proxy upon affidavit but permitting a double proxy marriage only if each applicant provides an affidavit that he or she is “(1) on active duty as a member of the armed forces of the United States or the state military forces; or (2) confined in a correctional facility”).

26. TOM STANDARD, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS* 137–38 (2007) (describing a telegraph wedding between an army telegraph operator at Camp Grant, Arizona and his fiancée in San Diego).

27. See *infra* note 123.

28. Proxy marriage, as well as other forms of distance marriage, has received both scholarly and professional attention, but usually during wartime or shortly after, as the following listing of all known articles on the subject reveals. We attribute the timing of this interest to the problem of soldiers leaving their intimate partners on the home front. We have collected the various articles that have periodically addressed the matter, and then languished with relatively little notice. See Lillian M. Gordon, *Marriage by Proxy: The Need for Certainty and Equality in the Laws of the American States*, 20 SOC. SERV. REV. 29 (1946); W.H. Howery, *Marriage by Proxy and Other Informal Marriages*, 13 UMKC L. REV. 48 (1944); Ernest G. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473 (1919); Marvin M. Moore, *The Case for Marriage by Proxy*, 11 CLEV.-MARSHALL L. REV. 313 (1962); A. A. Roberts, *Marriage by Proxy: Including a Brief Consideration of the Nature of Marriage and of Agency*, 60 S. AFR. L.J. 280 (1943); William B. Stern, *Marriages by Proxy in Mexico*, 19 S. CAL. L. REV. 109 (1945); Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88 (1960); Comment, *The Validity of Absentee Marriage of Servicemen*, 55 YALE L.J. 735 (1946); Note, *Marriage by Mail*, 32 HARV. L. REV. 848 (1919); Note, *Marriage by Proxy—Conflict of Laws*, 2 N.Y. L. REV. 343 (1924); Note, *Validity of Proxy Marriages in Kentucky*, 35 KY. L.J. 228 (1947); see also Maurice Possley, *Marriage By Proxy Booming in Montana*, MONT. LAW., June–July 2007, at 32.

29. Louisiana offers “covenant marriage” in addition to standard marriage. Covenant marriages are not dissolvable though no-fault divorce, in which either couple can simply claim irreconcilable differences. See LA. REV. STAT. ANN. § 9:272 (2008) (“A covenant marriage terminates only for one of the causes enumerated in Civil Code Article 101. A covenant marriage may be terminated by divorce only upon one of the exclusive grounds

even alternative forms for family life,³⁰ could emerge.³¹ States are unlikely to have a great interest in offering readier access to variations, such as close kinship marriage, which remain disapproved in most states but permitted in some. In a symposium on e-marriage, legislators (and one assistant clerk of court) in attendance concluded that states that offer e-marriage should limit e-marriage to those of legal maturity.³²

By building on the proxy and other distance marriage precedent, we do not unsettle long, established traditions. To the contrary, the laws we have now are not a deep tradition, but rather an expediency that developed in a slap-dash manner from our early colonial society.³³ As mentioned above, marriage procedure has always been a part of changing regulatory regimes, reflecting developing notions of race, nationality, and public health.³⁴ As such,

enumerated in R.S. 9:307.”); LA. REV. STAT. ANN. § 9:272 (listing the grounds for terminating a covenant marriage by divorce as: adultery by one of the spouses; a spouse’s conviction of a felony followed by a sentence to death or imprisonment at hard labor; spousal abandonment for one year and the spouse’s constant refusal to return; one spouse’s physical or sexual abuse of the spouse seeking the divorce or a child of one of the spouses; the spouses have been living separate and apart continuously without reconciliation for a period of two year; the spouse’s excesses, cruel treatment, or outrages of the other spouse); *see also* John Witte, Jr. & Joel A. Nichols, *More Than a Mere Contract: Marriage as Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595, 595 (2008) (“On August 15, 1997, the State of Louisiana put in place the nation’s first modern covenant marriage law. The law creates a two-tiered system of marriage. Couples may choose a contract marriage, with minimal formalities of formation and attendant rights to no-fault divorce. Or couples may choose a covenant marriage, with more stringent formation and dissolution rules.”). Arizona and Arkansas also offer covenant marriage. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (2007) (setting forth requirements similar to Louisiana’s); ARK. CODE ANN. § 9-11-801 (2002) (same).

30. Larry Ribstein, *Incorporating the Hendrickses*, 35 WASH. U. J.L. & POL’Y (forthcoming 2011) (manuscript on file with authors) (critiquing proposals to use standard business forms for intimate relationships); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

31. In a transitional moment in legal history, state variations in marriage are becoming sufficiently salient so as to “brand” a particular state’s marriage laws, i.e., Vermont same-sex marriage or Louisiana covenant marriage. Modernized marriage laws would allow a Louisianan to have a Vermont same-sex marriage in Louisiana while a Vermonter could have a Louisiana covenant marriage. While Vermont may prefer not to enforce the terms of a Louisiana covenant marriage, couples who exchange vows in Vermont may still undertake a legal covenant marriage under Louisiana law before their friends, family, and community. Couples can choose the marriage laws they prefer and thereby claim, in marriage, the freedom Americans enjoy to define their own communities in legally relevant ways.

32. Bill Lippert et al., Remarks at Michigan State University Law Review Symposium: Modernizing Marriage Through E-Marriage (Nov. 10, 2010). States could choose other restrictions as a matter of prudence, but it is likely that e-marriage could make access to certain marriages, such as cousin marriage, available at a distance—as an incidental effect, not an animating purpose.

33. For an historical discussion of the development of marriage procedures, *see infra* Section III.

34. RICHMOND & HALL, *supra* note 15.

the laws are not designed to serve the needs of couples for access and convenience but rather to enforce cultural exclusions. The laws have been rigid in their treatment of disfavored groups³⁵ yet readily evaded insofar as they were written to protect vulnerable women.³⁶

Beyond removing the territorial restrictions to marriage licensing, states can develop new flexible procedures that take advantage of technological innovations while maintaining safeguards that preserve the idealized traditional marriage ceremony.³⁷ States can also introduce a requirement for couples to enter pre-agreements to divorce jurisdiction for the status of marriage granted to couples at a distance, and, indeed, “e-divorce” could simplify the difficulties that same-sex married couples face when they try to divorce while resident in a jurisdiction that does not recognize their marriage.³⁸ Rather than ossify, as have the existing formation regimes, these procedures could compete with each other in accordance with principles of federalism and jurisdictional markets.

Modernized marriage law might offer an important benefit for some couples: disclosure. Under current law, marriage neither requires disclosure nor offers help to prospective marital partners; you could marry a convict and not know it.³⁹ “Leap but don’t look” might have made sense when people lived in smaller communities in which people had established reputations and gossip left few hidden skeletons in peoples’ closets, but less so in our mobile,

35. PASCOE, *supra* note 19.

36. RICHMOND & HALL, *supra* note 15.

37. Depending on legislative determinations of state policy preference, states have the option of requiring teleconferencing or creating an internet “virtual” presence with the authorizing state. Or states could simply allow couples outside their borders to receive and file licenses easily by internet download, i.e., “e-marriage.”

38. See *infra* Section IV.B.2; see also Andrew Koppelman, *The Difference the Mini-Domas Make*, 8 LOY. U. CHI. L.J. 265, 265 (2007) (describing the legal difficulties same-sex married couples face when divorcing while resident in states that do not recognize their unions). There are constitutional issues to be sorted out in our suggestion of pre-agreements to jurisdiction. See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942) (confirming a domicile requirement for a court to grant a divorce); *Williams v. North Carolina*, 325 U.S. 226 (1945) (providing additional guidance regarding the domicile rule); see also discussion *infra* Section IV.B.2.

39. Common-sense intuition has some support in work done in Canada on “predatory marriages,” and in the actual experiences of some individuals. See, e.g., *Wife of Notorious Serial Killer Had “Wonderful Marriage,”* ABC7NEWS.COM (Apr. 30, 2007), http://abclocal.go.com/kg0/story?section=news/national_world&id=5258036 (stating that the wife of the “Green River Killer” met him after he was investigated as a suspect, but had no knowledge of his status as a suspect). For the Canada study, see KIMBERLY WHALEY, *THE “PREDATORY MARRIAGE,” ITS CONSEQUENCES, AND COSTS IN CAPACITY PROCEEDINGS* (2010), available at http://www.whaleyestatelitigation.com/resources/WEL_CBA_PredatoryMarriage_081710.pdf.

anonymous age in which many meet on the internet.⁴⁰ States could offer a regime in which couples authorize disclosure of their arrest or criminal records or credit or bankruptcy histories, either in exchange for excusing their physical presence within the state or, as a fit for the notion advanced here of treating marrying couples as responsible adults, with options allowing couples to choose their desired level of disclosure. This procedure, which shifts the default assumption toward disclosure as a routine option rather than an unusual demand, might reduce the signaling problem created by individuals seeking such information (e.g., “I love and trust you, honey, but I’d like to see your credit history before I say ‘I do.’”).⁴¹ It could seem odd for a partner to argue against the selection of additional disclosure. The need to reject disclosure might thus shift the burden of inquiry by a partner to a burden of refusal of a standard service. States could accumulate experience in the desirability of the differing formats and options presented.⁴²

As jurisdictions offer marriages beyond their borders, more people will enter into marriage not recognized in their home state. This leads to the question addressed above—what do people get out of such marriages? We argue marriage is best described as a hybrid of contract (it is an enabling regulation to create a legal relationship) between two people and their children, if any), and status good (it is a good that an official actor confers on behalf of

40. See CHADWICK MARTIN BAILEY & MATCH.COM, RECENT TRENDS: ONLINE DATING (2010), available at http://cp.match.com/cppp/media/CMB_Study.pdf (stating that 17% of couples married in the last year met on online dating site); Jessica M. Sautter, Rebecca M. Tippett & S. Philip Morgan, *The Social Demography of Internet Dating in the United States*, 91 SOC. SCI. Q. 554 (2010) (“Internet dating is a common mate selection strategy among the highly selective subpopulation of single Internet users and may continue to grow through social networks.”); Courtney Stoddard, *Hooking Up and Connecting Lives: Online Dating and the Economics of Marriage Search* (Sept. 2008) (unpublished Ph.D. dissertation, Princeton University) (on file with authors) (finding that “online dating has become increasingly important as a part of an individual’s search strategy” in the marriage market).

41. Many have identified this signaling problem as a reason for the relative lack of use of pre-nuptial agreements. Prospective spouses don’t want each other to know that he or she is contemplating the possibility of an outcome of divorce.

42. States could experiment with types of “prompts” encouraging a “Yes” reply. Pros and cons of background checks are an emerging issue relating to dating patterns. Stephanie Rosenbloom, *New Online-Date Detectives Unmask Mr. or Mrs. Wrong*, N.Y. TIMES, Dec. 16, 2010, http://www.nytimes.com/2010/12/19/us/19date.html?_r=1&ref=stephanierosenbloom. One negative consideration is false assurance provided by a dating site about a stranger. *Id.* Once marriage is contemplated, the risk of false assurance might have much less weight as a concern. More diligence in uncovering information could only help.

Indeed, states are beginning to regulate internet dating sites to try to assure safety. *Id.* The logic of states regulating commercial match-making services to help assure safety, while simultaneously offering marriage formalization to couples who may be strangers to one another, without any provision of cautionary advice or protocols for background checks, may seem increasingly difficult to rationalize. *Id.*

civil society) with two sets of benefits.⁴³ Modernized marriage leads to a wider distribution of marriage's status benefits, even if couples may still be denied the attendant contract benefits. This is particularly true for same-sex couples.⁴⁴ These couples would have the symbolic benefit of entering into an authorized marriage that several states and foreign jurisdictions might recognize. The status value of this ceremony is significant and is reflected in the vast amounts people spend on wedding ceremonies and, with same-sex couples, the expense to travel to states that authorize their marriages.⁴⁵

Finally, distance marriages offer legal benefits to same-sex couples. Several states, including Maryland and New York, now recognize out-of-state same-sex marriage, although they are not themselves authorized to issue licenses to same-sex couples.⁴⁶ In these states, distance marriage would allow same-sex couples to have ceremonies (and locally enforceable marriages) within their home states, even though their home state refuses to authorize such unions. The status may gain recognition for purposes of federal law, either because Congress repeals the Defense of Marriage Act ("DOMA")⁴⁷ or because the recent holdings that DOMA is unconstitutional are upheld in whole or in part.⁴⁸ Moreover, same-sex

43. Ristroph & Murray, *supra* note 30, at 1258 (discussing the status value of public recognition and concluding that the "quest for recognition is part of the ideology of the established family").

44. While a Vermont same-sex marriage is not legally cognizable in Louisiana, a modernized marriage law would allow Louisiana same-sex couples to celebrate an "official" wedding authorized by another state's law before family and friends at their place of worship. See CHRISTOPHER RAMOS, M.V. LEE BADGETT & BRAD SEARS, WILLIAMS INST., *THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN VERMONT* 1, 7 (2009), available at <http://www.law.ucla.edu/williamsinstitute/pdf/VT%20econ%20impact%20final.pdf> (estimating the travel-related expenses for out-of-state couples seeking marriage in Vermont will be an average of \$910.00).

45. See *id.*

46. See Aaron C. Davis & John Wagner, *Maryland to Recognize Same-Sex Marriages from Other Places*, WASH. POST, Feb. 25, 2010, at A01; Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1 (Editor's Note: New York enacted a same-sex marriage law on June 24, 2011). The Coquille Tribe authorizes same-sex marriages and explicitly recognizes same-sex marriages entered into in other jurisdictions. Coquille Tribal Reg., Ch. 741: Marriage and Domestic Partnership Regulation, available at <http://www.coquilletribe.org/documents/741MarriageRegulation.pdf>.

47. Pub. Law No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C).

48. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010) (stating that DOMA violates the "principles embodied in the Due Process Clause of the Fifth Amendment"); *Massachusetts v. U.S. Dep't Health & Human Servs.*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) (stating that DOMA violates the Tenth Amendment).

marriage has recognition under international human rights principles⁴⁹ and in a growing number of state laws.⁵⁰

II. LOOKING FOR REGULATORY PURPOSES: MARRIAGE PROCEDURE NOW AND THEN

Except for the handful of jurisdictions that recognize common law marriages,⁵¹ all states require those seeking marriage to perform some type of procedure that is relatively uniform but often oddly burdensome.⁵² Most of us simply take these requirements for granted: file some papers, show a driver's license, receive a marriage license, and get solemnized.

But these procedures have costs that extend well beyond the filing fees and administrative expenses. As mentioned above, they often prevent those who face barriers of physical separation, particularly those in the military, from marrying. They often prevent individuals from having the officiant⁵³ or other procedure they desire, or create a delay, not an insignificant cost given the money lavished on the ceremony. Those who have destination marriages

49. There are forces pointing strongly toward support for family formation, and hence marriage, in international law. Human Rights Watch argues for a right to form families. *Rulings Support Same-Sex Marriage*, HUMAN RIGHTS WATCH (Aug. 10, 2010), <http://www.hrw.org/en/news/2010/08/10/rulings-support-same-sex-marriage>. A report on a European case that refused to call same-sex marriage a right noted that there were three dissents. *Same-Sex Marriage Claim Rejected by European Court of Human Rights*, PHD IN HUMAN RIGHTS BLOG (June 27, 2010), <http://humanrightsdoctorate.blogspot.com/2010/06/same-sex-marriage-claim-rejected-by.html>.

50. States may recognize a marriage validly celebrated elsewhere even if violating local substantive law, because the violation is not thought to implicate a very important public policy. *Compare* *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 209 (Ohio 1958) (upholding validity of first-cousin marriage validly celebrated elsewhere even though that marriage was substantively prohibited under local law), *with* *In re Stiles Estate*, 391 N.E.2d 1026 (Ohio 1979) (denying validity of uncle-niece marriage validly celebrated elsewhere which could not be contracted within the state).

51. See GÖRAN LIND, *COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION* 179 (2008) ("Common law marriage has its origins in old English ecclesiastical law [and its recognition of clandestine marriage] [T]he fundamental principles for common law marriage were received into the American case law. Guiding the American development was *Fenton v. Reed*], 4 Johns. 52] (1809), in which the New York Supreme Court, without reference to earlier American case law, but citing three English cases [involving clandestine marriage], stated: 'No formal solemnization of marriage was requisite. A contract of marriage made *per verba de praesenti* amounts to an actual marriage, and is as valid as if made in *facie ecclesiae*.' The decision, supported by the leading scholarship, had remarkable impact on the case law during the entire 1800s [helping to establish the recognition of 'common law marriage'].").

52. Examples include rigid limits on who may be an officiant, *see* *Somin*, *supra* note 15, and specifications of what county may issue a license for residents of a state, *see* *infra* note 65.

53. *See* *Somin*, *supra* note 15 (discussing Virginia law limiting choice of preferred officiant).

to exotic locales must rely upon the sometimes unreliable local government procedures and often fear that they will not have legally recognizable marriages,⁵⁴ a true disappointment given the expense of such marriages.

Despite these costs, current marriage procedures offer no obvious benefits to couples. In the past, as mentioned above, these procedures served cognizable goals such as publicity to prevent bigamy and incest and prevention of venereal disease. Today, benefits such as in-state expenditures accrue to states, not to couples.

Our proposal reinvigorates the state role in regulating entry into marriage in a way that facilitates couple autonomy and rationally shapes the state involvement to reflect contemporary needs, given the mobility of the population and the growing use of technology to form social connections and make legal agreements. Access to different jurisdictions' marriage laws empowers couples to select the most convenient and efficient procedures. Further, states would have incentives to experiment, giving marriage formation procedure regulatory goals that make sense in our world.⁵⁵ We believe that disclosure can be such a purpose. It is for the states and couples to find the correct balance of couple autonomy and regulatory schemes.⁵⁶

The rules governing the creation and recognition of marriage involve four legal matters:

1. the marriage procedure (licenses, solemnization, etc.);
2. the consequences of any procedural errors;
3. the substantive determination of who is eligible to be married under the laws of a given state; and,
4. the conflict-of-law analysis of whether a marriage is valid in a state other than the marriage-granting state.

States have remarkably similar and uncontroversial procedures. States generally do not question other states' marriage determina-

54. In discussions about their own and others' destination weddings, students have described to Professor Kuykendall the uncertainties of foreign marriage protocols, which create costs and a sense of unease.

55. Vermont, for example, has a strong commitment to principles of justice, a pride in its leadership role in marriage equality, and an interest in establishing a general reputation as an innovator. Oliver Goodenough, Remarks at American Association of Law Schools Annual Meeting: Hot Topics Panel (Jan. 7, 2011); see also *infra* text accompanying notes 217–219 (concerning incentives for states to export desirable law).

56. For a theoretically rich discussion of the possibility of offering “statist” options in family law that may be selected voluntarily, see Ristroph & Murray, *supra* note 30, at 14 (referring to “authoritarianism with a voluntarist face”).

tions following the ancient legal maxim of *lex loci celebrationis*, under which states recognize marriage as valid if it was valid in the jurisdiction in which it was performed or authorized. While states observe *lex loci*, they allow for a public policy exception, under which they will *not* recognize a marriage of a sister state if it disagrees with the state's substantive eligibility determination (i.e., same-sex, in a few states, first cousin, and, in the past, mixed-race marriages).

Courts typically overlook procedural imperfections, such as the instances where couples solemnized their marriage in a state or county in which their license was not intended under the statute to be valid for use, and recognize such marriage on the public policy justification of favoring marriage.⁵⁷ This was true even when the rules specifying which county was the proper venue were intended for the protection of women⁵⁸ and thus had a rationale other than inchoate ideas about marriage as a local concern.

57. *Barbosa-Johnson v. Johnson*, 851 P.2d 866 (Ariz. Ct. App. 1993) (finding a valid marriage where the parties used an Arizona marriage license for a wedding taking place in Puerto Rico); *De Potty v. De Potty*, 295 S.W.2d 330 (Ark. 1956) (finding a valid marriage in Arkansas despite the use of a Texas marriage license); *McPeck v. McCardle*, 888 N.E.2d 171 (Ind. 2008) (finding a valid marriage when the couple complied with the Indiana marriage laws even though the marriage was not performed in the state); *State v. Brem*, 178 P.2d 582 (N.M. 1947) (finding that despite having a license issued in New Mexico the marriage performed in Texas was valid either because the marriage license requirement in Texas is directory or because the couple fulfilled the elements of common law marriage while living in the state); *Maxwell v. Maxwell*, 273 N.Y.S.2d 728 (Sup. Ct. 1966) (finding a valid marriage where the couple used a New Mexico license to marry in California because there was solemnization by a rabbi); *In re Compulsory Accounting in the Estate of Farraj*, No. 4803/07, 2009 WL 997481 (N.Y. Sur. Ct. 2009) (finding a marriage as valid under New York law based on the parties' expectation and the solemnization ceremony despite the invalidity of the marriage in New Jersey where it was performed). *But see Kisla v. Kisla*, 19 S.E.2d 609 (W. Va. 1942) (refusing to find a valid West Virginia marriage where the couple had obtained and used a Pennsylvania marriage license but recognizing the couple's child as legitimate).

58. *Wallace v. Screws*, 149 So. 226 (Ala. 1923) (finding that failure to obtain a license from the female's home county does not render any subsequent marriage void for that reason); *Ely v. Gammel*, 52 Ala. 584 (1875) (finding that a marriage is not void when the license used to solemnize the marriage was not issued by the female's home county); *People v. Linger*, 71 P.2d 306 (Cal. Ct. App. 1937) (finding that failure to use a marriage license in the issuing county does not void the marriage); *Minshew v. State*, 102 S.E. 906 (Ga. Ct. App. 1920) (finding a valid marriage even if the license was obtained in the wrong county); *People v. Reynolds*, 217 Ill. App. 577 (App. Ct. 1920) (finding that marriages are not void for want of compliance with the statute unless the statute expressly states the invalidity of said marriages); *Stevenson v. Gray*, 56 Ky. 193 (17 B. Mon. 193) (Ct. App. 1856) (finding that failure to obtain a marriage license in the female's home county did not invalidate the marriage); *Gatewood v. Tunk*, 6 Ky. 246 (3 Bibb. 246) (Ct. App. 1813) (finding that if a marriage is solemnized by a minister, failure to provide a license from the appropriate county will not invalidate the marriage); *State v. Trull*, 85 So. 70 (La. 1920) (finding a valid marriage where the couple obtained a license from a parish where neither lived and then used the license to solemnize a marriage in a different parish); *Martin v. Otis*, 124 N.E. 294 (Mass. 1919) (finding an irregular marriage because the license issued was not used in the issuing town but

Despite this leniency, the laws on the books typically dictate to couples the options for planning and conducting their wedding.

A. Typical Procedure for Marriage Formation

Despite the legal implications of marriage, couples do not consult lawyers in order to marry. Rather, they call the clerk's office to ask about the basic steps or check the website's how-to explanations.⁵⁹ Most offices offer clear statements limiting the use of a license to within the state and forbidding the use of an out-of-state license.⁶⁰

1. Getting the License

States do not use the licensing statutes to impose regulations and monitor their enforcement to affect the care with which cou-

finding the marriage saved in that it was otherwise lawful); *In Re Silverman's Estate*, 227 A.2d 519 (N.J. Super. Ct. App. Div. 1967) (finding a valid marriage when the license was not issued from the bride's county of residence); *Abbott's Petition*, 27 Pa. D. & C. 205 (Ct. Common Pl. 1935) (finding a valid marriage where two minors failed to obtain a license from the appropriate county prior to the marriage and the license that was issued after the marriage was not from the county where the marriage was performed); *Douglas v. Douglas*, 6 Tenn. App. 12 (Ct. App. 1927) (finding a valid marriage where the ceremony was performed in a county adjoining the issuing county and all other formalities had been fulfilled).

59. See *Marriage FAQ*, [WWW.CITYCLERK.NYC.GOV](http://www.cityclerk.nyc.gov/html/marriage/faq.shtml#married), <http://www.cityclerk.nyc.gov/html/marriage/faq.shtml#married> (last visited Sept. 19, 2009) ("The contract must be signed by both parties and at least two witnesses and all signatures must be given within the State."); *Marriage Licenses*, [WWW.CLARKCOUNTYNV.GOV](http://www.clarkcountynv.gov/Depts/clerk/Services/Pages/MarriageLicenses.aspx), <http://www.clarkcountynv.gov/Depts/clerk/Services/Pages/MarriageLicenses.aspx> (last visited Apr. 14, 2011) ("In order to have a legal marriage, a ceremony must be performed in the State of Nevada within one year from the date of issuance of the marriage license The ceremony may be performed at any wedding chapel, church, Office of Civil Marriages, or anywhere a licensed minister is willing to perform a ceremony within the State of Nevada."); Alachua County, Fla., *Marriage/Online Application*, [WWW.ALACHUACOUNTY.US](http://www.alachuacounty.us/government/clerk/famlaw/marriage.aspx), <http://www.alachuacounty.us/government/clerk/famlaw/marriage.aspx> (last visited Sept. 19, 2009) ("Do both parties have to be present at the Clerk's office to apply for a license? Yes."); see also *Marriage License Laws*, U.S. MARRIAGE LAWS, http://www.usmarriagelaws.com/search/united_states/ (last visited Sept. 19, 2009) (providing a summary of each state's marriage laws and links to the state bureaus or clerks).

60. See, e.g., EXEC. OFFICE OF THE GOVERNOR, PERFORMING MARRIAGE CEREMONIES: A GUIDE FOR FLORIDA NOTARIES PUBLIC 10 (1999), available at http://www.flgov.com/wp-content/uploads/notary/wedding_handbook.pdf ("Additionally, a Notary from another state, including South Carolina and Maine, may not perform a marriage ceremony in Florida. And, a Florida notary may not marry a couple who has obtained a marriage license from another state.").

ples make the decision whether and when to marry.⁶¹ A couple that wants to marry almost always applies for a marriage license from a county clerk in the state where the couple wishes the wedding to take place. The license asks couples to answer questions concerning basic personal data.⁶² After the application is made a clerk issues the license to the couple for later use.⁶³ Waiting periods for a license are generally nonexistent or minimal.⁶⁴ States typically specify that the couple must obtain a license from the county where the marriage will be performed, where the parties reside, or from the state.⁶⁵ Some states insist on having both parties present when applying for a license, while others are more flexible.⁶⁶ Documentation

61. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1628 (2007) (“State marriage law today primarily regulates marriage only during the entry and exit stages, and even then, the regulation is very light.”).

62. TEX. FAM. CODE ANN. § 2.004 (West 2006) (describing the questions on a marriage license application). In 1929, Richmond and Hall expressed dismay that clerks tolerate perjury in license applications and make no effort to refer perjury in the applications for prosecution. RICHMOND & HALL, *supra* note 15, at 73.

63. TEX. FAM. CODE ANN. § 2.009 (West 2006 & West Supp. 2009) (describing the issuance of the license from the clerk after the application is made).

64. Richmond and Hall described the “modern” approach—as of 1929—as not more than five days. RICHMOND & HALL, *supra* note 15, at 109. Abrams counts two states as of 2007 as having five-day waiting periods and thirteen as having three-day waiting periods. See Abrams, *supra* note 61, at 1647 n.107. Some states have a waiting period, typically ranging from one to three days during which the license cannot be used. N.Y. DOM. REL. LAW § 13-b (McKinney 1999) (stating that the marriage license cannot be used within twenty-four hours of issuance); TEX. FAM. CODE ANN. § 2.204 (West 2006 & West Supp. 2009) (requiring a seventy-two hour waiting period before the marriage license can be used but waiving this requirement if the couple obtains pre-marital counseling). A rough count of states reveals that around half of the states now have no waiting period. As recently as 1968, the lack of a waiting period was viewed as a telling detail in writer Joan Didion’s description of Las Vegas weddings as exemplars of “geographic implausibility,” loss of connection to “real life,” and provision of “the facsimile of proper ritual” to those “who want it but lack knowledge of how to do it.” Joan Didion, *Marrying Absurd*, in SLOUCHING TOWARD BETHLEHEM 79 (2d ed. 2008) (“The State of Nevada, alone among these United States, demands neither a premarital blood test nor a waiting period before or after the issuance of a marriage license.”). For a general summary of waiting period and blood test requirements, see *Marriage License Requirements*, FINDLAW, <http://family.findlaw.com/marriage/marriage-laws/marriage-blood-test.html> (last visited Oct. 16, 2009).

65. LA. REV. STAT. ANN. § 9:222 (2008) (stating that a marriage license may be obtained in any parish no matter where the parties live or where the ceremony will be performed); MICH. COMP. LAWS ANN. § 551.101 (West 2005) (requiring couples to obtain a license from the county of residence of either party and, if non-residents, from the county where the marriage will be performed).

66. LA. REV. STAT. ANN. § 225 (2008) (stating that no license shall be issued unless both parties presented themselves with a certified copy of their birth certificate); MISS. CODE ANN. § 93-1-5 (2008) (allowing parties to either apply for a marriage license in writing when accompanied by an affidavit of age from a next of kin or appear in person and take an oath to prove age); TENN. CODE ANN. § 36-3-104 (2005) (requiring both parties to present themselves to the clerk unless one is incarcerated or ill in which case a notarized statement can be used instead). In 1929, Richmond and Hall regarded the personal presence of both parties in the clerk’s office as critical to protecting underage girls, the mentally deficient,

such as proof of identity, age, and social security number, is typically required,⁶⁷ and some states require the marriage candidates to provide a social security number on the application for the marriage license.⁶⁸ The licensing stage is an opportunity to enforce age limitations⁶⁹ and, for a few states, to require medical testing, either for information or for restricting access to a license to marry.⁷⁰ Some states encourage couples to attend pre-marital counseling or offer incentives for doing so, like waiver of a waiting period after issuance of the license or reduced fees.⁷¹ A minimal fee is usually charged for the issuance of a marriage license.⁷² While states have generally abandoned waiting periods of any appreciable length at all,⁷³ marriage licenses are valid for a limited time.⁷⁴

and so forth, and lamented a dearth of law or procedures assuring it. RICHMOND & HALL, *supra* note 15, at 51–52.

67. TEX. FAM. CODE ANN. § 2.002 (West 2006 & West Supp. 2009); *id.* § 2.005 (requiring proof of identity and age with birth certificate, license, passport).

68. MICH. COMP. LAWS ANN. § 551.102(1) (West 2007) (requiring the parties to place their social security numbers on the application for the marriage license); TENN. CODE ANN. § 36-3-104 (2005) (requiring the contracting parties to apply for the marriage license and provide social security numbers).

69. ALA. CODE § 30-1-4 (1975) (stating parties under sixteen are not able to contract a marriage); TENN. CODE ANN. 36-3-105 (2005) (stating that it is unlawful to issue a marriage license to parties who have not reached the age of sixteen); TEX. FAM. CODE ANN. § 2.009 (West 2006 & West Supp. 2009) (allowing minors to marry if they obtain parental consent, have previously been divorced, or have a court order finding that marriage is in the child's best interest).

70. For example, New York requires certain marriage license applicants to submit to testing for sickle cell anemia but will not invalidate a marriage where the parties fail to get the testing and cannot deny the license solely because the tests come back positive. N.Y. DOM. REL. LAW § 13-aa (McKinney 1999); *see also* MISS. CODE ANN. § 93-1-5 (2008) (requiring a medical certificate showing that the applicant does not have syphilis). Most states do not require a blood test. *See Blood Test for Marriage License*, U.S. MARRIAGE LAWS, http://www.usmarriagelaws.com/search/united_states/blood_test_requirements/mandatory/index.shtml (last visited Apr. 14, 2011).

71. TEX. FAM. CODE ANN. § 2.013 (West 2006 & West Supp. 2009) (encouraging pre marital counseling and offering objectives of the course); *id.* § 2.204 (waiving the seventy-two hour waiting period if a couple attends marriage counseling).

72. ALA. CODE § 30-1-8 (1975) (stating that persons who solemnize marriages are entitled to \$2.00); MICH. COMP. LAWS ANN. § 551.7 (West 2008) (stating that if a mayor performs a marriage s/he may charge a fee determined by the city council and deposited into the city's general fund); MICH. COMP. LAWS ANN. § 551.103(2) (West 2007) (requiring a twenty-dollar fee to be paid by parties applying for a marriage license); TEX. LOC. GOV'T CODE ANN. § 118.018 (West 2008) (noting that a fee is associated with the issuance of the marriage license and is due when the license is issued).

73. *See Waiting Period for Marriage Licenses*, U.S. MARRIAGE LAWS, http://www.usmarriagelaws.com/search/united_states/waiting_period_marriage_license/index.shtml (last visited Apr. 14, 2011).

74. ALA. FAM. CODE § 30-1-9 (1975) (stating that Alabama license is only valid for thirty days from the date it is issued); TEX. FAM. CODE ANN. § 2.201 (West 2006) (stating that license is only valid for thirty-one days after issuance).

2. Regulations Affecting the Ceremony.

There is no specific blueprint for the proper marriage ceremony but many states require that, at a minimum, the parties declare their desire to be husband and wife in the presence of an officiant and sometimes of witnesses.⁷⁵ Most couples assume they must be present in the state that marries them; gay couples in the recent weddings rode in buses to marry in Iowa, and no one commented that it was odd to require their brief physical presence.⁷⁶

State statutes specify the parties who are qualified to solemnize a marriage. Some states impose fairly rigid, territorial based limitations⁷⁷ backed by criminal sanctions,⁷⁸ and others provide flexible

75. MICH. COMP. LAWS ANN. § 551.9 (West 2005) (requiring that the parties declare in the presence of the officiant and two witnesses that they take one another as husband or wife); N.Y. DOM. REL. LAW § 12 (McKinney 1999) (requiring at least one witness be present at the marriage ceremony); TENN. CODE ANN. § 36-3-302 (2009) (requiring that the parties take one another as husband and/or wife in the presence of the minister/officer).

76. The basis for the assumption is the long practice, originating from the physical convenience of local licensing, that came to seem natural and hence a given of how the state authorizes formal marriage. One state, Arizona, has a governing case holding that an Arizona license can be used anywhere in the world. See *infra* note 97. Yet a call by Prof. Kuykendall to the Maricopa County Clerk's office yielded a response that licenses are only valid for use in Arizona. In a recent incident involving a gay couple's use of a D.C. marriage license in Texas, with an authorized person officiating by Skype from D.C., a spokesman for the D.C. Superior Court explained the District's cancellation of the marriage certificate as follows: "Marriage statutes in the District of Columbia (dating back to 1901) requires [sic] marriages to be celebrated within the jurisdictional and territorial boundaries of the city . . . Both the officiant and the parties to the marriage must be physically present at the ceremony performed in the district." *Gay Men Fight on After Court Deems Skype Marriage Invalid*, CNN (Dec. 4, 2010), http://articles.cnn.com/2010-12-04/us/dc.gay.marriage_1_gay-marriage-marriage-statutes-skype?_s=PM:US. The official cited no evidence, either of the assertion regarding history or the current meaning of the D.C. statute. *Id.*

77. MICH. COMP. LAWS ANN. § 551.7 (West 2008) (stating that a district court judge or magistrate may perform marriages in the districts he or she serves, a municipal judge in the city/township, a probate judge in the court district, a federal judge seemingly anywhere in the state, a mayor anywhere in the county where the city he or she is mayor of is located, a county clerk in the county where he or she works, religious ministers anywhere in the state, etc.); N.Y. DOM. REL. LAW § 11 (McKinney 1999) (stating that only federal judges of the Second Circuit and the districts in New York and various other judges presiding within the state may solemnize marriages); VA. CODE ANN. § 20-25 (2004) (stating federal judges who are residents of the state may solemnize weddings within the state).

78. MICH. COMP. LAWS ANN § 551.15 ("If any person should undertake to join others in marriage, knowing that he is not lawfully authorized so to do, or knowing of any legal impediment to the proposed marriage, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail not more than 1 year, or by a fine not less than 50 nor more than 500 dollars, or by both such fine and imprisonment, in the discretion of the court."). Ristroph and Murray discuss the use of criminal law "to enforce a particular model of the family." See Ristroph & Murray, *supra* note 30, at 1241. This sort of criminal statute concerning improper officiating seems a vestige of the use of criminal law to shape the family, unenforced but present on the statute books as a hyperbolic statutory warning of the overhang of state control.

one-day certifications.⁷⁹ In other states, officiants are typically described as members of the clergy, judiciary, or other public officials such as a mayor.⁸⁰ States generally recognize that the rules should respect religious traditions that do not adhere to the format of having an officiant who presides and declares the couple to be married.⁸¹ For example, New York allows couples to enter a written contract and effectively marry themselves in the presence of a judge or other official of the state.⁸² Statutes often specify that a good faith belief that an officiating person had authority is sufficient to create a valid marriage even though the belief was mistaken.⁸³ The rules for who may officiate generally can be overcome if a desired officiant becomes a member of the Universal Life Church,⁸⁴ which allows virtually anyone to become a minister.⁸⁵

79. Massachusetts allows any friend or family member to marry a couple so long as the application is sent in six weeks in advance. MASS. GEN. LAWS ch. 207, § 39 (1991). Vermont will temporarily certify someone to officiate over a wedding within the state provided that person meets the statutory requirements. VT. STAT. ANN. Tit. 18, § 5144a (2008).

80. ALA. FAM. CODE. § 30-1-7 (1975) (naming licensed ministers, judges, pastors of religious societies). Massachusetts is already providing, on the Governor's website, a prominent offer for flexibility as to officiants, which permits any friend or family member to apply for a one-day designation to preside at a wedding in Massachusetts. See *One Day Marriage Designation Instructions*, OFFICIAL WEBSITE OF THE GOVERNOR OF MASSACHUSETTS, http://www.mass.gov/?pageID=gov3modulechunk&L=1&L0=Home&sid=Agov3&b=terminalcontent&f=one_day_marriage_designation_instructions&csid=Agov3 (last visited on Apr. 14, 2011).

81. N.Y. DOM. REL. LAW § 12 (McKinney 1999) (stating that the marriage solemnization requirements of the state do not apply to the Quaker religions); TENN. CODE ANN § 36-3-301 (2005) (stating that a marriage where there are witnesses but no presiding officiant is valid); 2009 VT. ACTS & RESOLVES 3 (stating that the solemnization requirements of the state do not mandate an officiant for Quaker ceremonies); see also Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 494 (2009).

82. N.Y. DOM. REL. LAW § 11 (McKinney 2009); *id.* § 12 (simply requiring the couple to take one another as husband or wife in the presence of a magistrate or clergyman).

83. TEX. FAM. CODE ANN. § 2.302 (West 2006) (stating that the marriage will still be valid even when officiant lacks authority so long as there was no indication that the officiant lacked authority or the parties believed in good faith that the marriage was valid); UNIF. MARRIAGE & DIVORCE ACT § 206.d, 9A U.L.A. 182 (1998) (stating that a marriage is still valid even if the party solemnizing the marriage was not qualified if the parties believe he or she was qualified).

84. *Universal Life Church v. Utah*, 189 F. Supp. 2d 1302 (D. Utah 2002) (holding unconstitutional a 2001 Utah statute providing that ordination by the internet is not valid for purposes of eligibility to preside as a minister in a Utah marriage ceremony).

85. *Become a Minister and Get Ordained*, UNIVERSAL LIFE CHURCH MONASTERY, <http://www.themonastery.org/?destination=ordination> (last visited Apr. 14, 2011) ("At the ULC Monastery, we believe that ordination should be available to all who seek and ask."); see also *Universal Life Church*, 189 F. Supp. at 1307 ("The ULC will ordain anyone free, for life, without questions of faith. Anyone can be ordained a ULC minister in a matter of minutes by clicking onto the ULC's website and by providing a name, address, and e-mail address. Anyone can also be ordained by mailing to the ULC a name and address. There is no oath, ceremony, or particular form required.").

3. Clerical and Record-Keeping Rules

The officiant is typically responsible for returning the license and certificate to the appropriate county clerk.⁸⁶ Local officials often have record-keeping obligations.⁸⁷ The payoff for the statutory commitment in favor of requiring that marriages occur under local control and be documented by strict records is low. With decentralized administration and old-fashioned hard copy records, it is only to be expected that marriage statistics are not especially valuable to researchers, at least as compared with what could be generated by the use of internet-enhanced collection.⁸⁸

4. Lenient Ex Post Enforcement: Forgiveness of Procedural Flaws

Courts, with relatively rare exceptions,⁸⁹ do not see the rules as sufficiently controlling as to invalidate marriages. When the rules

86. MICH. COMP. LAWS ANN. § 551.104 (West 2007) (requiring the officiant to fill in the blank marriage license/certificate and return it to the issuing clerk within ten days of the ceremony); TENN. CODE ANN. § 36-3-303 (2005) (stating that the person who solemnizes the marriage must return it within three days to the issuing clerk); TEX. FAM. CODE ANN. § 2.206 (West 2006) (stating that the person conducting the ceremony is responsible for recording the license and returning it to the county that issued it within thirty days of the ceremony); *id.* § 2.208 (describing the information that the county clerk must record upon receipt of the marriage license); UNIF. MARRIAGE & DIVORCE ACT § 206.a, 9A U.L.A. 182 (1998) (requiring that a party to the marriage complete the marriage license and send it to the issuing clerk).

87. ALA. CODE § 30-1-12 (1975) (stating that the probate judge must keep a book with a record of all the licenses issued by him/her); ALA. CODE § 30-1-13 (1975) (stating that if a person other than the probate judge performs the marriage, he or she must send information regarding the marriage to the probate court for proper registration); MICH. COMP. LAWS ANN. § 551.104 (West 2007) (stating that persons officiating over a marriage ceremony should keep a record of the marriages performed); TENN. CODE ANN. § 36-3-103 (2005) (stating that the county clerk who issues licenses is authorized to record the license when returned to the clerk).

88. *Marriage and Divorce Related Statistics*, NATIONAL HEALTHY MARRIAGE RESOURCE CENTER, <http://www.healthymarriageinfo.org/collections-by-topic/marriage-and-divorce-related-statistics#Collection%20and%20Quality> (last visited Apr. 14, 2011); *see also* Hugh Carter, *National Marriage and Divorce Statistics: Progress Report, 1945-1955*, 70 PUB. HEALTH REP. 347 (1955), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2024537/pdf/pubhealthreporig00160-0013.pdf>.

89. *Edwards v. Franke*, 364 P.2d 60 (Alaska 1961) (refusing to find a valid marriage where the parties failed to obtain a marriage license and finding that the Alaska statute banning common law marriage was mandatory and not directory); *Welch v. State*, 100 Cal. Rptr. 2d 430 (Ct. App. 2000) (finding no valid marriage where the couple did not get a marriage license or solemnize the marriage aside from privately taking vows); *Williams v. Williams*, 460 N.E.2d 1226 (Ind. Ct. App. 1984) (finding no valid marriage where the couple did not get a marriage license); *Nelson v. Marshall*, 869 S.W.2d 132 (Mo. Ct. App. 1993) (failing to find a valid marriage where the parties failed to obtain a marriage license); *Farah*

are violated, courts employ various savings doctrines, with more or less legal precision,⁹⁰ to hold procedurally deficient marriages valid. Courts will often take the initiative to “fix” procedural violations, including failure to file the license as required,⁹¹ an insufficient number of witnesses,⁹² ineligibility of the presiding official,⁹³ and marriage in the wrong county. Now, state marriage law seems to serve no other purpose than to provide a veneer of state control and approval and lacks a clear regulatory purpose, except perhaps to perpetuate its own administrative apparatus. The *ex ante* rules drive the process but are often understood *ex post* to be a brittle bit of law that should not be a barrier to recognizing a marriage.⁹⁴ Couples face the greatest risk if they intentionally ignore a rule, especially the rule requiring that a license be used within the state

v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993) (finding a marriage void where the parties entered a proxy marriage in England that failed to meet the statutory requirements although there was a religious ceremony).

90. Farley v. Farley, 10 So. 646 (Ala. 1892) (finding a valid but voidable marriage where no marriage license was obtained and solemnizer was not authorized); Darling v. Dent, 100 S.W. 747 (Ark. 1907) (finding that a marriage could be valid despite failure to obtain or record a marriage license); Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980) (finding a valid marriage where the parties failed to obtain a marriage license but had the marriage solemnized in a religious ceremony and the statutory requirements were deemed to be advisory); Gay v. Pantell, 139 S.E. 543 (Ga. 1927) (finding that a marriage performed without a license was voidable not void); Feehley v. Feehley, 99 A. 663 (Md. 1916) (finding a valid marriage where the parties failed to obtain a marriage license but participated in a religious ceremony); Haggin v. Haggin, 53 N.W. 209 (Neb. 1892) (finding that failure to obtain a marriage license did not affect the validity of a marriage); Berenson v. Berenson, 98 N.Y.S.2d 912 (Fam. Ct. 1950) (finding that failure to obtain marriage license did not invalidate the marriage); Heller v. Heller, 68 N.Y.S.2d 545 (Sup. Ct. 1947) (finding that failure to procure a marriage license did not invalidate a marriage); *In re Cossin's Estate*, 126 N.Y.S.2d 363 (Sur. Ct. 1953) (finding that failure to obtain a marriage license did not affect the validity of a marriage solemnized by a religious ceremony); *In re Kaminsky's Will*, 126 N.Y.S.2d 220 (Sur. Ct. 1953) (finding a valid marriage where the parties were married in a religious ceremony despite failure to obtain a marriage license); *In re Levy's Estate*, 6 N.Y.S.2d 544 (Sur. Ct. 1938) (finding that failure to procure a license did not invalidate a marriage); State v. Parker, 11 S.E. 517 (N.C. 1890) (finding that failure to procure a marriage license did not invalidate a marriage); State v. Robbins, 28 N.C. 23 (1845) (finding that failure to obtain a marriage license did not invalidate a marriage); Chapman v. Chapman, 32 S.W. 564 (Tex. Civ. App. 1895) (finding a valid marriage despite failure to obtain a marriage license); Morville v. State, 141 S.W. 102 (Tex. Crim. App. 1911) (finding that a marriage license is evidence of marriage but not a prerequisite of marriage); McDonald v. White, 89 P. 891 (Wash. 1907) (finding a valid marriage where it was unclear whether parties obtained a marriage license).

91. Krizman v. Indus. Accident Comm'n, 58 P.2d 405 (Cal. Ct. App. 1936) (finding that marriage in foreign state not invalidated by failure to record marriage certificate).

92. Parker v. Saileau, 213 So. 2d 190 (La. Ct. App. 1968).

93. Shamsee v. Shamsee, 381 N.Y.S.2d 127 (App. Div. 1976).

94. See *supra* text accompanying notes 57–58, 89–93; *infra* text accompanying notes 97–98.

that issued it.⁹⁵ One state attorney general has issued an opinion offering a purportedly complete proof that a couple that uses the state's license in another state would not have a valid marriage under the law of any state.⁹⁶

Courts often construe the marriage code liberally, as containing authorization to couples to marry outside the jurisdiction but pursuant to its ceremonial marriage laws.⁹⁷ For instance, in a

95. A concurrence and a dissent in *De Potty v. De Potty*, 295 S.W.2d 330 (Ark. 1956) crystallizes the strong, but fading view regarding strict, good faith compliance with a territorial rule on using a license. A concurrence places the following gloss on the holding:

I feel sure that the opinion in this case intends only to approve a marriage relationship [without license] only where; (a) the parties engaged in a ceremony substantially in compliance with that prescribed by the statutes; (b) the parties to the ceremony acted in good faith and believed that they were complying with all the provisions of our statutes; (c) they consummated the ceremony by cohabitation, and; (d) the proof of (a), (b), and (c) mentioned above is clear and convincing.

Id. at 332 (Ward, J., concurring). A dissent quaintly captured the sense of territoriality as a critical factor in marriage law:

The validity of a marriage—in the absence of any questions of public policy in the domiciliary state—is determined by the law of the state wherein the marriage is contracted. So Arkansas has the right—in fact, the duty—to determine what is a valid marriage in this State. Our laws provide for the issuance of a license, form of the license, applicants being required to take blood tests, sobriety, waiting period, performance of the marriage ceremony, and returning of the certificate of marriage to the issuing county. In short, up to the date of this case, if anyone had wanted to see about a marriage, the information could have been found in the office of the county clerk wherein the marriage license was issued. Hereafter where will we look for the recording of a marriage performed in Arkansas? According to this opinion, we will have to look in one of the county clerk's offices in Texas. We might just as well have to look in Oregon, Maine, California or Mexico, and then consult every preacher in Arkansas to see if he had performed such a marriage in this State on a license issued in some other state. No record of such a ceremonial marriage in Arkansas on a license from another state could be found in any county courthouse in Arkansas.

Id. at 885–86 (McFaddin, J., dissenting).

96. Marriages Pursuant to a License Issued in Alabama Must Be Solemnized in Alabama to Be Valid, Ala. Att'y Gen. Op. 99-00144 (1999), available at <http://www.ago.alabama.gov/pdfopinions/99-00144.pdf> (finding that marriages performed pursuant to an Alabama marriage license must be performed in Alabama to be valid); see also Justice Court Judge's Authority to Perform Marriage Ceremonies, Miss. Att'y Gen. Op. 2001-0475 (2001), 2001 WL 1725322 (finding that a justice could not perform a marriage ceremony pursuant to a non-state issued marriage license). *Contra* Validity of Marriage Under Certain Conditions, Ark. Att'y Gen. Op. 96-183 (1996), 1996 WL 375948 (finding a valid marriage where the couple used an Arkansas marriage license for a marriage performed in Italy); Validity of a Marriage Performed Outside of Tennessee Pursuant to a License Issued by a Tennessee County Clerk, Tenn. Att'y Gen. Op. 85-189 (1985), 1985 WL 193738 (finding that a Tennessee marriage license does not have to be used within the state of Tennessee).

97. *Barbosa-Johnson v. Johnson*, 851 P.2d 866 (Ariz. Ct. App. 1993) (holding that the provisions of the marriage evasion statute permit an Arizona marriage license to be used anywhere in the world); *In re* Petition for Compulsory Accounting in Estate of Farraj, No.

particularly striking example of this tendency, an Arizona case, *Barbosa-Johnson v. Johnson*,⁹⁸ held that the provisions of the marriage evasion statute permit an Arizona marriage license to be used anywhere in the world. Despite this ruling, the conceptual divide persists in the common understandings of Arizona officials, who continue to inform the public, on websites and by telephone, that an Arizona marriage license is only valid for use within Arizona.⁹⁹ Finally, statutes occasionally extend forgiveness for past, or even prospective, use of the state's marriage license outside the state.¹⁰⁰

B. Notable Exceptions and Variations

Common law marriage and proxy marriages are notable exceptions to this general structure, demonstrating that our legal traditions do not have a fixed commitment to any one form of marriage procedure and suggesting that numerous forms are consistent with the regulatory purposes of marriage.

1. Common Law Marriage

Common law marriage is the exception to the requirement for couples to follow state statutes that set up the exclusive means for a couple to obtain the status of marriage under state law. A common law marriage does not involve a marriage license or a ceremony. Couples begin to hold themselves out as husband and wife after they mutually agree to the marriage and begin living together as a married couple. Only a few states still recognize common law marriage but many states recognize common law marriages validly contracted elsewhere even though such marriages could not be

4803/07, 2009 WL 997481 (N.Y. Sur. Ct. Apr. 14, 2009) (holding that a religious ceremony in New Jersey entered into without a license was a marriage solemnized under New York marriage law).

98. 851 P.2d 866.

99. Information on the internet, supposedly provided by the Clerk of the Superior Court of Maricopa County, states that "[t]he marriage license is valid for one year, and can only be used within the State of Arizona." Judy Hedding, *How to Obtain a Marriage License in Arizona*, ABOUT.COM, <http://phoenix.about.com/cs/weddings/ht/marriagelicense.htm> (last visited October 17, 2009).

100. TENN. CODE ANN. 36-3-103 (c)(1) (2005) ("If a license issued by a county clerk in Tennessee is used to solemnize a marriage outside Tennessee, such marriage and parties, their property and their children shall have the same status as if the marriage were solemnized in this state."); VA. CODE ANN. § 20-37-1 (2006) (stating that even if a Virginia license is used in a marriage outside of Virginia, the marriage has the status as if it were performed in Virginia); *see also* TENN. CODE ANN. § 36-3-103 (2005) (validating all marriages "occurring prior to May 2, 1989" using Tennessee licenses outside the Tennessee).

contracted locally.¹⁰¹ In the handful of states that retain common law marriage, the doctrine is sometimes used to recognize a marriage in which the ceremony failed for lack of compliance with the statutes.¹⁰² In addition, courts in states that do not recognize common law marriage sometimes stretch doctrine to recognize common law marriages of couples who reside there.¹⁰³ Party control over marriage appears in different eras and thus reinforces the contract element in marriage and the pressure for the state to adjust its ground rules for status recognition in ways that give effect to couple autonomy.

2. Proxy Marriage and Other Distance Marriages

A few jurisdictions, under specific circumstances,¹⁰⁴ recognize marriage ceremonies in which proxies substitute for one or both members of the marriage.¹⁰⁵ Proxy marriage demonstrates the perennial need for both ritual and flexibility in marriage solemnizing.¹⁰⁶ Further, proxy marriage is a demonstration that

101. Aaron Larson, *Common Law Marriage*, EXPERTLAW (Aug. 2003), http://www.expertlaw.com/library/family_law/common_law.html (describing the process of common law marriage and listing the states that recognize them); see also TEX. FAM. CODE ANN. § 2.401 (West 2006) (describing the requirements of an informal marriage).

102. Larson, *supra* note 101.

103. *Renshaw v. Heckler*, 787 F.2d 50 (2d Cir. 1986) (finding a valid common law marriage for a New York couple that had traveled through Pennsylvania, a common law marriage jurisdiction, approximately eight times in twenty-one years and had cohabited under the reputation of being a married couple); *Blaw-Knox Constr. Equip. Co. v. Morris*, 596 A.2d 679 (Md. Ct. Spec. App. 1991) (finding a valid thirty-eight year common law marriage for a Maryland couple that spent two nights at a hotel in Pennsylvania where they had the reputation of being married and cohabited); *Katebi v. Hooshiari*, 732 N.Y.S.2d 382 (App. Div. 2001) (finding a valid common law marriage for a New York couple who had traveled through Pennsylvania and Georgia holding themselves out as husband and wife at various times during their relationship); *Carpenter v. Carpenter*, 617 N.Y.S.2d 903 (App. Div. 1994) (finding a valid common law marriage for a New York couple who spent eleven days in Pennsylvania during their twenty-five year relationship during which they held themselves out as husband and wife); *In Re Claim of Coney v. R.S.R. Corp.*, 563 N.Y.S.2d 211 (App. Div. 1990) (finding a valid common law marriage where the couple had traveled through Georgia, a state recognizing common law marriages, for three days); *State v. Phelps*, 652 N.E.2d 1032 (Ohio Ct. App. 1995) (finding a valid common law marriage in part based on evidence of Islamic ceremonies as well as holding out).

104. See *supra* note 25 (listing statutes).

105. TEX. FAM. CODE ANN. § 2.006 (West 2005) (allowing for a single proxy to apply for the marriage license with an affidavit from the party to be married and allowing for double proxy where the couple are both on active duty or both in correctional facilities); *id.* § 2.007 (describing the affidavit to be submitted for the proxy representation); *id.* § 2.203 (stating that a proxy can appear at the ceremony for the absent party).

106. Canon law in the Roman Catholic Church recognized proxy marriage and continues to do so. The principal must write, if possible, explicitly giving his or her proxy authority to marry. This commission must be made before the pastor, other Church functionary, or

presence within a territorial boundary is a legal habit that can be, has been, and continues to be dispensed with.

The form has persisted in the United States in five states, for unclear reasons. Several states still permit it but mainly extend it to members of the armed services on active duty.¹⁰⁷ For example, California, Montana, and Texas extend the privilege of single proxy marriage to members of the armed services on active duty (California requires an armed conflict) without regard to their being a resident of the state.¹⁰⁸ Montana permits double proxy marriage to be used, but only if one member of the couple is a resident of Montana or a member of the U.S. military on active duty.¹⁰⁹ Montana's greater liberalism of authorizing double proxy marriage may be a result of its history of all-male mining camps. Delaware allows proxy marriage for the moribund.¹¹⁰

In addition, courts have recognized proxy marriage for immigration status. For instance, in *Aznar v. Commissioner of Immigration*, a federal district court recognized, for immigration purposes, a proxy marriage between a New York resident and a resident of

two witnesses. See William F. Cahill, *Historical Notes on the Canon Law on Solemnized Marriage*, 2 CATH. LAW. 108, 109 n.3 (1956); see also POMPONIIUS, DIGEST, XXII, 2, 5, cited in Lorenzen, *supra* note 28, at 473.

In addition to canon-law recognition, the royalty and nobility of Europe used proxy marriage. Among the examples are Clovis with Clotilde, Joanna of Navarre with Henry IV of England, Anne of Brittany with Archduke Maximilian, Margaret of Anjou with Henry VI of England, Princess Anne with James I of England, Queen Mary Tudor with Philip II of Spain, and Napoleon and Marie-Louise. High nobility sometimes used proxy marriage as well, as with the Duke of York marrying Mary Beatrice of Modena in 1673. T.F. THISELTON-DYER, ROYALTY IN ALL AGES: THE AMUSEMENTS, ECCENTRICITIES, ACCOMPLISHMENTS, SUPERSTITIONS, AND FROLICS OF THE KINGS AND QUEENS OF EUROPE 310-14 (1903).

We are not aware of a scholarly explanation of why European royalty was so attached to this form of solemnizing marriage. We speculate that proxy marriage provided greater flexibility for political maneuver, as such marriages were de facto political alliances. A proxy marriage could be easily annulled for lack of consummation permitting parties to back out of the deal if necessary. Indeed, the historical record is filled with several such annulments. Further, proxy marriages could be performed immediately, without the time-consuming preparations and elaborate ceremonies that royal weddings perforce required. They could "seal a deal" immediately, if political exigencies so required.

Regardless of the reasons for proxy marriages, European governments appear to have been attached to them, keeping them legal for royalty even as they made them illegal for everyone else. In the late nineteenth century, when Germany and Italy each united the country and promulgated national civil codes, their marriage law provision set forth mandatory marriage procedures prohibiting proxy marriage, but both codes explicitly exempted their royal houses. See Lorenzen, *supra* note 28, at 478. Similarly, the 1754 Hardwicke Act exempted the British royal family from its mandatory procedure. Geo. II., c. 33, cl. 17-18.

107. See *supra* note 25.

108. See *supra* note 25.

109. See *supra* note 25. The usual assumption is that the member of the military is deployed away from his normal domicile.

110. See *supra* note 25. Delaware's law is a single-proxy statute, where one of the parties is near death.

Spain under the *lex loci celebrationis* maxim.¹¹¹ As U.S. District Judge Lowell said in the *Suzanna* case, “If royalty could do it, why may not those of more common clay be allowed to follow their example.”¹¹²

The availability of proxy marriage statutes does not appear to be widely known, although some efforts seem to be emerging to offer proxy services through commercial solicitation of couples who do not have any previous connection with a state.¹¹³ Because of the general understanding that marriage is associated with the presence of a couple in the state that authorizes the marriage, Montana officials became uneasy about the extent to which couples with no connection to Montana were using an earlier version of the statute.¹¹⁴ Concern prompted the Montana legislature to change the law.¹¹⁵

Experience over time shows countries and states have allowed proxy marriage when the exigencies of the time require it. During wartime, various countries explicitly authorized absentee marriage. The Belgian law of May 30, 1916, provides that “[d]uring the duration of the war either or both of the parties may appear before the officer of the civil status either in person or by a special and

111. United States *ex rel.* Aznar v. Comm’r of Immigration, 298 F. 103 (S.D.N.Y. 1924); *Ex parte* Suzanna, 295 F. 713 (D. Mass. 1924).

112. *Suzanna*, 295 F. at 716; see also THISELTON-DYER, *supra* note 106, at 310–14 (providing examples of proxy marriages involving royalty). A striking contemporary example is the proxy marriage, under Mexican law, of Roberto Rossellini and Ingrid Bergman. See DONALD SPOTO, NOTORIOUS: THE LIFE OF INGRID BERGMAN 300 (2001) (quoting Bergman as saying, “Of course, we were very sorry not to be present at our own wedding . . . but that doesn’t make it count any the less for us”).

113. See, e.g., MARRIAGE BY PROXY, <http://www.marriagebyproxy.com/> (last visited Apr. 14, 2011) (offering a double proxy in Montana for military service members and a single proxy in Colorado, which does not require military service nor residency).

114. Possley, *supra* note 28 (“The purpose of the bill was for the military, and there was a fear that it was being abused. The intention was to modify the law without shutting the door to its highest intentions. Inquiries have come from all [over] the world . . . There were hundreds and hundreds of requests for information. We decided the law needed to be amended to make it clear and eliminate ambiguity, although I am not sure how Montana has the authority to issue marriage licenses for an entirely foreign jurisdiction.” (internal quotation marks omitted)); Dan Barry, *Trading Vows in Montana, No Couple Required*, N.Y. TIMES, Mar. 10, 2008, at A11, available at http://www.nytimes.com/2008/03/10/us/10land.html?_r=1 (“‘We were getting calls from Turkey and the Middle East,’ recalls Peg Allison, the tolerant district court clerk here in Flathead County. ‘From people who were definitely not citizens of the United States, and had nothing to do with the military.’”).

115. The newly limiting portion of the Montana statute is in Section 40-1-301 (4):

One party to a proxy marriage must be a member of the armed forces of the United States on federal active duty or a resident of Montana at the time of application for a license and certificate pursuant to 40-1-202. One party or a legal representative shall appear before the clerk of court and pay the marriage license fee. For the purposes of this subsection, residency must be determined in accordance with 1-1-215.

authentic power of attorney.”¹¹⁶ France and Italy provided for similar laws.¹¹⁷ Similarly, as discussed above, many jurisdictions in the United States continue to recognize proxy marriage. It is worth noting that during World War II, Minnesota had a law authorizing proxy marriage.¹¹⁸

Beyond proxy marriage in which there is, in fact, a physical person (the “proxy”) present within the authorizing jurisdiction, U.S. law has authorized the marriages of individuals in distant locations using telegraph, telephone, or mail. As with proxy marriages, the exigencies of war played a role in distance marriage, with soldiers, who either faced a high probability of death (and thus wanted to settle death benefits on intimate partners) or left pregnant partners at the homefront.¹¹⁹

Unfortunately, good statistics about the prevalence of telephone marriage are not available. We know it existed largely from newspaper and other accounts.¹²⁰ A law review comment, written in 1946, describes the need of servicemen during World War II to have access to marriage formalization when they could not be present for a ceremony.¹²¹ Beyond noting the prevalence of telephone marriages, the article recognizes the normative argument for making marriage as accessible as possible: “When a state assumes the authority to prescribe the sole conditions under which its citizens may assume so basic a relation as that of marriage, it incurs the responsibility of making certain, in so far as possible, that the

116. Lorenzen, *supra* note 28, at 479 (citing MASSON, LA LEGISLATION DE GUERRE 146 (1917)). Interestingly, the Roman Catholic Church permits proxy marriage, as discussed above, but does not recognize (or at least at one time did not recognize) telephone marriage. See *Marriage by Phone Out, Rome Ruling Snags Romance of Italian Girl and G.I.*, N.Y. TIMES, Feb. 9, 1958, at 27.

117. Lorenzen, *supra* note 28, at 479 (citing DUVERGIER, LA LÉGISLATION COMPLÈTE DES LOIS, ETC. (1915)).

118. 1945 Minn. Laws ch. 409 (allowing marriage proxy for duration of war plus six months).

119. Weyrauch, *supra* note 28, at 108–09 (lamenting the licensing trend and suggesting the need for a safety valve to avoid hardship). Having soldiers stationed abroad during peacetime began to happen after WWII. Before such regular peacetime stationing of soldiers outside the country, wartime was the primary moment the United States sent soldiers abroad. See Bedi, *supra* note 8.

120. *Marriage by Telephone*, N.Y. TIMES, Feb. 21, 1890, at 2; FLORIDA MARRIAGE BY MAIL, <http://www.floridamarriagebylicensebymail.com/> (last visited Apr. 14, 2011); *Marriage License: Apply by Mail*, JUDICIAL BRANCH OF ARIZONA, MOJAVE COUNTY, <http://www.mohavecourts.com/clerk/mlpage.htm> (last visited Apr. 14, 2011); *Phone Marriage*, MARRIAGETOGO.COM, http://www.marriagetogo.com/text_content_page2.html#phone%20marriage (last visited Apr. 14, 2011); *Marine's Widow, Baby in Immigration Limbo*, MSNBC.COM (Sept. 17, 2009, 11:01 AM), http://www.msnbc.msn.com/id/32891829/ns/us_news-life/.

121. See Comment, *The Validity of Absentee Marriage of Servicemen*, *supra* note 28.

privilege of marrying is denied only by design, and not by inadvertence.”¹²²

Similarly, contemporary commenters collected instances of telephone marriages, giving the impression that they were somewhat common.¹²³ While there were no cases challenging these weddings, there is some case law concerning proxy marriages in Mexico, which servicemen and their spouses used in the hope that U.S. jurisdictions would recognize them. These cases generally upheld such marriages.¹²⁴ In the 1950s, the celebrity couple of Ingrid Bergman and Roberto Rossellini, facing local barriers to their

122. See *id.* at 753. The argument likely assumed the person wishing to marry from a distance had some connection to the state. But in the nature of marriage law, if one state made distance military marriage possible and the accommodation was for the needs of the military, states might find it easy enough to allow a soldier to use the law if his fiancée traveled to the state. Given the willingness of states to allow short-term visits to marry, any individual state, to which a soldier could travel to marry in peacetime, might wish to be just as accessible to him and to his partner when he cannot travel because of war. Today, with a stronger awareness of Equal Protection principles in government's treatment of all persons, a state might well wish to serve constitutional values of equal access that are denied or ignored elsewhere. That is, a state could be sensitive to the fact that those who have the right to travel to the state to marry are barred by the demands of military service from doing so and be spurred to open access (since collectively states monopolize marriage access and have fairly uniform rules demanding the physical presence of the couple). See Mae Kuykendall, *Exporting Ceremonial Marriage: Constitutional Considerations* (unpublished draft) (on file with the author). To rewrite the sentence in light of such considerations: “If states assume the authority to prescribe exclusive state-administered rules for marriage access and do so almost uniformly, they incur the common responsibility, which can be fulfilled by the action of one state, of making certain, in so far as possible, that the privilege of marrying is denied only by design, and not by inadvertence.” Note that Montana already offers double proxy marriage to members of the military, without a requirement of a prior connection to Montana. See *supra* note 115.

123. According to a student comment written shortly after World War II, the most common means for absentee marriages were proxy or telephone ceremonies, or contracts, signed by proxy or exchanged by mail. See Comment, *The Validity of Absentee Marriage of Servicemen*, *supra* note 28, at 735 n.1 (citing O'Neill, *Most Married Man in America*, *YANK*, Oct. 5, 1945, at 11; Reynolds, *Where There's a Will There's a Wedding*, *N.Y. SUNDAY NEWS*, Sept. 3, 1944, at 23–29; *KAN. CITY STAR*, Mar. 4, 1946, p. 3, col. 2 (noting an attorney's fiftieth appearance as proxy in ceremony); *N.Y. TIMES*, July 29, 1945, § 4, at 2 (noting the twenty-fourth Tulsa proxy wedding)). “Sporadic instances of absentee marriage occurred during World War I.” *Id.* (citing *N.Y. TIMES*, Oct. 8, 1917, at 7 (telephone); *N.Y. TIMES*, June 1, 1918, at 11 (telegraph); *N.Y. TIMES*, June 22, 1918, at 9 (telegraph)). Interestingly, as the student comment points out, the Judge Advocate General of the Army suggested advocated soldiers should have access to marriage by mail. See *id.* That same comment pointed out that the Attorney General of Florida, while not recognizing the validity of common law marriages, had ruled that marriage by telephone is valid. *Id.* at 748.

124. *Hardin v. Davis*, 16 Ohio Supp. 19 (Ct. Com. Pl. 1945) (“Having found that the parties in the instant case intended to be and were legally married by proxy in Mexico, that there was no fraud in connection with their marriage, and that the resulting marriage status of the parties is not contrary to Ohio law or its public policy, the Court, therefore, finds, declares, orders and decrees that Laura Mae Hardin, the plaintiff, and Walter Lloyd Davis the defendant, were legally married at Juarez, Mexico, on May 8, 1944.”). See generally Stern, *supra* note 28.

marriage in Italy, availed themselves of the proxy marriage procedures in Mexico.¹²⁵ The marriage was reported in the American press as a genuine marriage.

The U.S. Court of Appeals upheld distance marriage conducted by letter in the celebrated case, *Great Northern Railway v. Johnson*.¹²⁶ There, the husband was from Minnesota and the wife from Missouri. At that time, both states recognized common law marriage,¹²⁷ which required no formality or solemnization. It is arguable that *Great Northern Railway* did not reach the question of whether the state-required rituals could be performed distantly. On the other hand, though, the case stood for party autonomy. It held that, without explicit statutory authorization,¹²⁸ the parties had the right to effectuate a marriage using basic contractual principles.

So deeply embedded has been the precedent of proxy marriage as a path to a recognized marriage that the eminent Edward Lorenzen argued during the end of the First World War that proxy and other distance marriage conducted over the telephone (discussed below) would be legal in the United States. He shows that proxy marriage was perfectly legal in England prior to passage of the Hardwicke Act, citing *inter alia*, Swinburne's *Treatise on Espousals*.¹²⁹ Asserting (a bit heroically) that the American colonies "accepted the then prevailing view that a marriage *de presenti* without a religious ceremony constituted a perfect marriage," Lorenzen argues that proxy marriage was part of the common law on marriage that the colonies adopted. Thus, the traditions that many imagine are embodied in licensing rules and consequent conventions actually supersede, in this scholar's view, a much deeper tradition that enabled couples to marry despite geographic separation.

Finally, in a form of distance marriage, Massachusetts currently has an elaborate statute allowing a person who was a Massachusetts resident at the time of a foreign marriage ceremony, if later resid-

125. See SPOTO, *supra* note 112.

126. 254 F. 683 (8th Cir. 1918).

127. Ann Laquer Estin, *Golden Anniversary Reflections: Changes In Marriage After Fifty Years*, 42 FAM. L.Q. 333, 336 n.23 (2008) ("Ten states and the District of Columbia still recognize common-law marriages: Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Utah, and Texas.").

128. Licensing has tended to preclude other means of getting married, thus limiting the value of the case as a precedent. The case remains instructive about the authority of a state to allow marriage by long distance. BLACK'S LAW DICTIONARY 1060 (9th ed. 2009) (defining "common-law marriage" as "[a] marriage taking legal effect without license or ceremony only when two people who are capable of marriage, live together as husband and wife with the intention of being married and hold themselves out to others as being married").

129. Lorenzen, *supra* note 28, at 478.

ing anywhere in the United States, to file evidence of the marriage with a Massachusetts clerk or registrar.¹³⁰ This seems to be a convenience that allows for transferring to an American state, Massachusetts, the official record of a marriage that might lack for good record keeping outside the country. Massachusetts thereby serves in retrospect as the official “host” of the marriage solemnization. It has some echoes of our proposal, in that Massachusetts perceived the need of its marriage procedure—its record keeping—to be made available for those who married outside the Commonwealth.

Part of the resistance to distance marriage may emerge from a misunderstanding of the old legal chestnut, *lex loci celebrationis*. This legal rule holds that jurisdictions should rely on the law of the state in which the marriage was celebrated to determine its validity, except if a strong public policy exception exists. This principle applies to domestic recognition of marriages performed in other states,¹³¹ as well as international recognition of marriages performed in other nation states.¹³² For example, Nebraska recognizes a marriage performed in California under valid California law and procedure, even though Nebraska specifies different procedures for valid marriage. On the other hand, Nebraska does not recognize a

130. MASS. GEN. LAWS ANN. ch. 207, § 36 (West 2007).

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

132. Ernest G. Lorenzen, *Polygamy and the Conflict of Laws*, 32 YALE L.J. 471, 474 (1923) (“As regards marriage, our courts have said that under our conditions it is convenient to determine its validity according to the law of the place of celebration. In the case of foreign marriages also they appear to deem it expedient to apply the *lex loci celebrationis*.”). See generally Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1209 (2000) (“Marriages are typically considered valid everywhere if they are valid in the state of celebration.”). Some states have explicit statutory provisions that blend their marriage evasion law with the recognition afforded to marriages under the principle of *lex loci celebrationis*. See, e.g., CONN. GEN. STAT. § 46b-28 (2005) (“All marriages in which one or both parties are citizens of this state, celebrated in a foreign country, shall be valid, provided (1) Each party would have legal capacity to contract such marriage in this state and the marriage is celebrated in conformity with the law of that country.”). Massachusetts has a stand-alone marriage statute that declares void evasive marriages. MASS. GEN. LAWS ANN. ch. 207, § 10 (West 2007). The elaborate statute—discussed *supra* note 130 and accompanying text—is not a *lex loci celebrationis* provision, which Massachusetts was not moved to restate in statute but seemingly assumes as a given. Rather, it functions as an offer by Massachusetts to serve in retrospect as the official “host” of the marriage solemnization. Our proposal has the merit of making it possible for a ceremony of marriage performed anywhere in the world by an American citizen to be an official act in an American state, with its attendant public record keeping. We note, in addition, that our proposal can also support improved state record keeping of marriages, as well as the compilation of comprehensive statistics on patterns of marriage.

California same-sex marriage, or a Saudi Arabian polygamous marriage, under the public policy exception.¹³³

The *lex loci celebrationis* maxim contains a certain syllogism: if marriage is validly performed in X jurisdiction, then Y jurisdiction must recognize it. However, committing the logical error of negating the antecedent, many in the debate, either implicitly or explicitly, draw an erroneous corollary: if a marriage performed in X is not valid and authorized in X, then Y jurisdiction must *not* recognize it—even if the marriage would be a valid marriage if performed in Y. For the many lulled by this faulty reasoning, a jurisdiction only has *power* to determine what constitutes a valid marriage if performed within its territory, and as a corollary, it has no power to authorize marriages anywhere else.¹³⁴

This corollary is wrong on more than mere formal, logical grounds. First, states historically have never assumed marriage as a matter of exclusive regulatory control.¹³⁵ The history of marriage

133. The public policy exception is reinforced by DOMA. See Defense of Marriage Act, 28 U.S.C. § 1738(C) (2010). Section 3 of DOMA reaffirmed the principle that states did not have to recognize out-of-state marriages that violated public policy:

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.

Id. For an argument that the public policy exception in the conflict of laws doctrine allows state courts to rule same-sex marriages as invalid without reliance upon DOMA, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1975–76 (1997).

Nothing we propose would alter the non-recognition of a same-sex marriage by Nebraska. We are only concerned that other states accept the procedure by which a marriage that is satisfactory under their public policy for marriage substance is formalized. We do not propose to force recognition of marriages in any jurisdiction that rejects a marriage under its public policy exception, but only to make access to the formalization of a marriage available at a distance. That marriage would then be recognized in any jurisdiction that recognizes the type of marriage it is.

134. Ala. Att’y Gen. Op. 99-00144, *supra* note 96 (advising addressee that “Alabama lacks any authority to license activities that occur outside her borders” and a “ceremony performed [using an Alabama marriage license] in Tennessee was not a valid solemnization under Alabama law”). Our syllogism is consistent with the Restatement. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt.i. (“Marriage which does not meet the requirements of the state where it was contracted. Upholding the validity of a marriage is, as stated in Comment *b*, a basic policy in all states. The fact that a marriage does not comply with the requirements of the state where it was contracted should not therefore inevitably lead to the conclusion that the marriage is invalid.”).

135. As shown above, the Church originally defined marriage, and English law (the Hardwick Act) defined marriage in terms of Church law. See *infra* Section III. In the United States, the colonies/states were varied in their involvement with marriage and reliance on religious definitions. See *infra* Section III.

licensing, despite the confusing term “license,”¹³⁶ which despite its ecclesiastical origin suggests state regulatory control, is a story of religious heterogeneity and state reception towards a multitude of marriage solemnization rituals, particularly in the United States. Second, states have always authorized and sanctioned marriage performed outside of their territorial borders through such mechanisms as proxy, mail, and telephone marriages.¹³⁷

In short, distance marriage, whether by mail or telephone, with or without proxy, has legal precedent in this country. This precedent’s strength proceeds from the logic of marriage: it is essentially a party-driven agreement that the state sanctions and enables. Described this way, marriage obviously can be performed without both parties’ physical presence in any one place. Territorial monopolies persist from legal inertia and legally simplistic institutions that go unchallenged.

III. PAST REGULATORY GOALS

The previous section portrays an elaborate machinery to regulate marriage formation that, despite its widespread rigidity, demonstrates tremendous flexibility at times. This reflects the lack of any clear regulatory purpose to modern marriage procedure. As we demonstrate, modern marriage procedure simply reflects antiquated goals and lacks a purpose appropriate for the twenty-first century. At best, present-day statutes give the illusion of a rational framework, carefully designed to reflect deeply felt values that remain vital today. Instead, statutes today constitute the fossilized relic of the transient and forgotten accretions of abandoned regulatory aims.

136. The Massachusetts marriage code avoids using the term “license,” instead providing for the filing of “a notice of intention of marriage” and calling for a certificate signed by the clerk or registrar “specifying the date when notice was filed with him and all the facts relative to the marriage which are required by law to be ascertained and recorded.” MASS. GEN. LAWS ANN. ch. 207, § 28 (West 2007). Massachusetts’s statutory usage recognizes linguistically the party control over the marriage and the role of the Commonwealth as a facilitator, recorder, and source of publicity: the Code of the Commonwealth treats the marital formalization as something more like the filing of a copyright or a land title than like an application for a patent. While Massachusetts enforces some outside limits on providing the certificate, they are the extreme instances of tender age and being party to an existing marriage.

137. See *supra* text accompanying notes 25–28; *supra* Section II.B.2.

A. Religious Regulation of Marriage: Banns' Notice and Publicity

Throughout the Middle Ages and into early modern Europe, both civil and ecclesiastical law recognized that a valid marriage did not require any type of church ceremony or state involvement.¹³⁸ Following established teaching, both the Church and the state recognized that mere stated consent of the parties creates a marriage or, to be legally precise, consent made in the present tense (*per verba de praesenti*) in contrast to words expressing a future intention to marry.¹³⁹

While marriage *per verba de praesenti* was valid, it was considered “clandestine” or “irregular” in comparison to properly sanctioned marriage performed by a clergyman in a church. Despite the centrality of consent, the Church had rules on marriage eligibility. The purpose was dual. Parties should be capable and sincere in giving their consent. Also of importance, the Church sought to prevent bigamy and incest. The Fourth Lateran Council in 1215¹⁴⁰ officially set forth the “triple calling of banns”—i.e., the wedding was announced at church on the three Sundays prior to the marriage.¹⁴¹ The ceremony had to be performed by a priest, in the presence of witnesses—and it had to be performed during certain days and

138. See R. B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500–1850, at 2 (1995) (“Consent in the present tense was almost universally accepted by canonists after the late 1180s as the critical test of whether a marriage existed or not.” (quoting J.A. BRUNDAGE, LAW, SEX AND CHRISTIAN SOCIETY 268–69 (1987)); LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 141 (2002); see also OUTHWAITE, *supra*, at 269 (“This was the official view echoed in later civil law and it was supported by the common law . . . [as evidenced by] Chief Justice Holt’s judgment in *Collins v. Jesson* in 1704 that if a contract be *per verba de praesenti*, it amounts to an actual marriage which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiae*.”); Joseph N. Perry, *The Canonical Concept of Marital Consent: Roman Law Influences*, 25 CATH. LAW. 228, 233 (1980) (“From this point on [the reign of Pope Alexander III in the twelfth century], it became a matter of Church doctrine that, at the most fundamental level, consent alone creates Christian marriage *in iure*.”).

According to Outhwaite, common law lawyers encouraged by the Statute of Frauds of 1677 began to insist upon some writing in proof of marriage. OUTHWAITE, *supra*, at 2.

139. John E. Semonche, *Common-Law Marriage in North Carolina: A Study in Legal History*, 9 AM. J. LEGAL HIST. 320, 321 (1965).

140. *Id.*

141. Banns had hitherto been traditional in many Christian countries. OUTHWAITE, *supra* note 138, at 4. The Church set forth other requirements, such as stipulations concerning where and when marriages should take place, registration of marriage, and parental consent for marriages of minors. *Id.*

times.¹⁴² Individuals had to swear to matters concerning appropriate age and/or parental consent and provide a security bond.¹⁴³

The Church's adoption of rules of marriage formation had clear regulatory goals. Clandestine marriage created opportunities for bigamy and even incestuous marriage, which calling of the banns was meant to counter. Perhaps more important, clandestine marriage disrupted inheritance, as children could marry without parental consent or even their parents' knowledge.¹⁴⁴ Both civil and ecclesiastical law, while accepting marriage *per verba de praesenti*, treated it less favorably than properly sanctioned marriage. In England, "more than thirty sets of canons and diocesan statutes attempted to ensure that English marriages were conducted in ways that the church approved of."¹⁴⁵ Most severe, "those not marrying in the approved manner, and those who assisted them, were liable to punishments that ranged from repeated whippings to excommunication."¹⁴⁶ Similarly, English civil law treated marriages solemnized irregularly at a disadvantage. For instance, the common lawyers, fearing that any woman could claim a secret marriage with a recently deceased man, forbade women not married in a legal church wedding from enjoying full inheritance rights.¹⁴⁷ Secret marriages could evade censorious community opinion that might oppose them and, having done so, were not subject to clear proof.

The Council of Trent in 1564 abolished recognition of clandestine marriage in all Catholic countries, requiring all legitimate ecclesiastical marriage to be performed before a priest and with witnesses.¹⁴⁸ The Council grandfathered existing irregular

142. Rebecca Probert, *Control over Marriage in England and Wales, 1753–1823: The Clandestine Marriages Act of 1753 in Context*, 27 LAW & HIST. REV. 413, 418–19 (2009).

143. *Id.* (citing THE ANGLICAN CANONS, 1529–1947 (Gerald Bray ed., 1998)).

144. *Id.* at 431–37 (discussing the use by wealthy parents of conditions on property in restraint of marriage without consent). The playwright Horton Foote provides a touching early twentieth century American account of his parents' marriage over the objection of his mother's parents. See HORTON FOOTE, FAREWELL: A MEMOIR OF A TEXAS CHILDHOOD 18 (1999). Albert Horton Foote and Harriet Gautier Brooks, both of Wharton, Texas, sneaked over to a nearby Texas town called El Campo, got a license, and came back to Wharton, where a minister married them in a house six blocks from Harriet's parents' house. *Id.* They set up housekeeping in Wharton and were snubbed by her parents until the day her mother called and said, "I thought I'd come over to see you this afternoon if you're going to be home." *Id.* Her mother had yielded to the hardy practice of couple autonomy. *Id.*; see also Mae Kuykendall, *Marriage Procedure*, THE CONGLOMERATE (Apr. 14, 2010), <http://www.theconglomerate.org/2010/04/marriage-procedure.html>.

145. OUTHWAITE, *supra* note 138, at 5.

146. *Id.*

147. *Id.* at 5 (citing F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 374 (2nd ed. 1989)).

148. *Id.*

marriages—an early example of legal presumption in favor of existing marriages.¹⁴⁹ In Catholic countries, this shift in ecclesiastical law ended further irregular marriage and any civil recognition of such marriages.¹⁵⁰

Because Henry VIII broke with the Catholic Church in the 1530s, several decades before the Council of Trent, England never adopted the Council's reforms and only eliminated clandestine marriage in 1753 with passage of the Hardwicke Act.¹⁵¹ Clandestine marriage persisted, therefore, in England for two centuries, existing alongside regular Church marriage which took place according to the ecclesiastical law of the Anglican Church.¹⁵² Whether the American colonies received clandestine marriage, therefore, is an open question.¹⁵³

B. Special Procedures for the Elite

Many couples, seeking to marry legitimately within the Church, sought to escape banns' residency and publication burdens. From at least the fourteenth century, bishops in England did grant licenses, permitting marriage without banns.¹⁵⁴ Presumably using his judgment and knowledge of his own parishioner's status, truthfulness, and respectability, the bishop or his delegate would issue a marriage license. Typically, the bishops would only have power to issue licenses within their bishopric or diocese.

Thus, the Church, not the state, issued the first marriage licenses. They no doubt provided a fashionable escape, a First Class, as it were, in marriage screening. But, the regulatory purpose remained the same—the Church provided notice and publicity, as well as satisfying itself that the marriage was willing and voluntary and that the couples were otherwise eligible.

149. THE COUNCIL OF TRENT: THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 192–232 (J. Waterworth ed. & trans, London, Dolman 1848), available at <http://history.hanover.edu/texts/trent/trentall.html>.

150. See Perry, *supra* note 138, at 229–32.

151. OUTHWAITE, *supra* note 138, at 5; see also Hardwicke Act, Geo. II, c. 33 (1754).

152. OUTHWAITE, *supra* note 138, at 5.

153. See Lorenzen, *supra* note 28, at 478.

154. Patrick McGrath, *Notes on the History of Marriage Licenses, in GLOUCESTER MARRIAGE ALLEGATIONS 1627–1680*, at xx, xx–xxi (B. Firth ed., 1954). While McGrath notes that “the first canonical enactment . . . seems to be the eleventh canon of the Synod of Westminster in 1200, when it was ordered that no marriage should be contracted without banns being thrice published in the Church, except by special authority of the bishop,” it appears that there is no historical record of licenses, in fact, being granted until the fourteenth century. *Id.* at xx & n.4.

*C. The State Take Over (or Delegation to the Anglican Church)
of Marriage in England*

The 1753 Hardwicke Act ended legal recognition of clandestine marriage in England, giving civil recognition only to “regular” marriage performed according to Anglican ecclesiastical law as it then existed—i.e., through either banns or licenses and following the various, often odd, procedural rules concerning residency, time, and day.¹⁵⁵ Only a bishop and those vested with his authority could provide licenses.¹⁵⁶ In addition, a couple could obtain a special license from a bishop, which would allow marriage anywhere within the bishopric, or from the Archbishop of Canterbury, which would allow one to marry anywhere in the Kingdom. These “special licenses” had some social cachet due to their expense and the status they conveyed.¹⁵⁷ Interestingly, the Act made exceptions for Jews, Quakers, and the royal family—groups that either could not marry in an Anglican church or, as with the royal family, had marriages that for political reasons had to be more flexible, requiring, at times, marriage by proxy or outside the country.¹⁵⁸ Catholics and dissenters were not exempted, an artifact of anti-Catholic bias not remedied until the nineteenth century.¹⁵⁹ Anglo-American law has long used marriage law to discriminate against minorities.

As the license evolved into a vehicle for state regulation of marriage, there emerged a conventional legal assumption (still much with us) that the state has licensing authority over marriage based on territorial boundaries, just as a bishop’s licensing authority was

155. The strange procedural rules included specific times and days when marriage could be performed, as readers of Thomas Hardy will recall: luckless Fanny Robin from *Far from the Madding Crowd* was late to her planned wedding to Frank Troy and could not be married that day. These peculiar rules have stayed with us, as the previous section shows, reflected in the odd procedural requirements states continue to enforce.

156. Geo. II., c. 33, cl. 17–18.

157. *Id.* at sec. 6; see also JANE AUSTEN, *PRIDE & PREJUDICE* 341 (Courage Classics ed., 1992) (Mrs. Bennet to Elizabeth upon recently hearing of her marriage to Darcy: “‘My dearest child,’ she cried, ‘I can think of nothing else! Ten thousand a year, and very likely more! Tis as good as a Lord! And a special licence. You must and shall be married by a special licence. But my dearest love, tell me what dish Mr. Darcy is particularly fond of, that I may have it tomorrow.’”).

158. Geo. II., c. 33, cl. 17–18. Interestingly, when Germany and Italy adopted national codes governing marriage solemnization, they also made exemptions for their ruling houses. See Lorenzen, *supra* note 28, at 478.

159. In the 1830s, Parliament passed bills allowing justices of the peace to license marriage and eliminated the Anglican monopoly on religious solemnization. Parliament, however, maintained Church authority to marry by banns. OUTHWAITE, *supra* note 138, at 164.

limited to his diocese.¹⁶⁰ The preceding discussion questions this idea. Under the Hardwicke Act, the English Parliament chose to recognize marriages performed in a certain way (i.e., with banns or Church licensed); it did not suggest that its *own* power to authorize marriage was limited to its borders.

D. The Patchwork Emergence of Marriage Law in the United States

The American colonies were, with the exception of Georgia, founded in the seventeenth century, a time during which English marriage law was in flux, with clandestine marriage still recognized but its precise legal status unclear.¹⁶¹ As a result, the colonies had freedom to craft laws to suit their own religion and social structure. Because the 1753 Hardwicke Act did not apply to the English possessions overseas (or Scotland or Ireland), the American colonies maintained that freedom until the Revolution.¹⁶² Even more important, the traditional Anglican form of “regular” marriage simply did not make sense in the colonies. After all, many of the colonists, like New England’s Puritans or Pennsylvania’s Quakers, were colonists *because* they did not want to be Anglican, a desire that they fervently, even fanatically, felt. Their religious and political disposition led them to reject the Anglican form of solemnization. With the presence of a priest, a church wedding appeared too close to the Catholic sacrament of marriage. Further, even colonists who lacked hostility towards the Anglican Church faced the practical problem that in the newly and sparsely populated colonies there often were no Anglican clergy available to solemnize marriages.¹⁶³

The colonies, therefore, devised diverse legal solutions to the problem of creating “regular” marriages that differed according to their religious and social organizations.¹⁶⁴ For instance, the Puritans of Massachusetts, likely reacting against the Catholic view of marriage as a sacrament, argued that marriage needed no priestly

160. See Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. REV. 307, 317–18 (2008) (asking “Where is same-sex marriage?” and providing several geographic answers, including “Massachusetts, Connecticut, and until recently California” and “[m]uch of Western Europe”).

161. See *supra* text accompanying notes 138–147.

162. Hardwicke Act, Geo. II, c. 33, sec. 18.

163. Semonche, *supra* note 139, at 326. (“Notice that provisions for a civil ceremony result, not from the Puritan view that marriage is a civil right that should be regulated by the state, but rather from the practical problem of an absence of clergy.”)

164. 2 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 125 (1904) (“The continuity of English law and custom in the New England colonies is not more striking than the innovation.”).

intermediary.¹⁶⁵ Influenced by the example of the Netherlands, their previous residence, the Puritans of Massachusetts Bay introduced strictly civil marriage, which involved an appearance before a judge.¹⁶⁶ This minimal legal transaction dominated marriage solemnization in New England, as every colony viewed “marriage . . . as a civil contract and the celebration was performed by a civil magistrate.”¹⁶⁷ New York, originally a Dutch colony, following a modified Dutch model, allowed either religious or civil ceremonies. When the British took over, their government imposed a regime similar to the pre-existing Dutch approach, permitting celebration of marriage before a minister or justice of the peace.¹⁶⁸ In the Quaker proprietary colonies of Pennsylvania and Delaware, law reflected the Quaker custom of permitting any type of religious ceremony but requiring public notice followed by a witnessed marriage ceremony and subsequent registration with a county registrar.¹⁶⁹

165. We find far-fetched the assertion that Puritan contractual weddings were in any way related to New England’s current liberal marriage regimes. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1794–95 (2005) (“In Puritan New England, by contrast to the rest of the United States, members of the clergy came late into participation in the licensing of marriage Marriage in New England was from the start a civil contract solemnized by a civil magistrate It is tempting to see some connection between this history and New England’s vanguard role in the state licensing of same-sex couples”). Rather, aversion to the Catholic view that marriage was a sacrament no doubt drove the form of Puritan marriage. Further, it is a mistake to claim that the Puritans, in fact, saw marriage as a private “civil contract.” To the contrary, the Puritans believed in strict state control over marriage. As an early commentator said, although the Puritans regarded marriage as “purely a civil contractual relation,” they insisted that it “be regulated by municipal law [and] be sanctioned by the civil authority.” 2 HOWARD, *supra* note 164, at 210. Indeed, there are instances of the purely contractual clandestine marriages, and the Puritan state punished them. Perhaps most famously, Governor Richard Bellingham in 1641 secretly married Penelope Pelham and was indicted for the offense. See *id.* In other words, even though there was ecclesiastical law determining valid marriage in the Church’s eyes, the state always had to choose what parts of ecclesiastical law were required for a valid marriage in the state’s eyes.

166. 2 HOWARD, *supra* note 164, at 134. Governor Hutchinson states of the Puritans, “I believe there was no instance of marriage by a clergyman after they arrived, during their charter; but it was always done by a magistrate, or by persons specially appointed for that purposes. It is difficult to assign a reason for so sudden a change, especially as there was no established form of the marriage covenant.” 2 THOMAS HUTCHINSON, HISTORY OF MASSACHUSETTS BAY 392 (Salem, Thomas C. Cushing 1795).

167. 2 HOWARD, *supra* note 164, at 128–34 (“The law and custom of the other New England colonies were essentially the same. Everywhere marriage was regarded as a civil contract and the celebration was performed by a civil magistrate.”). We think it a mistake to view Puritan marriage as a private contract, as some modern advocates of contract-based marriage suggest. As we discuss below, Puritan marriage rejected the Catholic view that marriage was a sacrament but always insisted upon strict state control.

168. *Id.* at 294.

169. *Id.* at 125.

In contrast with Quaker liberalism, several southern colonies adopted rules similar to the 1753 Hardwicke Act in England. In Virginia, all marriages had to be solemnized by an Anglican minister, a rule in force until after the Revolution.¹⁷⁰ Marriage ceremonies could be performed after publication or license, which the Governor was empowered to issue.¹⁷¹ North Carolina had a similar rule giving the marriage monopoly to Anglican ministers, a rule that was controversial, of course, among Dissenters, i.e., non-Anglican Protestants.¹⁷²

The strange diversity of marriage regulation at the outset of our country's history created the groundwork for a confusing patchwork of regulatory structures for the next 200 years.

E. The Nineteenth Century Turn Towards Licensing as Tool for Enforcing Discrimination and Advancing Public Health

As in many other areas of law, state marriage formation law moved towards uniformity throughout the nineteenth century—a uniformity that characterizes current law, the features of which we discuss above.¹⁷³ Many of the colonies permitted marriage by licenses instead of banns, just as in England.¹⁷⁴ In the nineteenth century, most state statutes eliminated banns or public announcement requirements and began to require licensing exclusively.

Licensing emerged as a tool states used to regulate marriage directly. The states seized the opportunity to transform the regulation of marriage from minimal self-enforcement to intrusive government control.¹⁷⁵ First, many refused licenses on miscegenation grounds, greatly (and undesirably) expanding the narrow

170. It is important to remember that some colonies, and later states, had established churches. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003) (stating that Virginia, Maryland, North Carolina, South Carolina, and Georgia recognized the Anglican Church, while Massachusetts, New Hampshire, Vermont, and Connecticut were Congregationalist (Puritan)).

171. 2 HOWARD, *supra* note 164, at 240–47.

172. Semonche, *supra* note 139, at 319–20.

173. See *supra* Section II.A.

174. For example, in New York, marriage by “[l]icense ‘under the hand and seal of the governor’ in place of banns is still allowed.” 2 HOWARD, *supra* note 164, at 294.

175. The elimination of banns was slow but inexorable. In 1929, Richmond and Hall counted three states that still permitted banns: Maryland, Ohio, and South Carolina. See RICHMOND & HALL, *supra* note 15, at 337 n.1. Other states eliminated banns earlier: Massachusetts in 1850, see *The New Marriage Law*, CHRISTIAN REGISTER, Apr. 27, 1850, at 68; Connecticut in 1855, see *New Marriage Law in Connecticut*, GERMAN REFORMED MESSENGER, Jan. 17, 1855, at 4230; New Hampshire in 1854, see *The Marriage Laws of New Hampshire*, HOME JOURNAL, Oct. 21, 1854, at 4.

regulation of marriage that had traditionally only involved bigamy, incest, and publication.¹⁷⁶ Later, as discussed above, states added requirements such as waiting times and blood tests for syphilis and other venereal diseases.¹⁷⁷

F. Obsolescence of Marriage Procedure's Justifications

Ironically, in modern times, the state has retreated from virtually all of the regulatory purposes marriage procedure once served. Most prominently, the states (of course) no longer prohibit interracial marriage. Most states have dropped, or decreased, venereal disease testing, as a societal consensus has moved towards individual control of this information.¹⁷⁸ Indeed, a few states' brief efforts to require AIDS testing before marriage ended in the face of public resistance.¹⁷⁹ Going back even further, marriage licenses hardly constitute publicity or notice as marriage records are notoriously difficult to search. Even the paternalistic goal of preventing rash marriages has evaporated.¹⁸⁰ While the Las Vegas wedding is hardly the norm, waiting periods have decreased to the point of vanishing as we discuss in Section II above.

IV. DEFINING MARRIAGE'S REGULATORY GOALS AND MAKING PROCEDURE TO FURTHER THEM

So far this Article has shown that existing regulatory structures for marriage formation are largely historical artifacts and serve few, if any, cognizable regulatory purposes. We next will identify regulatory purposes and procedures that make sense in the modern context. However, before proper procedures can be established, we must develop a working definition of marriage with a specified purpose. We argue marriage is best described as a

176. NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 28–33 (2000); see also PASCOE, *supra* note 19.

177. PASCOE, *supra* note 19, at 138.

178. ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES* 143–46 (1987) (describing states' requirement of a blood test for venereal disease starting with Connecticut in 1935); see *supra* note 70 and accompanying text.

179. Illinois and Louisiana required AIDS testing for marriage licenses, but these requirements have all been repealed. See ILL. ANN. STAT. ch. 750, ¶ 5/204 Historical & Statutory Note (Smith-Hurd 1993) (repealed 1989); LA. REV. STAT. ANN. §§ 9:230–:231 (West 1991) (repealed 1988); see also Isabel Wilkerson, *Illinoisans Fault Prenuptial Tests for AIDS*, N.Y. TIMES, Apr. 16, 1988, at A6, available at <http://www.nytimes.com/1988/04/16/us/illinoisans-fault-prenuptial-tests-for-aids.html>

180. See *supra* notes 64, 73 (describing evolution away from waiting periods).

hybrid of enabling regulation to create a legal relationship and status—a status that carries value in and of itself. Two sets of benefits emerge from such a description:

- (i) Marriage as an enabling regulation that allows individuals to form a legal relationship between themselves, their children (if any), and their property. Both individuals and the state have an interest in ensuring that the relationship is entered into with ample disclosure and information about the partners.
- (ii) Marriage as a status good, itself, that the state and/or civil society confer. Perhaps responding to a deep anthropological need, people want the status created by public recognition of their long-term sexual and romantic relationships.¹⁸¹

This conception of marriage's benefits, in turn, leads to two clear regulatory goals. First, if marriage is an enabling regulation it should be rendered as convenient and efficient as corporate law. This suggests that regulation should aim towards flexibility, particularly through the offering of marriage to those across borders. Just as with corporate law, jurisdictional competition will emerge once individuals are allowed to choose among the laws of different jurisdictions. In addition, more complete information will lead to more efficient contracting. States can offer services, such as a means for couples to agree to effective disclosure to one another. With incorporation, state filing offices provide some basic monitoring, such as to assure there is no duplication of a trade name.

Second, viewing marriage as a status good suggests that the status of marriage, as a benefit and good in and of itself, should be more widely and efficiently distributed. This is another benefit of cross-border marriage authorization. As will be discussed in the last section, offerings of a status good across state lines, consistent with federalism, is a model for progressing toward a goal of marriage equity worth considering as an alternative to the Supreme Court's mandating one form of equity—nationwide equal marriage rights for same-sex couples.

This section defends our concept of marriage and examines a modernized marriage procedure to further the regulatory goals marriage suggests.

181. See Ristroph & Murray, *supra* note 30.

A. Marriage as Enabling Regulation and Status Good

Conventional legal wisdom vacillates in its classification of marriage between (i) a government-regulated and -created status¹⁸² and (ii) a self-regulating contractual or religious agreement.¹⁸³ Neither classification is complete, and one cannot reduce marriage into either. Marriage is not just a contract. It will always have status aspects because the state will never allow private contractual regulation of certain matters, including children (especially upon divorce), tax treatment, inheritance and intestacy, support obligations, and default rules for the division of property in the case of divorce. Courts are uniform in their refusal to enforce prenuptials that purport to regulate how children will be treated upon divorce.¹⁸⁴ Similarly, most states place a limit on the enforceability of

182. BLACK'S LAW DICTIONARY 1542 (9th ed. 2009) (defining "status" as "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations, or any particular group of them separately considered <the status of a landowner>."); Cass R. Sunstein, *The Right To Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005) ("My conclusion is that the 'right to marry' entails both some right of intimate association in the private sphere and (more relevantly for present purposes) *an individual right of access to the official institution of marriage so long as the state provides that institution*. With respect to the access right, the best analogy is to the right to vote."); Richard A. Wilson, *The State of The Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples*, 38 LOY. U. CHI. L.J. 323, 329 (2007) ("Derived from the status as a social and legal construct, not a bargained-for, expressly enumerated transaction, the rights of married persons and the legal protections-the 'benefits and burdens'-of marriage are neither inherently nor in fact a matter of contract. Neither are they set forth in any detail in a given state's marriage statutes."). See generally MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006); ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 161 (2009) ("We typically think of marriage as a status But from a legal perspective, marriage also can be viewed as a kind of standard form contract.").

183. Legal scholars have advocated treating marriage as purely or largely a contractual relationship for decades. See Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1222-23 (2006); Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464-65 (1998) ("[C]ouples should be authorized to legally define their own marriages. Many arguments have been made, and have gained general acceptance, that courts should enforce agreements as to the terms of divorce, at least regarding the division of property. Courts should be authorized to also enforce private agreements regarding grounds for divorce and terms of an ongoing marriage."); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 209-11 (1982) (arguing for "the desirability of a new pattern of intimate relations law in which contractual tools and processes would play a critical role . . . consciously deciding where to apply contract principles with enthusiasm, where to discard them as inappropriate, and where to tailor them to the special context of marriage"); Sunstein, *supra* note 182, at 2115 ("As a matter of law, at least, people can generally leave the marital form whenever they wish to do so. Increasingly, marriage resembles a contract, dissoluble at the will of the parties, rather than a permanent status.").

184. Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL LAW. 413, 426-27 (2008) ("Not surprisingly, provisions in a prenuptial agreement purporting to affect the

prenuptial agreements that purport to regulate certain inalienable rights or intrude too greatly upon partners' autonomy while married.¹⁸⁵

Beyond the fact that the state governs key parts of the marriage relationship, placing the legal relationship outside of contract, proponents of state withdrawal from marriage and its submergence into contract misapprehend the long history and value of marriage as a benefit, even status good, which the state must help to provide.¹⁸⁶ Marriage responds to individuals' need for a public recognition of their unions, and not for mere contractual obligation.¹⁸⁷ Market behavior supports this claim. Fewer than five percent of couples spend the money or expend the efforts to obtain prenuptial agreements to specify or alter their legal rights under the law.¹⁸⁸ In contrast, people value ceremony and the status of marriage. If lay people valued marriage as a contract, they would more often use pre-nuptial agreements, which modify marriage's "pre-packaged" legal contract or status.¹⁸⁹ If individuals lack the interest to modify the terms of legal marriage, individuals either are completely pleased with the terms (arguably unlikely) or value

rights of the parties' children are void as against public policy. Provisions limiting child support are unenforceable, as are provisions that seek to dictate the custody of a child or a parenting schedule unless the disposition is also in the best interests of the child.").

185. *Id.* at 430 (noting that courts and federal law refuse to enforce prenuptial agreements that waive rights to ERISA protected retirement funds, other survivor benefits, or temporary alimony, purport to regulate conduct during the marriage, require children to be brought up in a certain religion, and limit bases for divorce).

186. Sunstein, *supra* note 182, at 2116 ("But private arrangements, religious and otherwise, might provide as much protection of children as official marriage does; and the protection of children might be ensured directly, through requirements of care and support, rather than through marriage in its current form."); see also Estin, *supra* note 81, at 479 (noting that the laws in the areas of contracts, public benefits, immigration, bankruptcy, and tax are built upon commonly held marriage norms and commenting that "[p]rivatizing marriage would require construction of new rules, a new official law, in each of these different frameworks").

187. Lois Smith Brady, *Stephen Davis and Jeffrey Busch*, N.Y. TIMES, Dec. 6, 2009, at S17 ("In August 2004, Mr. Busch and Mr. Davis were among a group of same-sex couples who sued Connecticut for the right to marry, a case the group won in October 2008. 'Marriage is so much more than a collection of rights and privileges,' Mr. Busch said. 'Nobody says, 'Oh, I want to civil union you.'").

188. ARLENE G. DUBIN, PRENUPS FOR LOVERS: A ROMANTIC GUIDE TO PRENUPTIAL AGREEMENTS 15 (2001) ("Anecdotal evidence suggests that 5 to 10 percent of couples . . . now enter into prenups."); Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997) ("Of marrying couples, approximately 5 percent (about 50,000) sign prenuptials each year."); Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 2 (Harvard Law Sch. John M. Olin Center for Law, Economics and Business Discussion Paper Series, Working Paper No. 436, 2003), available at http://lsr.nellco.org/harvard_olin/436/.

189. "Like corporate status, civil marriage today serves as an off-the-rack rule." Case, *supra* note 165, at 1781 (2005); see Mahar, *supra* note 188.

marriage for reasons other than legal. The average couple (or their families) spends over \$20,000 on their marriage ceremony and party.¹⁹⁰ A cross-sectional study of the five bridal magazines with highest circulation reveals an emphasis on ceremony with no article concerning marriage's legal import.¹⁹¹ Consistent with its role of status good, marriage and its rituals retain their social and personal significance even though there is considerably less social pressure to marry than in the past. Society now accepts that matters typically associated exclusively within a sanctioned marriage, such as child-rearing and sexual relations, may be done *outside* of marriage.¹⁹²

Conversely, marriage can never be, and never has been, merely a religious institution.¹⁹³ The state will always have an interest in basic human relationships because they implicate children, taxation, and other basic concerns regardless of whether the union is civil or religious. As the historical discussion above shows, English law treated clandestine marriage differently from official church marriage, thereby creating distinct secular and religious definitions of marriage. Keeping the state involved in defining marriage protects women from entering marriages that lack legal substance and over which religions exercise the only say as to the obligations of the parties.¹⁹⁴ Similarly, it protects uneducated or unwary women from relying on false understandings of their rights or obligations that social groups might encourage.¹⁹⁵

Finally, we reject viewing marriage exclusively as a status regulated by the state within its borders for three reasons. First, marriage statutes have evolved toward a relatively standard, though uninnovative, format,¹⁹⁶ suggesting that states now have no capacity or

190. See *Wedding Budget vs. Real Wedding Cost*, COST OF WEDDING, <http://www.costofwedding.com/> (last visited February 24, 2011) ("US couples spend [on average] \$24,066 for their wedding. However, the majority of couples spend between \$18,050 and \$30,083. This does not include cost for a honeymoon or engagement ring.").

191. Study on file with authors.

192. We expand upon this argument in Section III.

193. See *Kmiec Proposes End of Legally Recognized Marriage*, CATHOLIC NEWS SERVICE (May 28, 2009, 4:41 AM), http://www.catholicnewsagency.com/news/kmiec_proposes_end_of_legally_recognized_marriage/ ("The net effect of that, would be to turn over—quite appropriately, it seems to me, the concept of marriage to churches and a church understanding." (internal quotation marks omitted)).

194. Estin, *supra* note 81, at 514 (discussing the French rule on religious and civil marriages).

195. *Id.*

196. Grossman, *supra* note 18, at 434 ("While non-uniform marriage laws and the conflicts they engender are not new, the most significant disagreements among states about marriage law were resolved by the last third of the twentieth century. Thus, the recent introduction of same-sex marriage in a single state has disrupted a period of relative calm."); *Id.* at 442 ("The differences that had been so pronounced in the first half of the twentieth

incentive to innovate, experiment, or afford to marriage law improvement of the sort associated with modern regulation. The current regime, so to speak, has little to recommend it other than a preference for status quo. State laws' remarkable consistency has been well-documented, with most states moving towards similarity in licensing, waiting period, and solemnization requirements.¹⁹⁷

Second, marriage as a state regulatory franchise conflicts with marriage as an agreement, initiated and controlled by those who are getting married—a view fundamental to Anglo-American matrimonial law, a subject we discuss in Section III. While status advocates will often describe marriage as a “consented to legal status,” that misses an important point. As we discuss below, the state, particularly in the United States, historically never had a monopoly in defining that status, as discrete local and religious communities often assumed that role.¹⁹⁸ If marriage is a legal status, it is a strange, de-centered one in which religion, custom, the need for personal autonomy,¹⁹⁹ and various state jurisdictions interact to define its contours.²⁰⁰

Third, we maintain that under federalism, the nation can enjoy the state-conferred benefit of the status value of official marriage in all places. This can occur even as the debate concerning same-sex marriage continues in the political and judicial realms. Under a federalist system, there need not be *one* state in any one geographic area conferring the marriage status.

century all but disappeared in the second half . . . A snapshot of state marriage laws circa 1995 reveals a remarkably uniform system.”)

197. For a discussion of the basic procedures found in all state marriage law, see *supra* Section II.

198. See *supra* Sections III.D and III.E (discussing colonies' and later states' reception and development of marriage law).

199. See WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE SIXTH act 5, sc. 5 (“Marriage is a matter of more worth/Then to be dealt in by attorneyship.”). The insistence by same-sex couples of the marital nature of their relationship has led five states to accept an expanded definition of marriage. The broadening of the definition has been driven by individual demands for autonomy.

200. We agree with Ann Laquer Estin that in matters of marriage and family law, “state law and legal institutions have only a limited degree of control over society, and do not necessarily dominate or displace other social systems. Another [question] is that individuals may be simultaneously subject to different systems of rules, and these systems may not be coordinated or hierarchically arranged.” Estin, *supra* note 81, at 454. Estin continues, though, saying that “official law functions as a gatekeeping tool to define the shape of both family life and the broader social and political community.” *Id.* at 455. Estin thoroughly reviews the fact that the rules for marital exit are a critical benefit of state sanctioning. *Id.* at 470–73.

B. Marriage Formation Law: Regulatory Regime to Distribute a Status Good and Enable Certain Legal Relationships

Neither contract nor status perfectly captures the nature of marriage. As the preceding subsection argues, marriage has two sets of benefits. A state's marriage licensing must respond to both. As for the first set of benefits, marriage is an enabling regulation creating a legal relationship between two people, their children (if any), and their property. As for the second set of benefits, marriage is a status good that the state and/or civil society confer, a point that legal scholarship has not fully recognized. The genesis of desires for marriage deepened by official ceremony and sanction seems both obscure and profound.²⁰¹ While the frustration and difficulties inherent to any long-term relationship are hard to bear, the benefit of "sticking with it" outweighs these disutilities. People, therefore, marry to make it difficult to end their long-term relationships on the basis of relatively short-lived unhappiness.²⁰² An official marriage ceremony may be part of the psychology of making marriage worthwhile and later violation of the public, official, or "sacred" marriage vows part of the disutility of ending a long-term relationship. Relatedly, the expense and trouble of a wedding can serve as credible signal for sincere desires and intention to observe marriage vows.

Given the imperfectly understood, yet undeniable, way people value the social sanctioning of marriage, perhaps the best way to understand it is as a certain type of status good, like the receipt of a government medal or award. A status good is simply a good the demand for which is inspired by social rather than by utilitarian product attributes.²⁰³ Rather than provide utility in the more normal sense of nourishment, shelter, adornment, pleasure, or possession, status goods provide prestige²⁰⁴ and enhanced personal meaning. Marriage is a status good that requires state sanction and/or religion as necessary parts of its "social attributes."

201. Barbara Stark, *Marriage Proposals: From One-Size Fits to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001).

202. DAVID LAIBSON, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 444 (1997).

203. Roger Mason, *Measuring the Demand for Status Goods: An Evaluation of Means-End Chains and Laddering*, in 2 EUROPEAN ADVANCES IN CONSUMER RESEARCH 78-81 (Flemming Hansen ed., 1995).

204. Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79, 81 (1988).

1. Convenience and Disclosure in Marriage Formation

Consider competition among states in creating enabling regulations. Looking at precedent for a genuinely competitive market in law that maximizes individual control, yet maintains the value of state sanction, we would point to certain federalist features of corporate law and the efficiencies they create. A corporation organized in one state comes into being in another upon the delivery through in-state intermediaries of pro forma filings.²⁰⁵ Because corporate promoters can avail themselves of a state's laws without domiciling in such state or establishing even a temporary presence, states strive to provide the best legal mechanisms for formation, often using new technology. Convenience and lower cost are critical factors that businesses value and states work to provide. While some writers have noted that marriage laws might form a market for law,²⁰⁶ and some have offered an analogy of marriage to business forms,²⁰⁷ commentators and states have overlooked the potential for states to fashion their legal mechanism of marriage for consumption by those located, and remaining, outside their borders.²⁰⁸

205. Indeed, Vermont, a pioneer in innovative marriage, is an innovator in corporate form, permitting for the first time in the nation corporations that exist only in cyberspace, without requiring such companies to have a physical location for such essential corporate functions as board meetings or process service. See Wagner James Au, *Vermont OKs the Creation of Virtual Corporations*, GIGAOM (June 17, 2008, 12:30 PM), <http://gigaom.com/2008/06/17/vermont-oks-the-creation-of-virtual-corporations/>. Further, corporations have begun to develop permissions developed in state codes to hold "virtual shareholder meetings," in which shareholders may attend electronically and "ask questions and cast their votes live via the internet," using innovative technology developed for the purpose. Rick E. Hansen, *Corporate Governance: Revisiting Virtual Stockholder Meetings, Insights*, 23 CORP. & SEC. L. ADVISOR (2009).

206. F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561; see also O'HARA & RIBSTEIN, *supra* note 182, at 161 ("[M]arriage also can be viewed as a kind of standard form contract, much like a corporation . . ."). O'Hara and Ribstein explore the notion of the "market in marriage law." *Id.* at 166–68. They realize the efficiency benefits in allowing individuals to choose the applicable law. *Id.* at 171 ("[T]he benefits of a market for state marriage law are at least as clear as the benefits of a law market in other contexts . . ."). O'Hara & Ribstein, however, do not realize the possibility (and benefits) of cross-border marriage law. *Id.* at 168 ("[S]tates are competing only to attract residents willing to remain in the state . . .").

207. Martha E. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

208. Some commentators see the marriage geographic monopoly as a way states can impose costs on couples, thereby discouraging imprudent marriages. See O'Hara & Ribstein, *supra* note 132, at 1208 ("States use marriage law to define the types of relationships they want to encourage through subsidies, as distinguished from those they wish to discourage both by not conferring subsidies and even by criminal penalties. Accordingly, a state's liberal marriage law might help the local tourist trade but impose costs where the couple returns to live. There is also a somewhat greater justification for state paternalism given the emotional

We wish to stress that we see marriage law bearing only a family resemblance to other enabling regulations,²⁰⁹ like corporate codes. We do not argue that a marriage “is” a corporation. Just as we find uninformative the debate over whether marriage is a status or a contract, we see no need to taxonomize marriage. What we do argue, however, is that marriage as a type of legal ordering can borrow elements of corporation law, in particular, its enabling of individuals to access and utilize state legal systems to facilitate their business purposes, with or without physical presence within the state.²¹⁰

The implicit competition among states could exist in numerous parameters. First, it could provide more efficient marriage formation procedures. As mentioned above, the states have developed archaic requirements that continue through the centuries with only occasional improvement.²¹¹ With competition, states could provide more attractive waiting periods, identity background checks, and, yes, marriage fees.

Indeed, myriad procedures could be envisioned to fulfill a host of needs. States could require that both parties be present in one location, perhaps with a local notary. Or they can permit marriages of any two people anywhere on the globe, subject to whatever precautions they choose. Or they could outsource marriage to private firms that could provide the efficient and convenient service within

nature of the decision, its significance to the married couple, and the absence of efficient markets to discipline choice of marriage partners.”). They have not taken the next step—recognizing the efficiencies that could be gained from eliminating the geographic monopoly while, at the same time, through internet communications and information gathering, potentially further “paternalistic” state goals.

209. Corporate codes made a transition starting in the early twentieth century from being regulatory, based on a concession theory of the corporation, to an enabling philosophy. See Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 433 (1968) (explaining that “[d]uring the past half century, the state corporation statute has in large measure been transformed from a device to control, restrict, and govern the corporations chartered under it into an enabling act granting to enterprisers the relatively unrestricted opportunity to devise the type of entity which they desire”); Elvin R. Latty, *Why Are Business Corporation Laws Largely “Enabling”?*, 50 CORNELL L.Q. 599 (1965).

210. Kaplan, *supra* note 209, at 433–37 (reviewing trends, and commentary on them, toward incorporation of larger enterprises in states where the connection is nominal).

211. There may be a public choice explanation for this outcome. Public choice theorists view politics and the legislative process as “an exchange model.” See STEARNS ET AL., PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 16 (2009). Because there are few repeat players in marriage and no cadre of lawyers who work in marriage formation law, there is no demand to create an innovative, responsive market in marriage formation regulation. To illustrate, the American Academy of Matrimonial Lawyers, founded in 1962 and highly regarded by family law attorneys, has more than 1600 members in fifty states. Though their website serves as a resource across the whole array of family law problems, it has no treatment at all of marriage licensing procedures or barriers to access. See AAML, <http://www.aaml.org/> (last visited Feb. 24, 2011).

parameters set by the state. Taking advantage of these experiments, individuals could choose the legal forms of marriage they like best rather than be forced to use those rooted in the jurisdiction in which they are physically present. Internet teleconferencing and other modern communications technology allow individuals to have a transformed “legal experience”²¹² of marriage, just as these technologies have transformed corporate deal closings. These changes in the way we live (and live the law) render such remote marriage ceremonies far more emotionally effective (and affective) than earlier efforts at distance marriage, like proxy and letter marriage, making e-marriage a desirable alternative to solemnization invariably tied to a physical place.²¹³

Some might fear a “race to the bottom,” in which states with the most lax procedures would dominate. In other words, everyone will use distance marriage to get a Las Vegas wedding. States will permit predatory marriage to vulnerable “lonely hearts.” This is probably not a serious concern. Existing marriage formation rules, as we discuss in Section I, already offer minimal procedures that do not coherently forward any regulatory goal. Many states, like Ohio, offer marriage without waiting periods. Marriage formation is already at the bottom in many places; Las Vegas-type marriage is there for the taking.

Instead, competition in marriage procedure might produce the opposite effect, i.e., a race to the top.²¹⁴ To avoid damaging the in-

212. See, e.g., Lynn Ashby, *Astronaut Wedding*, H TEXAS ONLINE (Sept. 1, 2003), <http://htexas.com/edit/astronaut-wedding>. That a marriage ceremony, without the exportable legal incidents, is valued is demonstrated by the space wedding conducted under Texas law between an American citizen in Houston and a Russian cosmonaut in space. *Id.* The marriage was valid in Texas when solemnized but was not valid in Russia. *Id.* The ceremony took place with the bride in a white gown, with music and flowers, and the groom present from space on a drop screen in a NASA conference room. *Id.* It was reported as “a standard American wedding.” *Id.* Nonetheless, the marriage was to be re-solemnized in Russia in a Russian Orthodox wedding after the cosmonaut’s return to Earth. *Id.*; see also *Live Internet Weddings Changes the Way Guests Attend Weddings*, ERELEASES.COM (March 13, 2007), <http://www.ereleases.com/pr/live-internet-weddings-changes-the-way-guests-attend-weddings-9405> (noting that the Starwood Hotel in Hawaii recognized the need for telecasting of wedding ceremonies to guests who could not attend); *id.* (“[P]erhaps the most valuable service Live Internet Weddings provides is not professional videography or even a live wedding Webcast. Perhaps its value is more intangible, more easily measured in shared memories made possible through the marriage of art and technology.”); VIVA LAS VEGAS WEDDING CHAPEL, http://www.vivalasvegasweddings.com/live_internet_weddings.htm, (last visited February 22, 2009) (“Your friends and family can view your nuptials from any location worldwide, live, on our Viva Las Vegas Wedding Chapel Streaming Web-Cams Our live Internet wedding streams are broadcast free!”).

213. Didion, *supra* note 64.

214. For a useful summary of the debate in corporate law between “race to the bottom” and “race to the top” interpretations of competitive federalism, see LARRY RIBSTEIN & BRUCE KOBAYASHI, *THE ECONOMICS OF FEDERALISM* 12 (2007).

tegrity and reputation of their legal systems, distance marriage adopter states would have to establish a couple's identity—and could do so in a more rigorous way because physical appearance at a clerk's office would be impossible. Rather, electronic identity verification could require background checks, including credit histories, arrest records, and the like. State governments, perhaps working with private contractors subject to tight regulation and control, are uniquely positioned to provide this information cheaply and accurately.

Individuals would have an interest in such checks. Indeed, it is amazing that the law requires greater disclosure for a publicly traded security one purchases than for the person one marries. Information about credit history and history of violent acts, for example, could greatly decrease transaction costs in marriage selection. Serious signaling problems impede the voluntary disclosure of information in romantic relationships. This problem is a factor in the limited use of prenuptial agreements. "Merely providing the opportunity to people to write prenuptial agreements is not an effective way of allowing such customization because . . . engaged couples are concerned that bringing up the idea of a postnuptial agreement will send a distrustful and damaging signal to their prospective spouse."²¹⁵ Asking for pre-nuptial agreements signals a low commitment to the marriage and little trust.

Just as with prenuptial agreements, asking for verification concerning credit history or arrest record signals a lack of trust. If such disclosures were a standard option as part of an identity verification process, the signaling problem would decrease. An express desire to pick a state that had no disclosure requirements, or to avoid a disclosure option in the state being used, may signal untrustworthiness—a fact that might induce a race to the top with innovations in marriage disclosure. Distance marriage constitutes a process that furthers *both* a couple's interest in improved and modernized marriage formation law *and* the state's interest in helping couples prevent imprudent marriages.²¹⁶

215. Sean Hannon William, *Sticky Expectations: Responses To Persistent Over-Optimism In Marriage, Employment*, 84 NOTRE DAME L. REV. 733 (2009) (citing Mahar, *supra* note 188, at 2).

216. Sunstein, *supra* note 182, at 2116 ("But private arrangements, religious and otherwise, might provide as much protection of children as official marriage does; and the protection of children might be ensured directly, through requirements of care and support, rather than through marriage in its current form."); *see also* Estin, *supra* note 81, at 479 (noting that the laws in the areas of contracts, public benefits, immigration, bankruptcy, and tax are built upon commonly held marriage norms and commenting that "[p]rivatizing

Most practically, states could compete on marriage fees. To the degree states have a local “monopoly” power over marriage, they can extract economic rents, i.e., prices that exceed marginal cost. Governments can extract these rents directly in the form of fees or in procedural requirements and like inconveniences.²¹⁷ A competitive market, without geographically imposed friction on using it, would lower fees and lead to more convenient forms of marriage solemnization. Assuming that state authorization of a marriage has a lower marginal cost, competition could cut costs significantly. This price-cutting might be likely to occur because distance marriage offers the opportunity for states to capture an international market in marriage.²¹⁸ One could envision that states could offer marriage authorization at very low price but earn significant revenue by attracting an enormous global market.²¹⁹ At the same time, the “price” for “rare” types of marriage, like same-sex marriage, could be quite high—perhaps capped by the cost of traveling to a distant location to get married.

2. Modernized Marriage, Choice of Law, and Contract’s Limits

Distance marriage raises a natural question. How do those who marry in a distant jurisdiction get divorced by a distant jurisdiction? Under the typical rule, divorce is a proceeding *in rem*. The marriage is “present” in the jurisdiction in which at least one

marriage would require construction of new rules, a new official law, in each of these different frameworks”).

217. Some states may limit fees to cost.

218. See *supra* note 114 and accompanying text (discussing the popularity, before its revision, of Montana double proxy statute, particularly among individuals from the Middle East).

219. The effect on immigration status would be a matter for the federal government, which already has special rules for how marriages of U.S. citizens to non-citizens are treated for immigration. See Abrams, *supra* note 61. To show distance marriage’s revenue potential consider the following numbers. According to the Center for Disease Control, Minnesota performed 11,424 marriages during the first six months of 2007. See CTR. DISEASE CONTROL, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR JUNE 2007, at 5 (2008), available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_12.pdf. Multiplied by \$110 per license, the Minnesota fee, see Sheri Stritof & Bob Stritof, *Applying for a Marriage License in Minnesota*, ABOUT.COM, <http://marriage.about.com/cs/marriagelicense/p/minnesota.htm> (last visited Apr. 14, 2011), marriage licenses revenue would be \$1,256,640 for that period.

Distance marriage opens an entirely different revenue potential. Montana provides proxy marriage, through private marriage services, which charge approximately \$500. See Barry, *supra* note 114. While the market for same-sex marriage is potentially enormous, Minnesota could double its revenue from licensing if it were to authorize a mere 628 e-marriages and charge this current market rate.

member of the couple resides.²²⁰ This jurisdiction's divorce law applies to the marriage regardless of what jurisdiction authorized the marriage's formation. Typically, e-marriage should raise no problem. People commonly get divorced in jurisdictions in which they have not married. It makes no difference whether they traveled to another jurisdiction to get married or received their authorization remotely, as with e-marriage.

The problem emerges when the jurisdiction in which the couple resides does not recognize the marriage, i.e., a couple that lives in Michigan but seeks a divorce dissolving their Vermont same-sex marriage. When a couple in a same-sex marriage asks a court to divorce them in a jurisdiction that fails to recognize such marriage, or when there is a mini-DOMA statute that prohibits recognition,²²¹ courts have applied three main approaches. First, they recognize the marriage as a marriage, at least for the purpose of the divorce, and can then divide the property.²²² Second, they recognize the marriage as contract and divide the property.²²³ Third, they refuse to recognize any relationship.²²⁴ In the latter two possibilities, courts would award custody of children on the rules established for children of unmarried couples. In fact, marriage does not entirely drive custody questions, where there are combinations of variations from the standard expectation of a married couple, nearly always of opposite sex, both of whom are biologically related to a child of the marriage.

Same-sex couples residing in a jurisdiction that does not recognize their union must return to the authorizing jurisdiction if their domicile states treat their relationship as purely contractual *or* refuse to recognize it. Returning to the authorizing state presents problems. Both members of the couples may not want to do so. And, many states have residency requirements, typically around six months for divorce.²²⁵ People are, therefore, stuck in a legal limbo.

220. *Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942).

221. Koppelman, *supra* note 38, at 265.

222. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. 2008); *Are Same-Sex Marriages Performed in Other Jurisdictions Valid in New Mexico?*, N.M. Att'y Gen. Op. 11-01 (2011), available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131#CompleteOpinion>.

223. Koppelman, *supra* note 38, at 271 (explaining that the correct view, in states that do not allow same-sex marriage but do not have mini-DOMAs that purport to void contractual rights associated with a migratory same-sex marriage, is to treat the marriage as though it were an ordinary contract).

224. *Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007).

225. D.C. CODE § 16-902 (2001) (stating that one party must reside in D.C. for at least six months immediately preceding the time of filing); VT. STAT. ANN. tit. 15, § 592 (2002) (stating that one party must reside in Vermont for at least six months at the time of filing).

Distance marriage would accelerate one problem that the several states' inconsistent treatment of marriage has created. On the other hand, distance marriage points to a solution that clarifies the nature of marriage as contract and legal status. We propose that all e-marriages *require* a prenuptial agreement in which the couple not only agree upon the disposition of property but also submit to the jurisdiction of the authorizing state in the event the domiciliary state refused to recognize their union for divorce purposes. The distance marriage authorizing state could therefore easily administer the divorce using the prenuptial agreement as a guide. We leave to later analysis the possible impediments to receiving a divorce recognized by other states if the state granting the divorce is not the domicile of at least one of the parties.

Requiring a prenuptial agreement reduces divorce's transaction costs.²²⁶ It also renders marriage more of a contract, and less of status. Individuals would be freer to craft unions that fit their choices. Further, mandatory prenuptial agreements also eliminate the signaling problem that many argue have hindered their widespread use. Internet resources could be used to provide couples with several on-line options and pull down menus. These would be government-provided model contracts that would provide simple rules. Couples would, of course, be free to use their own counsel to select more complicated contracts.

Custody of children in any same-sex divorce—or any divorce involving a marriage not universally recognized—presents yet another problem. Custody of children cannot be settled by contract. Rather, the domiciliary state has an interest in how children within its borders are treated, a concern that trumps any contractual arrangements. E-marriage, however, does not create any tremendous problems (other than those that exist now). Marriage has some role to play in custody decisions but is not the sole factor in the legal treatment of custody matters. Concededly, it is often true that each of the parties to a marriage has parental rights with respect to the same child. Further, it may be that the jurisdiction does not recognize second-parent adoption so that the members of a non-marital couple would have some difficulty in being recognized as legal parents if it is not the case that both parents are biologically related to the child. Nonetheless, child custody is a function of a whole array of factors not arising in any simple way from marital status. So the non-marital status of the couple would not necessarily cause the state to treat them any differently from a

226. Michael Hanlon & Michael Hanson, *Transaction Costs and Divorce* (Feb. 1, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1548640>.

married couple, and certainly not from a married couple who are not both biologically related to the child.

3. Status Goods: Distance Marriage, Same-sex Marriage, and Covenant Marriages

The “efficient” distribution of a status good is a tricky, even contradictory, goal. Society at large, by definition, confers status goods. Marriage, in particular, is conferred by the state as proxy for society. Marriage *qua* status good requires a sort of monopoly—in any given society, there can only be one (the state), or at best a handful of institutions (properly authorized officials or delegates), that can confer such goods. In that sense, it does not make sense to speak about efficient allocations of the marriage status. Only the state can provide the benefit.

On the other hand, federalism provides an alternate account of the nature of a state-conferred status good. Namely, the psychic benefits of receiving a marriage from another sister state, even if the couples’ home state fails to recognize such a marriage, are real. Same-sex couples travel to states like Vermont and Massachusetts to marry.²²⁷ They would not do so if there were no benefit in doing so.

Of course, the status or psychological benefits of a same-sex marriage in a jurisdiction that refuses to recognize such union are no doubt less than a recognized union—i.e., a Vermont same-sex marriage has less psychological benefit than a Florida destination marriage in a state such as Michigan that does not recognize same-sex marriage. But, because same-sex Michigan couples do, in fact, travel to Vermont to marry, there is unquestionably some value. Reducing the transaction costs can only be a net benefit.

Federalism combined with e-marriage might spur competition in the substance of marriage. Arizona, Arkansas, and Louisiana already provide covenant marriage. As discussed above, these marriages create much higher barriers to divorce.²²⁸ They offer a different type of marriage, and distance marriage would make such ceremonies more readily available. The recent proliferation of different types of marriage suggests that there might be markets for different types of marriage. Distance marriage might allow this diversity to flourish—meeting the “demand” for marriage more efficiently than the current one-size-fits-all regulatory approach. Distance marriage could energize a stagnant regulatory regime. It

227. See sources cited *supra* note 5.

228. See *supra* note 29.

could also open a process for other innovations in family forms offered by states.²²⁹

V. POLICY CONSIDERATIONS IN A RAPIDLY CHANGING LEGAL LANDSCAPE FOR MARRIAGE

A. General Overview of Goals of a Regime for Marriage Accessibility

Two developments in federal litigation are salient for our proposal, and, more generally, for an assessment of the ideal approach to shaping marriage procedure and policy in the twenty-first century. In 2010, U.S. District Judge Walker ruled that California's Proposition 8, which restricted the definition of marriage to exclude same-sex marriage, violates the equal protection clause of the Fourteenth Amendment and interferes with the fundamental right to marry, derived from the substantive meaning of the Fourteenth Amendment.²³⁰ A few months earlier, U.S. District Judge Tauro of Massachusetts ruled that section 3 of the Defense of Marriage Act²³¹ violates due process of law under the Fifth Amendment by severely undermining the equality of treatment of couples married under the law of a state.²³² The California case imposes the equality norm on state marriage substance, thus enmeshing federal courts in shaping basic marriage law traditionally controlled by states. In so doing, it short circuits the process by which federalism has over time encouraged the spread of liberalized marriage rules from state to state—which, as Grossman has written, is the long-standing pattern.²³³

Our proposal offers a less traumatic path to greater access to marriage for same-sex couples than does the California holding, while providing general modernizing benefits to marriage procedure. The constitutional invalidation of the part of DOMA that withholds federal recognition of same-sex marriages, combined with our proposal, would allow some same-sex couples to use those jurisdictions recognizing their unions to obtain federal benefits (depending on how thorough is the destructive effect of the non-recognition by the domicile state at the time of the marriage). At the same time, it would avoid imposing marriage law by the Supreme Court on all the states, allowing individual states to take the

229. See *supra* text accompanying notes 27–31.

230. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

231. 1 U.S.C. § 7.

232. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010).

233. Grossman, *supra* note 18, at 342.

lead to modernize marriage and maintain their historic role in defining marriage. Thus, as opposed to Judge Walker's decision, Judge Tauro's case holding DOMA unconstitutional on equality grounds is not a maximalist holding²³⁴ but a holding that fits our federal system well by demanding that the federal government give the same recognition to the marriages authorized by Massachusetts, Vermont, and other states as it does to those the most conservative states formalize.

The insistent application by federal courts to all states of the equality norm, undiluted, accelerates social change in states highly resistant to it and fuels high octane conflict.²³⁵ The adoption of distance marriage gradually introduces same-sex marriage ceremonies in resistant states and allows a constitutional dialogue without a violent backlash.

No less than Justice Ruth Ginsburg has recognized the importance of giving states a role at central points in constitutional evolution. In her famous essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*,²³⁶ she laments the overarching effect of *Roe v. Wade*. She points out that states were already evolving towards more flexible laws about abortion when the decision came down. The decision, in effect, mobilized opposition and sparked a backlash, ironically leading to less liberal abortion laws. Justice Bader Ginsburg writes:

234. The phrase, "maximalist holding" was used by Dale Carpenter in analyzing the decision of the federal district court declaring California Proposition 8 unconstitutional. See Dale Carpenter, *A Maximalist Decision, Raising the Stakes*, THE VOLOKH CONSPIRACY (Aug. 4, 2010, 7:54 PM), <http://volokh.com/2010/08/04/a-maximalist-decision-raising-the-stakes/>. Cass Sunstein has advocated "judicial minimalism," especially in connection with federal court supervision of marriage law. He recently wrote about the limits of judicial minimalism, and noted that, "If reciprocity and mutual respect are desirable, it follows that public officials or judges, perhaps even more than ordinary people, should not challenge their fellow citizens' deepest and most defining commitments, at least if those commitments are reasonable and if there is no need for them to do so." See Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 832-33 (2008). Putting aside the reasonableness or not of opposition to same-sex marriage, there is some basis to say that the "genius of federalism" makes "no need" for federal courts to mandate an undiluted equality norm for all state marriage laws before allowing federalism to spread the equality norms through the workings of state sovereignty.

235. The failure to retain three Iowa Supreme Justices who voted to extend equal marriage rights to same-sex couples under Iowa law suggests the intensity of conflict associated with judicial resolution of the same-sex marriage debate in favor of marriage rights. See A.G. Sulzberger, *Ouster of Iowa Judges Send Message to Bench*, N.Y. TIMES, November 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> (describing the removal vote as "unprecedented," thus indicating the passions aroused by court imposition of same-sex marriage).

236. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. REV. 375 (1985).

Roe ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend ‘toward liberalization of abortion statutes [among the several states]’ noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings *Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.²³⁷

Nationally imposed same-sex marriage runs the same risks that Justice Ginsburg described.²³⁸ In contrast, modernized marriage procedures offer similar, or identical, benefits to couples but would moderate the pace of change. Same-sex couples can already go to another state to enter into the status under the law of another jurisdiction. With the ending of DOMA, adoption of distance marriage statutes by a state or states with same-sex marriage would close the loop, giving same-sex couples a very large share of marriage dignitary status and economic benefits, while allowing states to find their own preferred state-based policy process for accommodating the trend to recognizing same-sex marriage.

B. Legislative Issues

How might a regime of distance marriage within the United States look, taking into account both the values to be preserved in current marriage procedures and the possibility for improvements

237. *Id.* at 381, 385–86.

238. Courts use various methods to avoid, or delay, addressing contentious issues. There is a body of writing on underenforced Constitutional norms, which suggests a division between the meaning of the Constitution and the decision rules judges apply. A useful review of such writings is in Kermit Roosevelt II, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193 (2006) (Replying to Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006)); see also Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579, 580 (2010) (referring to “the idea that a conscientious constitutional court will on some occasions stop short of fully enforcing the Constitution because of particular features of the judicial process, but that these institutional limitations on the judiciary do not mark the substantive boundaries of the Constitution”).

and modernization? The following lists some regulatory goals such a regime might further:

1. Make marriage readily accessible for those unable to be present together at a ceremony in the state solemnizing the marriage and for couples who are excluded from marriage by other jurisdictions;
2. Assure that each member of the couple is entering the marriage freely and without pressure or coercion or deception;
3. Assure that each member of the couple is in fact free to marry based on current marital status and age and, for states that deny marriage to same-sex couples, gender;
4. Render the ceremony readily available to friends and family without regard to their ability to be present with either member of the couple;
5. Provide opportunities for innovation by private businesses delivering remote marriage ceremonies;
6. Take advantage of efficiencies to reduce cost to the average couple wishing to use the e-marriage procedure;
7. Allow new room for the state to earn fees from funds available as a result of less costly marital mechanics;
8. Offer the possibility of heightened protections against imprudent marriages based on only casual acquaintance, subject to couple preference;
9. Design a national electronic system for accurate records of existing marriages and for the compilation of useful data for the study of marital patterns and trends; and
10. Make necessary recitals asserting that the compliance with the state's distance procedure constitutes constructive presence in the state.

In addition to the elements any statute could have, states could consider protections extending beyond current law, to protect parties against a coerced or fraudulent marriage, a significant problem in immigration. This is an area in which states could experiment to outsource some components of the marriage procedure, allowing certified internet counselors to create and offer protocols for validation of marital bona fides that exceed the

absent protocols in the current nominally regulatory but de facto “de-regulated” licensing regime.²³⁹ Internet marriage procedure could recover aspects of the original concerns animating the publication of banns.²⁴⁰ While a general marriage statute might face constitutional barriers if it created onerous counseling requirements that could result in a complete denial to a couple of a license, the extension of internet convenience could be conditioned on agreement by the parties, or offer them the option, to undergo more extensive confirmation of their identity, their personal knowledge of one another, the existence or not of any side agreements or inducements, and the lack of any coercion.

Like Louisiana’s and Arizona’s covenant marriage, such “gold-plated” marriage requirements could signal a higher degree of commitment. Some newlyweds might find this ability to show their spouse greater commitment valuable to overcome uncertainty on the spouse’s or his or her family’s part. As these requirements impose cost in terms of time and money, they could be viewed as “credible signals” that reliably track actors’ sincerity. And they might well help prevent unwise marriages of relative strangers.

Legislative approaches would depend on the number of couples and the circumstances in which a state wishes to aid with a more accessible marriage procedure. We do not draft here model statutes to address matters such as the standardization of distance statutes for purposes of data collection, or federal revisions to immigration law that cede to sound state law the supervision of marriages by U.S. citizens to non-citizens. All of these subjects are ripe for innovation that strengthens state administration of marriage law and procedures.²⁴¹ Distance marriage statutes require elaboration of the underlying protections, forms of screening, and involvement by officials. Statutes affecting marriage procedure could best be developed through legislative hearings inviting input from a wide array of experts, including family law scholars, web experts on business models for the internet, and couples who have experienced unusual challenges in complying with standard marriage procedures. Choices would need to be made about limits on eligibility connected with citizenship status, the exact form that the ceremonial formalization would take, and the possibilities of con-

239. Abrams, *supra* note 61, at 1626–28.

240. See RICHMOND & HALL, *supra* note 15, at 32 (explaining how banns have become abandoned because “the old system leaned heavily upon publicity, but this was under a settled, small-town organization of society in which publicity was genuinely effective” but advocating advance notice periods to allow diligence by clerks and second thoughts by applicants, with concern to avoid consummation of inappropriate unions).

241. See Abrams, *supra* note 61, at 1626–28.

sortiums among states to reduce administrative expense and provide for standard recordkeeping. The possibilities for improved state marriage law are almost limitless, given their current condition of languishing in nineteenth century thinking.

CONCLUSION

Distance marriage will facilitate access to a legal relationship laden with symbolism, duration in relationships entered into with awareness of the weight of the commitment, care in confirming the identity and even offering aid to the parties to probe the background and motives of a partner, and public celebration of the significance of a marriage in the spaces where social meanings are shared. Our proposal allows couples to define their own community, freed from the contingency of geography and the historical accident of state borders. Although we call in part upon the power of internet communications, we do not suggest that marriages need be no more than a click of a mouse (although they could be if states and couples so desire). We recognize that people like the physicality of the ceremony: the flowers, the smells, the cake, the suits and dresses, the priest or other state officiant, the crying relatives, the kiss. States and individuals could easily choose the level of ritual and regulation they wish.

Building upon our federalist design, states could write statutes that reflect and express the values particular states embrace. People could choose those states to authorize their weddings that best match their own values. Same-sex couples could seek the states that recognize their unions. Individuals who live in a state that has marriage laws with which they disagree could seek to authorize their weddings from other states. In this way, distance marriage expands the expressive value of the marriage ceremony.

We recognize that, for some gay couples, the power of the marriage ceremony is hearing their own state say their marriage is legitimate. For such couples, the ideal picture of their marriage involves the convergence of the status, the recognition, and the location. While our proposal would increase the number of out-of-state marriages, it would do nothing on its own to make the couple's home state recognize the marriage.

For some, this limitation would be a bone of contention. But our proposal allows what the economists would say is the second best solution. To the degree marriage's utility is a function of the size and depth of the community recognizing it for couples excluded from that recognition, distance marriage is not optimal but it

could offer significant satisfaction and happiness nonetheless. In response to the culture wars, distance marriage offers a provisional cease-fire and an evolutionary process, deploying the neglected genius of federalism to spread marriage liberalization. Couples in marriage-hostile states could have it without persuading the most socially conservative adherents of Biblical claims about marriage. The federal courts could vindicate equality norms without entering the domain of state regulation of family forms, an area in which one can anticipate a coming period in which states respond to the demand both for the status good of marriage and the availability of alternative family forms. If the federal courts say that same-sex marriage is constitutionally mandated by the Equal Protection clause, there is some real prospect of introducing into state control over marriage a norm that may be difficult to confine to a logical ending point in demands for marriage access. If the states can gradually accept that same-sex couples should share in marriage, through applying state constitutional logic or legislative choice based on state norms, the federal courts could limit their supervision of the matter to manageable limits that reinforce existing understandings of federalism. Federal courts can discipline Congressional enactments, keeping a bright line between the domain of state law in family matters and the domain of federal law, which appropriately defers to state definitions of family forms. The norms of equality—equal access to marriage status and ceremony—can be achieved prudently and with some dispatch through the full use by states of their existing sovereign authority over marriage.

Our review of marriage history shows that marriage authorization has been remarkably flexible and not tied to territorial jurisdiction, only calcifying in recent years. Distance marriage answers contemporary needs for convenience, defusing cultural conflict over marriage and allowing couples choices that partially recover forgotten regulatory goals for informed decision-making in marriage formation. Consonant with our values, history, and constitutional structure, distance marriage can recover lost goals of marriage law, enrich traditions, and remove needless barriers to marriage for many couples.