E-MARRIAGE

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ABSTRACT: States inadvertently have created territorial monopolies for marriage formation law, requiring each marriage receiving the benefits of their licensing laws to be performed within their borders. This territorial restriction seems anomalous, given states' routine provision of legal orderings, such as incorporation, to those out-of-state. Building upon precedents such as proxy marriage and choice of law for multi-jurisdictional contracts, we argue that states can and should authorize weddings in any location.

Restricting states' marriage authorizing power to within their borders imposes unjustifiable costs. Eliminating this restriction could offer the benefits of jurisdictional competition. First, those seeking same-sex, covenant, or other types of marriages not authorized in their domiciliary state must travel and forego celebrating one of life's most important events before family, friends, and community. Second, beyond the value people place on the ceremony, state conferred marriage constitutes an important status good—even if the married couple's domiciliary state does not recognize the union. Restricting consumers' access to producers of this good, *i.e.*, state laws, raises costs with no justification. Third, though ubiquitous, laws governing marriage formation have lost discernible regulatory purpose, becoming mere inconveniences. Jurisdictional competition could create convenient marriage formation law that furthers the regulatory goal of encouraging prudent decision-making. Fourth, opening marriage laws allows greater expressive power to those couples who wish to marry under the laws of a particular state that, for instance, recognizes same-sex marriage. Finally, our proposal creates a federalist compromise to moderate protracted political and judicial struggles over substantive marriage rules.

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We wish to thank Barbara Atwood, Lee Badgett, Ann Bartow, Anita Bernstein, The Honorable Mollie Burke, Dale Carpenter, David Cruz, Robin Effron, James Fleming, Jill Horwitz, Nan Hunter, Jessica Litman, Geoffrey Miller, Martha Minow, Greg Mitchell, Marc Poirier, Doug Rendleman, Larry Ribstein, Mark Tushnet, Brian Wildenthal, and Tobias Wolff.

We thank Lisa Bernstein and the participants at the junior scholars workshop at the University of Chicago School of Law.

Introduction

Lost in the fierce debates over marriage's substantive rules, from interracial marriage in previous generations to same-sex marriage today, scholars overlook, and lawyers and lay people take for granted, the procedural rules for marriage formation.[1] State laws have similar, uncontroversial requirements: licensing, solemnizing, and registration but frequently impose random, even quaint conditions, ranging from both parties' physical presence within the city or county authorizing the marriage to peculiar requirements for officiants' identity and residence.[2] Current procedural rules serve no clear regulatory goals whatever their past purposes, which included publicity and notice and prevention of bigamy and incest, significant matters in a world of slow, costly communications. This lack of modern reappraisal is glaring given the attention lavished upon the formation of other legal relationships, such as corporations and, above all, the central importance of marriage in peoples' personal lives.[3]

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[1] For the last century, state marriage laws show 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. State of North Carolina, 317 U.S. 287, 216 (1942) (Frankfurter, J., dissenting), citing Ames, Proposed Amendments to the Constitution of the United States during the First Century of its History, contained in the Annual Report of the American Historical Association, 1896, vol. II, p. 190; Sen.Doc. No. 93, 69th Cong., 1st Sess., and the successive compilations prepared by the Legislative Reference Service of the Library of Congress. *Id*. at 217, concerning efforts to bring national uniformity to divorce laws (citing Proceedings of Governors' Conference (1910) 185-98; Proceedings of National Congress on Uniform Divorce Laws (1906)). Rather than a national law, fairly brittle local procedural rules govern marriage formation, and 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).

[2] *See infra* footnote 11 and accompanying text.

[3] As an example of the complete lack of interest in goals and purpose of the procedural rules governing marriage formation, a law professor recently (for personal reasons) noticed Virginia's requirements that lay, but not religious, officiants must be Virginia residents. *See* Ilya Somin, A Minor but Annoying Example of Unconstitutional Religious Discrimination in Virginia Marriage Law, http://volokh.com/2009/07/02/a-minor-but-annoying-example-of-unconstitutional-religious-discrimination-in-virginia-marriage-law/. His reaction was to question whether the distinction unfairly discriminated against the non-religious, never raising the fundamental question: whether the entire regulatory regime had any coherent, recognizable purpose.

To find a sustained, rigorous examination of the purpose of marriage 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

Most states only authorize marriages performed within their borders, creating a type of territorial monopoly[4] for marriage formation. In contrast, jurisdictional competition among the states exists for the formation of other legal relationships, such as corporations, an area of law that demonstrates dynamism relative to marriage formation law. We believe that states' territorial marriage monopolies have contributed to marriage formation law's languor.

To help bring coherence and purpose to marriage formation law, we propose making a state's marriage laws accessible to those not within the state's physical boundaries. [5] (Because we believe the internet could make such a transformation possible, we short-hand this concept as "e-marriage.") E-marriage builds on deeply rooted but overlooked precedent in both ancient and modern law: marriage by proxy,[6] telegraph,[7] telephone, and mail.[8] A state that adopts e-

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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*.

[4] We use the term "monopoly" in the non-technical sense, meaning the exclusive use of the state's marriage law within each state.

[5] In forwarding our proposal, we build on well-established precedent in which 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.").

[6] CAL. FAM. CODE § 420 (b) (West Supp. 2010) (providing for marriage of a member of the Armed Forces of the United States 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. CODE. ANN. FAM. § 2.006 (a) – (c) (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").

marriage would design procedures to allow couples outside its borders to marry under its laws. These procedures could vary in the ways that preserve the idealized traditional marriage ceremony, from teleconferencing to creating an internet "virtual" presence with the authorizing state--or states could allow couples outside their borders to receive and file licenses easily by internet download. States could also innovate with e-divorce 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.[9]

Opening states' marriage laws to those beyond their borders offers profound benefits. First, being married conveys a status value in and of itself. For whatever reason, couples almost universally seek to enter socially sanctioned, legally protected long-term relationships. Given the recent proliferation of different types of marriage, *i.e.*, same sex and covenant,[10] new and

[7] 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).

[8] Proxy marriage, and other forms of distance marriage, have 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. *See* Ernest G. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473 (1919); Note, *Marriage by Mail*, 32 HARV. L. REV. 848 (1919); Note, *Marriage by Proxy—Conflict of Laws*, 2 NEW YORK L. REV. 343 (1924); A. A. Roberts, *Marriage by Proxy: Including a Brief Consideration of the Nature of Marriage and of Agency*, 60 S. AFRICAN L.J. 280 (1943); William B. Sterrn, *Marriages by Proxy in Mexico*, 19 S. CAL. L. REV. 109 (1945); Note, *The Validity of Absentee Marriage of Servicemen*, 55 YALE L.J. 735 (1946); W.H. Howery, *Marriage by Proxy and Other Informal Marriages*, 13 UMKC L. L. REV. 48 (1944); Note, *Validity of Proxy Marriages in Kentucky*, 35 KY. L.J. 228 (1947); Lillian M. Gordon, *Marriage by Proxy: The Need for Certainty and Equality in the Laws of the American States*, 20 SOC. SERVICE REV. 29 (1946); Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88 (1960); Marvin M. Moore, *The Case for Marriage by Proxy*, 11 CLEV.-MARSHALL L. REV. 313 (1962); *see also* Maurice Possley, *Marriage By Proxy Booming in Montana*, MONT. LAW., June-July, 2007, at. 32.

[9] *See infra* Section IV; *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).

[10] 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 enumerated in R.S. 9:307." These grounds are one of the spouse's adultery; conviction of a felony and has been sentenced to death or imprisonment at hard labor; spousal abandonment for one year and constantly refuses to return; the spouse has physically or sexually abused 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

different types of this status are emerging. While Vermont may not 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, a profound and important legal ritual. Couples can choose the marriage status they prefer and thereby claim, in marriage, the freedom Americans enjoy to define themselves and their own communities in legally relevant ways.

Second, opening marriage laws would lower the cost of access to a different state's marriage laws, allowing more couples to perform this most central life ritual before family and friends. The psychic value of this ceremony is hardly trivial. This value 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. [11] Further, in a growing trend several states, such as Maryland and New York now recognize out-of-state same-sex marriage.[12] In these states, e-marriage would allow same-sex couples to have ceremonies (and enforceable marriages) within their home states, even though their home state refused to authorize such unions.

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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 offers 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).

[11] See Christopher Ramos, M.V. Lee Badgett, & Brad Sears, The Economic Impact of Extending Marriage to Same-Sex Couples in Vermont, The Williams Institute at 1, 7 (March 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).

[12] States that recognize out-of-state same-sex marriages, although they do not authorize them, are New York and Maryland. *See* Jeremy W. Peters, *New York Backs Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 29, 2008, at A1; Aaron C. Davis & John Wagner, *Maryland to Recognize Same-Sex Marriages from Other Places*, WASH. POST, Feb. 25, 2010, at A01. The Coquille Tribe authorizes same-sex marriages and explicitly recognizes same-sex marriages entered into in other jurisdictions. Coquille Tribal Regulation, Ch. 741 ("Marriage and Domestic Partnership Regulation").

Third, e-marriage encourages states to provide—even compete over—convenient ways to marry while more effectively safeguarding state interests to discourage imprudent marriages and fraud. Current law is moribund and irrational. E-marriage creates competitive pressure for states to eliminate archaic waiting periods[13] and other solemnizing requirements.[14] At the same time, e-marriage might allow a state to pursue its regulatory goals of encouraging prudent marriage and preventing fraud, which, we argue, is a proper goal for marriage formation procedure and can give coherence to this body of law. For instance, a state offering e-marriage might require that couples authorize disclosure of their arrest records or credit and bankruptcy histories in order to establish identity without their physical presence within the state.

Further, e-marriage would likely facilitate jurisdictional competition to allow optimal disclosure regimes to emerge. States have an interest in disclosure. Marriages in which spouses hide financial problems or criminal histories have a greater potential in divorce or exploitation, and impose costs on society. However, this disclosure's optimal extent is unclear given marriage's intimate nature and privacy concerns. E-marriage allows states to experiment and compete and permits couples to choose levels of disclosure best for them.

Jurisdictional competition naturally leads to race-to-the-top or race-to-the-bottom concerns of the sort so prominent in corporate law. We believe that the interests of couples themselves will avoid a race to the bottom. Generally, the signaling problem created by individuals seeking such information prevents its disclosure, *i.e.*, I love and trust you, honey, but I'd like to see your credit history and arrest record before I say "I do."[15] However, if couples were to choose from a drop down menu of states to authorize their weddings, a prospective spouse that wanted to signal

[13] *See infra* notes 23 to 26 and accompanying text.

[14] We discuss the procedural requirements for marriage in detail in Section 1.1a.

[15] 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 divorce.

moral goodness could pick a high disclosure state. Similarly, a refusal to use a high disclosure state might signal a shady past. This possibility might encourage individuals to voluntary disclose. How these signaling games equilibrate is not clear. Suffice it say that jurisdictional competition on marriage formation law does not necessarily make a race to the bottom.

At the same time, e-marriage would use federalism and the jurisdictional market it creates to lessen the impetus for protracted political, legal, and cultural struggles over same-sex marriage. The current trial challenging Proposition 8, and controversies associated with state referenda on same-sex marriage, promise either resolution through Supreme Court judicial fiat or Fabian culture war waged in every state capital. A judicial resolution, perhaps the ultimate, undemocratic "top down" solution, brings the possibility of a bitter and fruitless political struggle, not unlike the abortion controversies. Piecemeal resolution at the state legislatures also might also lead to endless political struggle. Using the states' federalist laboratories, e-marriage offers an experimental, gradualist compromise.[16]

This Article proceeds as follows: Section I examines the current law for marriage formation, describing its unreflective, non-innovative nature. Section II sets forth our theory of marriage as a hybrid enabling-regulation and status good. It explains how e-marriage improves the distribution of these goods while opening the possibility of a more efficient marriage formation regulatory procedure. It concludes with an analysis of how e-marriage would encourage creative approaches to the regulation of divorce and pre-nuptial agreements, including e-divorce. Section III examines the history of the law regulating marriage formation to conclude there is no territorial limit to authority of states to authorize marriage. Section IV puts forth

[16] We recognize that some same-sex marriage proponents would oppose e-marriage as slowing state adoption of same-sex marriage. We are agnostic on tactics but believe e-marriage offers a federalist understanding of marriage law.

several legislative e-marriage proposals, describing how e-marriage would change the current legal practice.

I. The Basics: Marriage Formation Law and the Uniformity of Inexplicable, Archaic Rules

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

1) the procedure to get married (licenses, solemnization, etc.);

2) the consequences of a couple's making a procedural error under the licensing law of a state;

3) the substantive determination 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.

The din of public debate concerning same-sex marriage and, to a much lesser degree, covenant marriage has revolved around the third requirement: who is qualified for marriage and what type of obligations and benefits does it confer.[17] In contrast, the first two concerns, which revolve around procedure, receive little attention. States have remarkably similar procedures, and they do not generate dispute. States generally do not question other states' marriage determinations 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.*, issue three: same-sex, first cousin and, in the past, mixed race, marriages).

[17] Grossman, *supra* note 1, at 456.

As far as the legal consequences for failing to observe these procedures, for instance solemnizing their marriage in a state or county that their license does not authorize, courts are, as a rule, lenient. They typically overlook procedural imperfections and recognize such marriage on the public policy justification of favoring marriage.[18] This was true even when the rules were intended for the protection of women.[19] Nonetheless, the laws on the books almost always dictate to couples the options for organizing their wedding. It is arguably the case that couples follow the "rule book" with more fidelity than they did before social mores made marriage less

[18] 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); Mc Peek v. Mc Cardle, 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 (N.Y. 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. 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).

[19] Ely v. Gammel, 52 Ala. 584 (Ala. 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); 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); People v. Lininger, 71 P.2d 306 (Cal. Dist. 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); 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); 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); 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 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. Com. Pl. Pa. 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).

critical for obtaining access to sexual intimacy.[20] Today, most couples are more likely to marry for the legal status than for access to sexual intimacy.

A. How to Get Married

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.[21] 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.[22]

1. Getting the license: States do not use the licensing statutes to regulate access to marriage in any significant sense.[23] 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

[20] Early twentieth century writing about "marriage evasion" was heavily concerned with the virtue of women, whose lives could be greatly damaged if they were led into a marriage by an older man before they were of legal age, or if they married hastily to someone not known to the community who might be a bounder. *See* RICHMOND & HALL, *supra* note 3 at 123-46, for expressions of such solicitude for girls and women. Today the concern for ill-advised marriages has more to do with immigration and financial fraud, in which a predatory person targets a person with means for an opportunistic access to resources, such as immigration permission or financial assets. The problems that sometimes arise are expressed in a website in when men recount bad experiences with Green Card marriages: Voice of American Immigration Fraud Victims, http://immigrationfraudvictims.us/case6.html (last visited September 28, 2009). Such protection as "marriage law" provides is afforded by the marital coverage in immigration regulation, as described by Kerry Abrams. *See generally* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007). State law plays no role at all in helping to detect marital opportunism..

[21] *See* Office of the City Clerk, The City of New York, Marriage FAQ, 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."); County Clerk, Marriage License Information, Clark County, Nev., http://www.accessclarkcounty.com/depts/clerk/Pages/marriage_information.aspx (last visited Sept. 19, 2009) ("In order to have a legal marriage, a ceremony must be performed in the State of Nevada within one year from date of issuance of the marriage license by any person licensed or authorized to perform ceremonies in Nevada."); Alachua County, Fla., Marriage Licenses, 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* U.S.MarriageLaws.com, 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).

[22] "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." Performing Marriage Ceremonies: A Guide for Florida Notories Public, http://www.flgov.com/pdfs/wedding_handbook.pdf (last visited February 22, 2009).

[23] Abrams, *supra* note 20, at 1628 ("State marriage law today primarily regulates marriage only during the entry and exit stages, and even then,
the regulation is very light.").

place. The license requests couples to answer questions concerning basic personal data.[24] After the application is made a clerk issues the license to the couple for later use.[25] Waiting periods for a license are generally nonexistent or minimal.[26] States vary in requiring a license from the county where the marriage will be performed, where the parties reside, or from the state.[27] Some states insist on having both parties present when applying for a license, while others are more flexible.[28] Documentation such as proof of identity, age, and Social Security number, is typically required,[29] and some states require the marriage candidates to provide a social security

[24] TEX. FAM. CODE ANN. § 2.004 (Vernon 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 3, at 73.

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

[26] Richmond and Hall described the modern approach—as of 1929—as not more than five days. RICHMOND & HALL, *supra* note 3, at 109. Abrams counts two states as of 2007 as having five-day waiting periods and 13 as having three-day waiting periods. *See* Abrams, *supra* note 20, 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 24 hours of issuance); TEX. FAM. CODE ANN. § 2.204 (Vernon 2006 & Supp. 2009) (requiring a 72 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 (2008 reissue) ("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* http://family.findlaw.com/marriage/marriage-laws/marriage-blood-test.html (last visited Oct. 16, 2009).

[27] 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).

[28] 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 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, and so forth, and lamented a death of law or procedures assuring it. RICHMOND & HALL, *supra* note 3, at 51-52.

[29] TEX. FAM. CODE ANN. § 2.002 (Vernon 2006 & Supp. 2009); TEX. FAM. CODE ANN. § 2.005 (Vernon 2006 & Supp. 2009) (requiring proof of identity and age with birth certificate, license, passport).

number on the application for the marriage license.[30] The licensing stage is an opportunity to enforce age limitations[31] and for a few states to require medical testing, either for information or for restricting access to a license to marry.[32] 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.[33] A minimal fee is usually charged for the issuance of a marriage license.[34] While states have generally abandoned waiting periods of any appreciable length at all,[35] marriage licenses are valid for a limited time.[36]

2. Common Law Marriage. 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. Common law marriage is, in fact, a historical outgrowth of a practice once referred to as clandestine marriage,

[30] 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).

[31] ALA. CODE § 30-1-4 (1975) (stating parties under 16 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 16); TEX. FAM. CODE ANN. § 2.009 (Vernon 2006 & Supp. 2009) (allowing minors to marry if they obtain parental consent, have previously been divorced, or a court order finding that marriage is in the child's best interest).

[32] For example, New York requires certain marriage license applicants to submit to testing for sickle cell anemia but won't invalidate a marriage where the parties fail to get the testing and can't deny the license solely because the tests come back positive. N.Y. DOM. REL. LAW § 13-aa (Mc Kinney 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* http://www.usmarriagelaws.com/search/united_states/blood_test_requirements/mandatory/index.shtml.

[33] TEX. FAM. CODE ANN. §2.013 (Vernon 2006 & Supp. 2009) (encouraging pre marital counseling and offering objectives of the course); TEX. FAM. CODE ANN. § 2.204 (Vernon 2006 & Supp. 2009) (waiving the 72-hour waiting period if a couple attends marriage counseling).

[34] 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 (Vernon 2008) (noting that a fee is associated with the issuance of the marriage license and is due when the license is issued).

[35] *See* http://usmarriagelaws.com/search/united_states/waiting_period_marriage_license/index.shtml.

[36] ALA. FAM. CODE § 30-1-9 (1975) (Alabama license is only valid for 30 days from the date it is issued); TEX. FAM. CODE ANN. § 2.201 (Vernon 2006) (license is only valid for 31 days after issuance).

in which only consent, specifically words stating consent in the present tense, was required to marry.[37]

Only a few states still recognize common law marriage but the Full Faith and Credit Clause usually allows a common law marriage to be recognized by all states if legal in the jurisdiction in which it arose.[38] 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.[39] In addition, states that do not recognize common law marriage sometimes stretch doctrine to recognize common law marriages of couples who reside there.[40]

3. Proxy Marriage. In limited jurisdictions and circumstances in a few states,[41] marriage licenses and marriage ceremonies can be executed with proxies substituting for one or

[37] *See* GORAN 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]: '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 1800's [helping to establish the recognition of "common law marriage"]").

[38] TEX. FAM. CODE ANN. § 2.401 (Vernon 2006) (describing the requirements of an informal marriage); http://www.expertlaw.com/library/family_law/common_law.html (describing the process of common law marriage and listing the states that recognize them).

[39] *Id.*

[40] 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 approximately eight times in twenty-one years and had cohabited under the reputation of being a married couple); Blaw-Knox Constr. Equip. Co., 596 A.2d 679 (Md. Ct. Spec. App. 1991) (finding a valid 38 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); Carpenter v. Carpenter, 617 N.Y.S.2d 903 (N.Y. App. Div. 1994) (finding a valid common law marriage for a New York couple who spent eleven days in Pennsylvania during their 25 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 (N.Y. 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); Katebi v. Hooshiari, 732 N.Y.S.2d 382 (N.Y. 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); State v. Phelps, 652 N.E.2d 1032 (Ohio Ct. App. 1995) (finding a valid common law marriage).

[41] *See supra* note 6 (listing statutes).

both members of the marriage.[42] The availability of these statutes does not appear to be widely known, although some efforts seem to be emerging, in Montana, to offer proxy services through commercial solicitation of couples who do not have any previous connection with the state.[43] Because of the general understanding that marriage is associated with the presence of a couple in the state that authorizes the marriage, the clerk in Montana expressed unease about the extent to which couples with no connection to Montana were using an earlier version of the statute.[44]

4. Regulations Affecting the Ceremony. There is no specific blueprint for the proper marriage ceremony but many states require that the parties declare their desire to be husband and wife in the presence of an officiant and sometimes witnesses, who must be present.[45] Most couples assume they must be present in the state that marries them; gay couples in the recent weddings rode in busses to marry in Iowa,[46] and no one commented that it was odd to require their brief physical presence.

[42] TEX. FAM. CODE ANN. § 2.006 (Vernon 2005) (allowing for single 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); TEX. FAM. CODE ANN. § 2.007 (Vernon 2005) (describing the affidavit to be submitted for the proxy representation); TEX. FAM. CODE ANN. § 2.203 (Vernon 2006) (stating that a proxy can appear at the ceremony for the absent party).

[43] See S&B, Inc., Marriage by Proxy, MarriagebyProxy.com, http://www.marriagebyproxy.com/ (last visited Sept. 19, 2009) ("Proxy marriages are our specialty.") (offering a double proxy in Montana for military service members, and a single proxy in Colorado, which does not require military service nor residency).

[44] Possley, *supra* note 8 ("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 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'."); 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'.").

[45] 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); 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). N.Y. DOM. REL. LAW §12 (Mc Kinney 1999) (requiring at least one witness be present at the marriage ceremony).

[46] *See infra* Section III.A.

State statues specify the parties who are qualified to solemnize a marriage, with some states imposing fairly rigid, territorial based limitations[47] backed by criminal sanctions[48] and others providing flexible one-day certifications.[49] In other states, the officiants who are awarded authority by the statutes are typically described as members of the clergy, judiciary, or other public officials such as a mayor.[50] 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.[51] 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.[52] 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.[53] The rules for who

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

[48] 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.").

[49] 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).

[50] 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: One Day Marriage Designation Instructions, which permits any friend or family member to apply for a one-day designation to preside at a wedding in Massachusetts, may be downloaded from the Governor's website, http://www.mass.gov/?pageID=gov3homepage&L=1&L0=Home&sid=Agov3, last visited on September 28, 2009.

[51] N.Y. DOM. REL. LAW §12 (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 page no. 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).

[52] N.Y. DOM. REL. LAW § 11 (Mc Kinney 2009); N.Y. Dom. Rel. Law § 12 (1999) (simply requiring the couple to take one another as husband or wife in the presence of a magistrate or clergyman)**.**

[53] TEX. FAM. CODE ANN. § 2.302 (Vernon 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) (a

may officiate can be generally overcome if a desired officiant becomes a member of the Universal Life Church,[54] which allows virtually anyone to become a minister.[55]

5. Clerical and Record-Keeping Rules. The officiant is typically responsible for returning the license and certificate to the appropriate county clerk.[56] Local officials often have record-keeping obligations.[57] In many respects, though, the follow-through from the strict ground rules for obtaining and using a license within territorial bounds does not produce a readily accessible set of official records and statistics about marriage as state records are often haphazardly maintained.

6. Lenient Ex Post Enforcement: Forgiveness of Procedural Flaws. Courts, with relatively rare exceptions,[58] do not see the rules as sufficiently controlling as to invalidate

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marriage is still valid even if the party solemnizing the marriage was not qualified if the parties believe s/he was qualified).

[54] 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 eligibility to preside as a minister in a Utah marriage ceremony).

[55] Welcome Universal Life Church Monastery, http://www.themonastery.org/jcontent/training/2-wedding-training?template=themonastery (last visited October 17, 2009) (providing procedures to become an online ordained minister). *See also* Universal Life Church v. Utah, *supra* note 54, 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-mall address. Anyone can also be ordained by mailing to the ULC a name and address. There is no oath, ceremony, or particular form required.").

[56] 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 10 days of the ceremony); TENN. CODE ANN. § 36-3-303 (2005) (stating that the person who solemnizes the marriage must return it within 3 days to the issuing clerk); TEX. FAM. CODE ANN. §2.206 (Vernon 2006) (stating that the person conducting the ceremony is responsible for recording the license and returning it to the county that issued it within 30 days of the ceremony); TEX. FAM. CODE ANN. § 2.208 (Vernon 2006) (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).

[57] 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, s/he must send information regarding the marriage to the probate for proper registration); MICH. COMP. LAWS ANN. §551.104 (West 2007) (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).

[58] 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 (Cal. Ct. App. 2000) (finding no valid marriage where couple did not get a marriage license or a 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 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

marriages. When the rules are violated, courts employ various savings doctrines, with more or less legal precision,[59] to hold procedurally deficient marriages valid. Examples of flaws courts "fix" include failure to file the license as required,[60] an insufficient number of witnesses,[61] ineligibility of the presiding official,[62] and marriage in the wrong county. The 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. Couples face the greatest risk if they intentionally ignore a rule, especially the rule requiring that a license be used within the state that issued it.[63] 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.[64]

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marriage license); Farah 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).

[59] 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 (N.Y. Dom Rel. Ct. 1950) (finding that failure to obtain marriage license does not invalidate the marriage); Heller v. Heller, 68 N.Y.S.2d 545 (N.Y. Spec. Term 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 (N.Y. 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 (N.Y. 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 (N.Y. 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 does not invalidate a marriage); State v. Robbins, 28 N.C. 23 (N.C. 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).

[60] Krizman v. Industrial Accident Comm'n, 58 P.2d 405 (Cal. Dist. Ct. App. 1936) (marriage in foreign state not invalidated by failure to record marriage certificate).

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

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

[63] *See infra* Section III.A.

[64] Marriages Pursuant to a License Issued in Alabama Must be Solemnized in Alabama to be Valid, Ala. Op. Att'y Gen. 99-00144 (1999), http://www.ago.state.al.us/ (follow "official opinions" hyperlink on the left; then follow ">>Go Directly to Opinion Search" hyperlink in the center of the page, near the top; then enter ""marriage

Courts often construe the marriage code liberally, as containing authorization to couples to marry outside the jurisdiction but pursuant to its ceremonial marriage laws.[65] For instance, in a particularly striking example of this tendency, an Arizona case, *Barbosa-Johnson v. Johnson*,[66] 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 continued to inform the public, on websites and by telephone, that an Arizona marriage license is only valid for use within Arizona.[67] Finally, statutes occasionally extend forgiveness for past, or even prospective, use of the state's marriage license outside the state.[68]

II. What is the purpose of marriage formation law?

The last section portrays an elaborate legal machinery to regulate marriage formation. Oddly, no clear regulatory purpose emerges from this massive canvas. One could infer a

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license"" in the full text search and push the "Search" button; scroll down to the opinion numbered 1999-144) (finding that marriages performed pursuant to an Alabama marriage license must be performed in Alabama to be valid); Validity of Marriage Under Certain Conditions, Ark. Op. Att'y Gen. 96-183 (1996),1996 WL 375948 (finding a valid marriage where the couple used an Arkansas marriage license for a marriage performed in Italy); *contra* Justice Court Judges Authority to Perform Marriage Ceremonies, Miss. Op. Att'y Gen. 2001-0475(2001), 2001 WL 1725322 (finding that a justice could not perform a marriage ceremony pursuant to a non-state issued marriage license); Validity of a Marriage Performed Outside of Tennessee Pursuant to a License Issued by a Tennessee County Clerk, Tenn. Op. Att'y Gen. 85-189 (1985),1985 WL 193738 (finding that a Tennessee marriage license does not have to be used within the state of Tennessee).

[65] 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. 4803/07, 2009 WL 997481 (N.Y. Sur. Ct. 2009) (holding that a religious ceremony in New Jersey entered into without a license was a marriage solemnized under New York marriage law).

[66] 851 P.2d 866 (Ariz. Ct. App. 1993).

[67] Information on the internet, supposedly provided by Clerk of the Superior Court of Maricopa County, states "The 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, http://phoenix.about.com/cs/weddings/ht/marriagelicense.htm (last visited October 17, 2009).

[68] VA. CODE ANN. § 20-37-1 (2006). Validation of certain marriages solemnized outside of the commonwealth (If Virginia license is used in a marriage outside of the commonwealth with a Virginia license, the marriage has the status as if it was performed in Virginia); 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."); *see also* TENN. CODE ANN. § 36-3-103 (2005). Validation of certain marriages solemnized outside of Commonwealth (validating all marriages "occurring prior to May 2, 1989" using Tennessee licenses outside the Commonwealth).

plethora of goals and motivation: discovering identity fraud by requiring verification, discouraging imprudent marriages through waiting periods, or limiting the spread of venereal disease. But, these regulations can hardly be said to effectively further any of these goals. In general, they offer no serious identity checks, waiting periods are short and couples can easily circumvent them by marrying in a state that has none, and most states no longer require health checks.

Understanding the goals of marriage formation requires an account of what is marriage from a legal perspective. Conventional legal wisdom vacillates in its classification of marriage between a (i) government-regulated and -created status[69] and (ii) self-regulating contractual or religious agreement.[70] Neither classification is complete, and one cannot reduce marriage into

[69] 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, 2095 (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").

[70] 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); Sunstein, *supra* note75, 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."); Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L. J. 453, 464-5 (1998) ("couples 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, 209-211 (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").

either. Marriage is not just a contract. It will always have status aspects[71] 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. Similarly, marriage can never be, and never has been, merely a religious institution, 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.

This section argues marriage is best described as a hybrid of enabling regulation to create a legal relationship and status—a status that carries value in and of itself.[72] These two descriptions show that marriage has two sets of benefits: First, marriage as an enabling regulation allows individual 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. Second, marriage is a status good that the state and/or civil society confer. Perhaps responding to a deep anthropological need, people crave the status created by public recognition of their long-term sexual and romantic relationships. Once we have argued for understanding marriage in these ways, Section III will then argue that e-marriage constitutes the best regulatory procedures to further these conceptions of marriage.

[71] BLACK'S LAW DICTIONARY, *supra* note 69.

[72] Economists generally defined "status goods," as something that provides social prestige or other psychic benefits. *See* Edward Miller, *Social Good and Luxury Taxes*, 34 J. ECON. & SOCIOLOGY 141, 143 (1975).

A. Not Only a Religious Category

An often-heard refrain advocates a state withdrawal from marriage to solve the cultural conflict about marriage of same-sex couples. As a recent example, two college students in California are working to promote a constitutional amendment abolishing marriage.[73] In a typical formulation, one student was quoted as saying: "This is a compromise. It says 'Get rid of marriage as a state institution. Make it a religious institution, keep politics out of it and stop the fighting.'"[74] Eminent legal academics often say the same thing.[75]

As the historical section discusses below, marriage was never a purely religious phenomenon. Marriage has legal aspects that only the state can confer. And, as the historical section discussed, the legal rights of marriage had *no* necessary religious connection for most of the history of Anglo-American law.

What advocates really seem to be suggesting when they want the "state to get out of marriage" is for the relationship to be pure, private contract: a contract with a religious ceremony. We reject such a reduction of marriage for two reasons. First, marriage involves certain status benefits involving community-approval that contract cum ceremony can never provide. Second, the state has too many interests in the marriage relationship, including the encouragement of the informed, non-exploitative decision to enter marriage and disposition of

[73] California Ballot Initiative Launched to Get State Out of the Marriage Business, http://www.towleroad.com/2009/03/ballot-initiative-launched-to-get-california-out-of-the-marriage-business.html, (last visited October 10, 2009).

[74] Aurelio Rojas, *Proposition. 8/ Some Foes Turn to the ballot: Groups Push New Drives to Reverse Gay Marriage Ban***,** THE SACRAMENTO BEE, Jan. 21, 2009, at A3.

[75] *See Kmiec Proposes End of Legally Recognized Marriage*, CATHOLIC NEWS SERVICE (May 28, 2009), 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'"); Cleveland v. United States, 329 U.S. 14, 25 (1946) (Murphy, J., dissenting) ("[w]e must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears.").

property and children upon dissolution, for the state to exit the business of regulating marriage.[76] In short, given that marriage, religious or otherwise, constitutes, the most basic bond in human society, the state will inevitably have an interest in regulating aspects of it.

B. Not Merely a Contract and the State's Inevitable Involvement

Proponents of state withdrawal from marriage misapprehend the long history and value of marriage as a benefit, even status good, which the state must help to provide.[77] Marriage responds to individuals' need for a public recognition of their unions, and not for mere contractual obligation.[78] Market behavior supports this claim. Fewer than 5 percent of couples spend the money or expend the efforts to obtain prenuptial agreements to specify or alter their legal rights under the law.[79] 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.[80] Prenuptial agreements are used, however, only rarely.[81] If individuals lack the interest to modify the terms of legal marriage, individuals either are completely pleased with the terms (arguably unlikely) or value marriage

[76] *See* Estin, *supra* note 51.

[77] Sunstein, *supra* note 69, 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."); Estin, *supra* note 51, 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.")

[78] Lois Smith Brady, *Stephen Davis and Jeffrey Busch*, N.Y. TIMES, Dec. 6, 2009, at St17 ("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.'"").

[79] Heather Mahar, *Why Are There So Few Prenuptial Agreements?* Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper 436 at 2 (2003), http://lsr.nellco.org/harvard_olin/436/; 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."); 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.").

[80] "Like corporate status, civil marriage today serves as an off-the-rack rule." Mary Anne Case, *Marriage Licenses*, 89 MINN L. REV. 1758, 1781 (2005).

[81] *See* Mahar, *supra* note 79.

for reasons other than legal. The average couple (or their families) spends over $20,000 on their marriage ceremony and party.[82] 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.[83] 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 matters typically associated exclusively within a sanctioned marriage, such as child-rearing and sexual relations, to be done *outside* of marriage.[84]

Most broadly, classifying marriage as a contract simply ignores its public nature, its involvement with social sanction and its socially sanctioned ritual. Anthropologists have long recognized marriage's unique function in human society, a role that has remained remarkably constant through history and culture. Claude Lévi-Strauss writes

> "every society has some way to operate a distinction between free unions and legal ones. Whatever the way in which the collectivity expresses its interest in the marriage of its members, whether through the authority vested in strong consanguinial groups, or more directly through the intervention of the state, it remains true that marriage is not, is never, and cannot be a private business." [85]

[82] According to the website Cost of Wedding, on average, "US couples spend $20,398 for their wedding. However, the majority of couples spend between $15,299 and $25,498 . . . This does not include cost for a honeymoon or engagement ring." *See* http://www.costofwedding.com/.

[83] Study on file with authors.

[84] We expand upon this argument in Section III.

[85] Claude Lévi-Strauss, *The Family*, *in* MAN, CULTURE, AND SOCIETY 147 (Harry L. Shapiro ed., 1956). We recognize that anthropologists today do not universally accept Lévi-Strauss's view about the universality of marriage—or the universality of virtually anything else concerning human social relations. *See* Lawrence Rosen, *Anthropological Perspectives on the Abolition of Marriage*, *in* MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 176 ("The 'answer' to the debate over the abolition of marriage—like many other issues in law and social policy—does not lie in some arcane example proving or disproving a universal proposition, but in the comprehension of how, in each society, linkages are configured."). As we argue below, however, the "need" for marriage has sufficient cross-cultural consistency to survive, despite the decreased social pressure to marry "Getting married" reasonably can be said to be a desire in and of itself. It may be that by affirming the category of marriage as a socially powerful practice, the state "does harm" in some instances. *See* Anita Bernstein, *Epilogue*, *in* MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS, *id.*, at 211. But marriage also appears by any reasonable approximation to be a desire even if the state did not provide a blueprint. For now, to recognize the nexus of marriage's value across cultures and the role of the state in facilitating its flourishing does not oblige us to peer any deeper into the endogeniety between law and human desire.

Viewed in this light, marriage is more than a private contract.[86] In the words of Claude Lévi-Strauss, it is never a "private business."[87]

Perhaps most important, as argued above, marriage will always involve the state. Such understandings protect women from entering marriages that lack legal substance and over which religions exercise the only say as to the obligations of the parties.[88] Similarly, it protects uneducated or unwary women from relying on false understandings of their rights or obligations that social groups might encourage.[89]

Further, the state will always have an interest in children. Courts are uniform in their refusal to enforce prenuptials that purport to regulate how children will be treated upon divorce.[90] Similarly, most states place a limit on the enforceability of prenuptial agreements that purport to regulate certain inalienable rights or intrude too greatly upon partners' autonomy while married.[91] Last, in the instances when individuals do not contract, the state must step in to provide default rules.

C. Marriage is not a regulatory franchise or pure status

[86] Richmond and Hall addressed the error, made by Blackstone, of simplifying the legal significance of marriage by equating it with contract. *See* RICHMOND & HALL, *supra* note 3, at 332 (discussing "the nature of the state's relation to the contracting parties").

[87] Levi-Strauss relates the public significance of marriage to the arrangements of kinship groups around heterosexual patterns, but the social web within which marriages are embedded provides a basis for its enduring public significance. The Coquille tribal regulation that recognizes same-sex marriages states as the function of marriages and domestic partnerships to "preserve the tribe's integrity, cohesiveness and continuity." *See supra* note 85.

[88] Estin, *supra* note 51, at 514 (discussing the French rule on religious and civil marriages).

[89] *Id.*

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

[91] *Id.* at 430 (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).

Conversely, we reject viewing marriage exclusively as a status regulated by the state for three reasons. First, marriage statutes have evolved toward a relatively standard, though un-innovative format,[92] suggesting that states now have no capacity or 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 law's remarkable consistency has been well-documented, with most states moving towards similarity in licensing, waiting period, and solemnization requirements.[93]

Second, marriage as 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 to which we will return. 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. If marriage is a legal status, it is a strange, de-centered one in which religion, custom, the need for personal autonomy[94] and various state jurisdictions interact to define its contours.[95]

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[92] Grossman, *supra* note 1, 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 century all but disappeared in the second half . . . A snapshot of state marriage laws circa 1995 reveals a remarkably uniform system").

[93] We discuss the basic procedures found in all state marriage, *supra*, in section III. .

[94] *See also* 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.

[95] 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 51, at 454. Estin continues, though, saying, "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.

D. 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 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.[96] While the frustration and difficulties inherent to any long-term relationship are hard to bear, the benefit of "sticking with it" outweigh these disutilities. People, therefore, marry to make it difficult to end their long-term relationships on the basis of relatively short-lived unhappiness. 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.

Similarly, to the degree norms and role motivate individuals to act, the legal creation of certain roles gives people societal scripts—allowing them to engage in virtuous, praiseworthy behavior. [97] Officially sanctioning relations *allows* people to be "virtuous partners" or "ethical spouses," committing them to this role as an aspiration that can transcend short-term

[96] Barbara Stark, *Marriage Proposals: From One-Seize Fits to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001).

[97] *See generally* ALASDAIR MACINTYRE, AFTER VIRTUE 203 (2d. ed., 1985) (arguing that it is "rationally justifiable to conceive of each human life as a unity, so that we may try to specify each such life as having its good and so that we may understand the virtues as having their function in enabling an individual to make of his or her life one kind of unity rather than another").

calculations. Many believe that a human's most basic desires include fulfilling a social role. Whether this conception of marriage renders human beings more Aristotelian purpose seekers than utility maximizers is a dispute for a much longer article. We just think that the lay vision of marriage is (and always has been) related to community, state, ceremony and status.[98] Legal proposals that wish to do away with the nexus are simply fighting the facts.

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.[99] Rather than provide utility in the more normal sense of nourishment, shelter, adornment, pleasure, or possession, status goods provide prestige.[100] Marriage is a status good that requires state sanction and/or religion as necessary parts of its "social attributes."

As such, marriage is a prestige good that paradoxically *requires* a type of monopoly, *i.e.*, it is a good only the government, with the possible involvement of religion, can provide. We argue that the form in which the monopoly is now exercised-- at the state level with territorial parameters–should be broken to allow any state or jurisdiction to offer marriage anywhere. We would release the energy of federalism to create competition and potentially greater consumer surplus. The status value of marriage is in some way a function of the size, depth, and closeness (whether spatial or cultural) of the community that recognizes it. Presumably, the more people and jurisdictions that recognize a marriage, the more valuable it is. In this sense, e-marriage

[98] STANLEY CAVELL, CONDITIONS HANDSOME AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTIONISM 105 (1988) (treating the marriage ceremony's performance of the "covenant of marriage [as] a miniature of the covenant of the Commonwealth...").

[99] 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 (1995).

[100] Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 QUARTERLY J. ECON. 79, 81 1988).

offers a trade-off or maximization. As discussed below, e-marriage permits a plethora of types of marriage (same-sex, covenant, etc.), increasing choice and participation in its benefits. Even if e-marriage might dilute some of its universal significance, the total benefit would likely increase due to the broader access to marriage.

III. Procedures to Further the Goals of Marriage

Marriage offers an enabling regulation for a legal relationship that balances individual contractual goals and state interest. It also is state-conferred status good. Procedures that allow for competition in the provision of these goods might very well lead to their more effective distribution.

A. Competition in the Law of Marriage Formation

First, consider competition 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.[101] 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

[101] 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, June 17, 2008, 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).

law,[102] and some have offered an analogy of marriage to business forms,[103] 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.[104]

We stress, moreover, that we see marriage law bearing only a family resemblance to other enabling regulations,[105] 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.[106]

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[102] F. H.. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561; O'HARA & RIBSTEIN, *supra* note 69, at 161 ("marriage 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 ("the 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 ("states are competing only to attract residents willing to remain in the state").

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

[104] Some commentators see the marriage geographic monopoly as a way states can impose costs on couples, thereby discouraging imprudent marriages. *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1208 (2000):

> 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 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.

[105] 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).

[106] *Id*.

This competition could exist on numerous parameters. First, it could provide more efficient marriage formation procedures. As mentioned above, the states have developed a cornucopia of strange archaic requirements that continue through the centuries without any pressure for their improvement.[107] With competition, states could provide more attractive waiting periods, identity backgrounds, 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 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"[108] of marriage, just as these technologies have transformed corporate deal closings.

[107] 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 50 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. http://www.aaml.org/go/about-the-academy/.

[108] *See, e.g.*, Lynn Ashby, From Russia With Love, H Texas Online (Sept. 2003), http://www.htexas.com/feature.cfm?Story=162. 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) ("[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."); ("Family and friends unable to attend can now watch from

These changes in the way we live (and live the law) render such remote marriage or "e-marriage" ceremonies far more emotionally effective (and affective) than earlier effort at distance marriage, like proxy and letter marriage, making e-marriage a desirable alternative to solemnization tied to a physical place.[109]

Some might fear a "race to the bottom," in which states with the most lax procedures would dominate. In other words, everyone will use e-marriage to get a Nevada 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;[110] Las Vegas-type marriage is there for the taking.

Further, competition in marriage procedure might produce the opposite effect, *i.e.*, a race to the top. To avoid damaging the integrity and reputation of their legal systems, e-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 identify 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.

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the comfort of home on a computer or by being connected to a big screen TV"); Viva Las Vegas Wedding Chapel, http://www.vivalasvegasweddings.com/live_internet_weddings.htm, (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 (click graphic icons below to view one of four locations). ("Our live Internet wedding streams are broadcast free!") (sells internet marriages that lack legal standing: the effort is to sell fantasy weddings that can take place over the internet).

[109] DIDION, *supra* note 26.

[110] 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 AND BRUCE KOBAYASHI, THE ECONOMICS OF FEDERALISM (Economic Approaches to Law Series) 12 (2007).

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. As mentioned above, serious signaling problems impede the voluntary disclosure of information in romantic relationships. "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."[111] Asking for pre-nuptial agreements signals a low commitment to the marriage and little trust. Similarly, asking for verification concerning credit history or arrest record signals a lack of trust. If such disclosures were mandatory as part of an identity verification process, the signaling problem would evaporate. An express desire to pick a state that had no disclosure requirements may signal untrustworthiness—a fact that might induce a race to the top with innovations in marriage disclosure. E-marriage constitutes a process that furthers *both* a couple's interest in improved and modernized marriage formation law *and* the state's interest in preventing imprudent marriages.[112]

Most practically, states could compete on marriage fees. To the degree states have a "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

[111] Sean Hannon William, *Sticky Expectations: Responses To Persistent Over-Optimism In Marriage, Employment,* 84 NOTRE DAME L. REV. 733 (2009), *citing* Heather Mahar, *Why Are There So Few Prenuptial Agreements?* Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper 436 at 2 (2003).

[112] Sunstein, *supra* note 69, 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."); Estin, *supra* note 51, 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.").

requirements and like inconveniences.[113] A competitive market 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 e-marriage offers the opportunity for states to capture an international market in marriage.[114] One could envision that states could offer marriage authorization at very low price but earn significant revenue by attracting an enormous global market.[115] 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 travelling to a distant location to get married.

B. Status goods: E-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

[113] Some states may limit fees to cost.

[114] *See supra* note 44 (discussing popularity of Montana double proxy statute, particularly among individuals from the Middle East).

[115] To show the revenue possibility of e-marriage consider the following numbers. According to the Center for Disease Control, Minnesota performed 11,424 marriages during the first six months of 2007. *See* http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_12.pdf (last visited Feb. 28, 2010). Multiplied by $110 per license, the Minnesota fee, http://marriage.about.com/cs/marriagelicenses/p/minnesota.htm, marriage licenses revenue would be $1,256,640 for that period. .

E-marriage opens an entirely different revenue potential. Montana provides proxy marriage, through private marriage services, which charge approximately $2,000. *See* Berry, *supra* note 44. 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 market rate.

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. They would not do so if there were no benefit in having a legally binding marriage from a jurisdiction that one is not literally connected to. This is not a surprising result. After all, many people have destination marriages, travelling to the Bahamas or some other scenic local, for a wedding. The psychic value of their marriages remains undiminished.

Of course, the status or psychic 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 psychic benefit than a Florida destination marriage in a state such as Michigan that does not recognize same-sex marriage. On the other hand, as same-sex Michigan same-sex couples travel to Vermont to marry, there is 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. Three states: Arizona, Louisiana, Arkansas, already provide covenant marriage. As discussed above, these marriages create much higher barriers to divorce.[116] They offer a different type of marriage, and e-marriage would make such ceremonies more available. The recent proliferation of different types of marriage suggests that there might be markets for different types of marriage. E-marriage might allow this diversity to flourish—meeting the "demand" for marriage more efficiently than the current one-size-fits all regulatory approach. E-marriage could energize a stagnant regulatory regime.

[116] *See supra* note 11.

IV. E-divorce, Choice of law, and Contract's Limits

E-marriage raises a natural question. How do those who e-marry get e-divorced? Under the typical rule, divorce is a proceeding *in rem.* The marriage is "present" in the jurisdiction in which at least one member of the couple resides. 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 travelled 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 who 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,[117] courts have applied three main approaches. First, they can recognize the marriage as a marriage, at least for the purpose of the divorce and can then divide the property. Second, they recognize the marriage as contract and divide the property. Third, they refuse to recognize any relationship. In the latter two possibilities, courts would award custody of children on the rules established for children of unmarried couples.

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 one year, for divorce. People are, therefore, stuck in a legal limbo.

[117] Koppelman, *supra* note **Error! Bookmark not defined.**, at 265.

E-marriage would accelerate the problem that the several states' inconsistent treatment of marriage has created. On the other hand, e-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 e-marriage authorizing state could therefore easily administer the divorce using the prenuptial agreement as a guide.

Requiring a prenuptial agreement reduces divorce's transaction costs. 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). If a state recognizes the marriage, custody procedures would proceed as in any other divorce. If the state does not recognize the marriage, courts would award custody as they do in any other situation of an unmarried couple living together.

V. The History of Marriage: Consent, Government Sanction, and Licensing

The history of the law governing marriage formation does not support the conventional legal story of state authority. This story involves exclusive state control over marriage formation within its borders through the licensing mechanism. The broader historical view, however, shows consenting couples to have primary legal authority in creating marriage. Licensing gradually emerged, as explained below, in the colonies and then the states, in response to a need for the facilitative role played in England by the Church to publicize and record a couple's marriage. Licensing did not emerge as the expression of an existing plenary state authority to grant or deny marriage status. Indeed, clearly discriminatory or paternalistic impulses which most would now reject, *i.e.*, denial of interracial marriage, prompted state assertion of control over marriage.

Cncerns that e-marriage would upset traditional state prerogatives in regulating marriage are inapt. While the federal system has reposed in states the sovereignty that allows them to frame their marriage and family laws, licensing is not a basis for envisioning states as sealed against couples' celebrating formal marriages under the laws of another jurisdiction.[118] We will demonstrate in the following section that, to the contrary, licensing is a subject for reformist vigilance. Licensing regimes should not become the legal enforcement of state's territorially anchored monopoly over marriage.[119] Rather, they should return to their original historical role of facilitating marriage, a role that modern communications technologies only strengthen.

One might claim that e-marriage upsets traditional state prerogatives in regulating marriage. We show that e-marriage is consistent with state authority as well as centuries of

[118] *See* Resnik, *supra* note 5, at 1577.

[119] Weyrauch, *supra* note 12, at 108-09 (lamenting the licensing trend and suggesting the need for a safety valve to avoid hardship).

history concerning marriage law. Consider the maxim *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,[120] as well as international recognition of marriages performed in other nation states.[121] 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 California same-sex marriage, or a Saudi Arabian polygamous marriage, under the public policy exception.

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

[120] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

[121] 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* O'Hara & Ribstein, *supra* note 97, at 1209 ("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). It also has an elaborate statute allowing for a person who was a Massachusetts resident at the time of a foreign marriage ceremony, if later residing anywhere in the United States, to file evidence of the marriage with the clerk or registrar of the town where the person was domiciled at the time of the foreign marriage ceremony. MASS. GEN. LAWS ANN. ch. 207, § 36 (West 2007). 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. The provision 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. 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. 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.

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, jurisdictions' *power* is only 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.[122]

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. The history of marriage licensing, despite the confusing term "license,"[123] which 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. The following examines the history of licensing under Anglo-American law, showing that the state has never assumed exclusive regulatory authority over marriage. This section then examines state power to approve marriages outside its borders.

A. The Emergence of Licensing in England

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

[122] Ala. Op. Att'y Gen. 99-00144 (1999), *supra* note 62 (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.").

[123] 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 state as a facilitator, recorder, and source of publicity: the state code treats the marital formalization as something like the filing of a copyright or a land title than like an application for a patent. While the state enforces some outside limits on providing the certificate, they are the extreme instances of tender age and being party to an existing marriage.

involvement.[124] 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.[125]

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. The Fourth Lateran Council in 1215[126] officially set forth the "triple calling of banns," *i.e.*, the wedding was announced at Church on the three Sundays prior to the marriage.[127] The ceremony, itself, had to be performed by a priest, in the presence of witnesses—and it had to be performed during certain days and times.[128] Individuals had to swear to matters concerning appropriate age and/or parental consent and provide a security bond.[129]

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[124] *See* LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 141(2002); R. B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850 (1995) at 2 ("'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). *See also id.* 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 ecclesia,' citing* English Reports, 191, p. 671."); Rev. 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 12th 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 lawyers encouraged by the Statute of Frauds of 1677 began to insist upon some writing in proof of marriage. *See also supra.* at 3.

[125] John E. Semonche, *Common-Law Marriage in North Carolina: A Study in Legal History*, 9 AM. J. OF LEGAL HISTORY 320, 321 (1965).

[126] *Id.*

[127] Banns had hitherto been traditional in many Christian countries. OUTHWAITE, *supra* note 124, 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.*

[128] Rebecca Probert, *Control over Marriage in England and Wales, 1753-1823: The Clandestine Marriages Act of 1753 in Context*," LAW & HISTORY REV. (2009).

[129] *Id.*, *citing* THE ANGLICAN CANONS, 1529–1947, Canons 101, 102, and 103 (Gerald Bray, ed., Woodbridge: The Boydell Press, 1998).

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.[130] Both civil and ecclesiastical law, while accepting marriage *per verba de praesenti*, treated it less favorably than properly sanctioned marriage. Indeed, both church and state actively discouraged clandestine 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."[131] 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."[132] 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.[133]

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.[134] The Council grandfathered existing irregular marriage--an early example of legal presumption in favor of existing countries.[135] In Catholic countries, this shift in ecclesiastical law ended further irregular marriage and any civil recognition of such marriages.[136]

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[130] *Id.* at 6.
[131] OUTHWAITE, *supra* note 124, at 5.
[132] *Id.*
[133] *Id*. at 5, *citing* F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 374 (2nd ed. 1989).
[134] *Id*.
[135] THE COUNCIL OF TRENT, THE TWENTY-FOURTH SESSION, THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT, at 192-232, (J. Waterworth ed., 1848) *available at* http://history.hanover.edu/early/trent.htm.
[136] *See* Perry, *supra* note 124, at 229-32.

Because Henry VIII broke with the Catholic Church in the 1530s, several decades before the Council of Trent, England never adopted the Council of Trent's reforms and only eliminated clandestine marriage in 1753 with passage of the Hardwicke Act.[137] 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.[138]

Many couples, seeking to marry legitimately within the Church, sought to escape banns' residency and publication burdens. From at least the 14th century, bishops in England did grant licenses, permitting marriage without banns.[139] 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. Ecclesiastical law on licensing in England continued to develop after the split from Rome.[140]

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. Only a bishop and those vested with his authority could provide licenses.[141] In addition, a couple could obtain a special license from a bishop, which would allow marriage anywhere within the bishopric, or

[137] OUTHWAITE, *supra* note 124, at 5; see Geo. II, c. 33 (1754).

[138] OUTHWAITE, *supra* note 124, at 5.

[139] Patrick McGrath, *Notes on the History of Marriage Licenses*, *in* GLOUCESTER MARRIAGE ALLEGATIONS 1627-1680 xx, xi (B. Firth ed., 1954). While McGrath notes that "the first canonical enactment . . . seems to be the eleventh canon of the Synod of Westminister 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 14th century. *Id.* at xx n.4.

[140]The Dispensations Act of 1534 confirmed the rights of the Archbishop of Canterbury to issue licenses. *Id.* at xxi, *citing* 25 Henry VIII, c. 21, clauses ix-x. In the reign of King James I, the Convocation of Canterbury systematized Church law and set forth Canons 101-104, which formalize ecclesiastical law on marriage and licensing. Canon 101 allows only those with "episcopal authority," *i.e.*, a bishop or his delegate, to issue a license. It appears as if the authority to sanction marriage was limited to the "exercising of right Episcopal jurisdiction." Vol. 6 THE ANGLICAN CANONS 1529-1947, *supra* note 114, Canon 101, at 401. In addition, "persons only as be of good state and quality" and only "upon good caution and security taken" could receive licenses. *Id.*

[141] Geo. II., c. 33, cl. 17-18.

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.[142] 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.[143] Catholics and dissenters were not exempted, an artifact of anti-Catholic bias not remedied until the 19th century.[144] Anglo-American law has long used marriage law to discriminate against minorities.

The point of this historical discussion to our argument is twofold. First, marriage was never purely religious or state-based. While the term "license" suggests a state regulatory function, the license was originally an expression of religious, not state, authority.[145] The state-granted license later assumed a central function in the regulation of marriage, prohibiting interracial marriage and controlling venereal disease. While the form of license remains, its original state regulatory purposes (bigamy, incest) as well as its later purposes (venereal disease,

[142] *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.'").

[143] Geo. II., c. 33, cl. 17-18. Interestingly, when Germany and Italy adopted national codes governing marriage solemnization, they also make exemptions for their ruling houses. *See* Lorenzen, *supra* note 8, at 478.

[144] 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 124, at 164.

[145] *See* Case, *supra* note 80, at 1765 ("I will do this in part by drawing analogies to the licensing the state provides for the drivers of automobiles and the owners of dogs and, most importantly, to its provision of corporate charters. In all four of these cases, the underlying activities involved could be and were at times carried on without state involvement, but the state at one point asserted monopoly control over licensing and, because, *inter alia*, of efficiency advantages from its involvement, the state is unlikely to retreat completely from the field.").

Contrary to Professor Case, marriage *always* involved the state. The Roman conubium was, of course, a legal status that the state defined. In England, the state and civil law never followed Church law in a route manner; rather, it recognized aspects of Church law, ignoring others—for instance, its refusal to grant inheritance rights to widows of clandestine marriages. Conversely, the state has never, at least in the United States, exercised exclusive authority over marriage, as religious communities through banns and other forms of legal forms, exercised much authority as well.

interracial marriage) are now obsolete. Licensing shows the regulation of marriage under common law constituted a complicated response between state and church, not primarily the domain of either.

Second, 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 limited to his diocese.[146] The preceding discussion debunks 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. To the degree the license has emerged as a lever for state regulation of marriage, a story we discuss below, the license cannot be seen as an expression of territory-based regulatory authority.

B. Marriage Solemnization in the United States

The American colonies were, with the exception of Georgia, founded in the 17th Century, a time during which English marriage law was in flux, with clandestine marriage still recognized but its precise legal status unclear. 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.[147] Even more important, the traditional, Anglican form of "regular" marriage simply did not make sense in the colonies. After all, many of the colonists,

[146] See Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. REV. 307, 317-318 (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").

[147] Hardwicke Act, Geo. II., c. 33, sec. 18.

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.

The colonies, therefore, devised diverse legal solutions to the problem of creating "regular" marriages that differed according to their religious and social organizations. A standard history of marriage states, "The continuity of English law and custom in the New England colonies is not more striking than the innovation."[148] For instance, the Puritans of Massachusetts, likely reacting against the Catholic view of marriage as a sacrament, argued that marriage needed no priestly intermediary.[149] Influenced by the example of Dutch practice, their previous residence, the Puritans of Massachusetts Bay introduced strictly civil marriage which involved an appearance before a judge.[150] This minimal legal moment dominated New

[148] GEORGE ELLIOT HORWARD, II A HISTORY OF MATRIMONIAL INSTITUTIONS 125 (1904, reprinted 1964).

[149] We find far-fetched the assertion that Puritan contractual weddings were in any way related to New England's current liberal marriage regimes. *See* Case, *supra* note 80, at 1794 ("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." HORWARD, *supra* note 148, at 210, citing SHIRLEY, "Early Jurisprudence of New Hampshire, Prcds. New Hamp. Hist. Soc. (1876-84). 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*. at 210. In other words, even though there was ecclesiastic 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.

[150] *Id*. 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

England, as every colony viewed "marriage . . . as a civil contract and the celebration was performed by a civil magistrate."[151] 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.[152] 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.[153]

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. Marriage ceremonies could be performed after publication or license, which the Governor was empowered to issue.[154] North Carolina had a similar rule giving the marriage monopoly to Anglican minister, a rule that was controversial, of course, among Dissenters, i.e. non-Anglican Protestants.

Because English marriage law was in flux during the 17th Century, the American colonies had to improvise, adopting certain English customs yet changing them significantly. Except in a few Southern colonies, no single or established Church ever established a monopoly on

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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." II HUTCHINSON, HISTORY OF MASSACHUSETTS at 392.

[151] HORWARD, *supra* note 148, 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 *infra*, Puritan marriage rejected the Catholic view that marriage was a sacrament but always insisted upon strict state control.

[152] HORWARD, *supra* note 148, at 294.

[153] HORWARD, *supra* note 148, at 125.

[154] HORWARD, *supra* note 148, at 240-47.

solemnization, as it did after 1753 in England.[155] Instead, because the colonists were creating legal forms *outside* existing religious institutions, often as with the Quakers and Puritans quite self-consciously, they could not turn to traditional legal solemnization. The Colonies created an American legal tradition of flexibility and adaptation to meet changing needs.

C. From Banns as Enabling Regulation to Licenses as State Regulation

Throughout the 19th Century, state laws moved to a certain type of uniformity—a uniformity that characterizes current law, the features of which we discuss in Section III. While this process is by definition complex and heterogeneous as it involves legal evolution in the several states, certain generalizations are fair. Both civil and religious weddings are permitted. Restrictions on the denominations permitted to perform weddings are, of course, eliminated, as any duly ordained minister may perform weddings. The license has emerged as a fulcrum for state regulation. At first the license prohibited interracial marriage. Now it aims to regulate same-sex marriage.

Many of the colonies permitted marriage by licenses instead of banns, just as in England.[156] In the 19th Century, most state statues eliminated banns or public announcement requirements and began to require licensing exclusively. We argue that banns constitute an enabling regulation, analogous to filing for a corporation, that provide precedent for e-marriage. Both allow individuals to attain a certain legal relationship, provided certain protocols are observed, with minimal government intervention—this is particularly true in the Quaker-

[155] 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) (Virginia, Maryland, North Carolina, South Carolina, and Georgia recognized the Anglican Church, while Massachusetts, New Hampshire, Vermont, and Connecticut were Congregationalist (Puritan)).

[156] For example, in New York, marriage by "[l]icense 'under the hand and seale of the governour' in place of banns is still allowed.'" HORWARD, *supra* note 148, at 294.

influenced colonies in which *any* religious group could authorize marriage.[157] Individuals controlled banns or public announcement in a way roughly analogous to filing for incorporation. Individuals determined the time and place, and the state provided an "off the rack" legal regime. States did not regulate directly through banns, but rather they permitted individuals with objections to the marriage to come forth—in a way roughly analogous to corporate self-government. Both banns and incorporation have limited regulatory goals, the former prohibiting bigamy and incest, the latter prohibiting duplication of trade names.

Licensing, on the other hand, was originally meant to make marriage more convenient for couples but became 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.[158] States added requirements such as waiting times and blood tests for syphilis. They refused licenses on miscegenation grounds, greatly (and undesirably) expanding the narrow regulation of marriage that had traditionally only involved bigamy, incest and publication.[159]

The shift from banns to licensing permitted the state to change the character of marriage from one that is decentralized and delegated to communities, in which the state facilitated private monitoring through publication, to one which government directly regulates, allowing discriminatory miscegenation laws. Ironically, in modern times, the state has retreated from the

[157] Interestingly, many of the states licensed clergymen to perform weddings with little or no governmental oversight, particularly in states with Quaker influences. An authorized clergyman had the discretion to marry anyone, just as a congregation could through banns. This resulted in claims that certain states had become "Gretna Greens" in which unscrupulous clergymen married couples that were unsuitable or otherwise imprudent. *See Marriage Law*, N.Y. TIMES, Nov. 15, 1880, at 4. (describing legal reform in New Jersey).

[158] 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 3, 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.

[159] NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 28-33 (2000).

areas the licenses regulated. Most prominently, the states (of course) no longer prohibit inter-racial marriage. Most states have dropped, or decreased, venereal diseases testing. Further, while the Las Vegas wedding is hardly the norm, waiting periods have decreased to the point of vanishing. In short, states' basis for licensing has largely evaporated, yet it persists as the dominant legal form regulating marriage for no good reason other than historical.

Failing to recognize this distasteful history, commentators believe that marriage solemnization was *always* or primarily a state regulatory franchise.[160] It clearly was *not*. Rather, it was an essentially private arrangement that required some public sanction. Territorial assumptions about licensing reinforced the regulatory view of marriage. Recall that a priest or minister could legally license marriages within his parish. This limitation logically proceeds from the fact that licenses served to replace banns, which, in turn, allowed people in the community to object to the marriage primarily on the grounds of bigamy. Parish priests could serve this regulatory role only in the community in which they had knowledge—their own.

Banns, like e-marriage, empowered entities other than the domiciliary states to authorize weddings. The state's role in the legal creation of marriage resembles its role in incorporation, which may be offered to citizens of any state and for which physical presence within a state is not required. Indeed, as discussed below, courts have realized this. They have recognized as valid proxy marriages, telephone marriage, and marriages in which individuals use licenses issued by one state but solemnize their union in another. It is to these types of marriages we now turn. On a more profound level, the use and persistence of banns prefigures e-marriage's conception of state law concerning matrimony as enabling and decentralized.[161]

[160] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH,WEALTH, AND HAPPINESS 71, 184-9 (2008).

[161] United States v. Lopez, 514 U.S. 549, 584 (1995) ("But it seems to me that the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the

D. Distance Marriages

1. Proxy Marriage

Proxy marriage demonstrates the perennial need for both ritual and flexibility in marriage solemnizing. As mentioned above, canon law recognized it and continues to do so,[162] and it was practiced among the royalty and nobility of Europe.[163] 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.[164] 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 19th century, when Germany and Italy united 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. Similarly, the 1754 Hardwicke Act exempted the royal family from its mandatory procedure. It seems at least likely that these exemptions sprang from the need to

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Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States").

[162] Canon 1089 §§ 1-4. According to Cahill, the Roman Catholic Church recognizes proxy marriage. 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 two witnesses. William F. Cahill, *Historical Notes on the Canon Law on Solemnized Marriage*, 2 CATH. LAW. 108, 109 n.3 (1956); Pomponius, Digest, XXII, 2, 5, *cited in* Lorenzen, *supra* note 8, at 473.

[163] For instance, 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).

[164] 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.

perform for political purposes royal marriages abroad and perhaps a need to keep proxy marriage available to royalty.[165]

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.[166] Three states—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.[167] Montana permits its double proxy marriage provision also to be used if one member of the couple is a resident of Montana.[168] Montana's greater liberalism may be a result of its history of all-male mining camps.

In addition, courts have recognized proxy marriage for immigration status. For instance, a federal district court recognized, for immigration purposes, a proxy marriage between a New York resident and a resident of Spain in the case, *Aznar v. Commissioner of Immigration*, under the *lex loci celebrationis* maxim.[169]

Proxy marriage is an early demonstration that presence within a territorial boundary is a legal habit that can be, has been, and continues to be dispensed with. As discussed below, e-marriage could encompass any degree of procedural safeguards, ranging from submission of physician or psychologist affidavits to waiting periods, thereby protecting the state's procedural interest just as well as, or even better, than a physical presence requirement.[170] Territorial

[165] It is worth nothing that proxy marriages for the British royal house continued after the passage of the Hardwicke Act of 1753, with, for example, the marriage the Duke of York and Albany (with Lord Malmesbury as proxy) to Princess Frederica Charlotte of Prussia in 1791.

[166] *See supra* note 42.

[167] *See supra* note 42.

[168] *See supra* note 42.

[169] United States *ex rel.* Aznar v. Commissioner of Immigration, 298 F. 103 (D.C.N.Y. 1924); *Ex parte* Suzanna. 295 F. 713 (D.C. Mass. 1924).

[170] An oft-cited case held that a Nevada marriage complied with the goals of Nevada licensing law, which are publicity and certainty. Fraud was held to be remote and unlikely. Barrons v. United States, 191 F. 2d 92 (9th Cir. 1951).

presence need not protect this state interest. As U.S. District Judge Lowell said in the *Aznar* case, "If royalty could do it, why may not those of more common clay be allowed to follow their example."[171]

2. Absentee Marriage: Telephone and Mail Marriages

The strongest argument for e-marriage's propriety is that is has occurred before with older technologies: telephone or mail marriage has occurred at various times in the United States. As with proxy marriages, the exigencies of war played a role in telephone marriage. Unfortunately, good statistics about the prevalence of telephone marriage are not available. We know it exists largely from newspaper and other accounts.[172]

A law review article, written in 1946, describes the need of servicemen during World War II to have marriages validated when they could not be present. Beyond noting telephone marriage's prevalence, 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 privilege of marrying is denied only by design, and not by inadvertence."[173]

Other countries, during war time, explicitly authorized absentee marriage. The Belgian law of May 30, 1916, provides that, "During the duration of the war either or both of the parties may

[171] These marriages are listed in THISELTON-DYER, *supra* note 163, at 310-14. A striking contemporary example is the proxy marriage, under Mexican law, of Roberto Rossellini and Ingrid Bergman. DONALD SPOTO, NOTORIOUS: THE LIFE OF INGRID BERGMAN 300 (2001) (quoting Bergman 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!").

[172] *Marriage by Telephone*, N.Y. TIMES, Feb. 21, 1890, at 2; Florida Marriage by Mail, http://www.floridamarriagelicensebymail.com/; Arizona, Marriage License: Apply by Mail, http://www.mohavecourts.com/clerk/mlpage.htm; California Phone Wedding for Active Duty Service, http://www.marriagetogo.com/text_content_page2.html#phone%20marriage; Recent story on marriage by phone with military service member: *Marine's Widow, Baby in Immigration Limbo*, MSNBC, Sept. 2, 2009, http://www.msnbc.msn.com/id/32891829/ns/us_news-life/.

[173] *See* Note, *Validity*, *supra* note 8, at 735-37.

appear before the officer of the civil status either in person or by a special and authentic power of attorney."[174] France and Italy provided for similar laws.[175] Similarly, as discussed *supra*, 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.[176]

The United States Court of Appeals upheld distance marriage conducted by letter in the celebrated case, *Great Northern Railway v. Johnson*.[177] There, the husband was from Minnesota and the wife from Missouri. Both states recognized at that time common law marriage, 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, the parties had the right the effectuate a marriage using basic contractual principles.

Edward Lorenzen argued during the end of the First World War that proxy and distance marriage 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.[178] Arguing (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.

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[174] Lorenzen, *supra* note 8, 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.

[175] Lorenzen,*supra* note 8, at 479, *citing* DUVERGIER, LA LÉGISLATION COMPLÈTE DES LOIS, ETC. (1915).

[176] Minn. Laws 1945, c. 409 (marriage proxy allowed for duration of war plus six months).

[177] 254 F. 683 (8th Cir. 1918).

[178] Lorenzen, *supra* note 174, at 478.

Regardless of their legality, telephone marriages were common during times of war. Commenters of the time collected instances of telephone marriages, giving the impression that they were somewhat common.[179] 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 United States jurisdictions would recognize them. These cases generally upheld such marriages. [180]

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 lazy legal dogmatism.

3. Conclusions

The preceding historical analysis undercuts many assumptions about the marriage ceremony. First, lawful marriage solemnizing has not always required a couple's physical proximity to one another, or their joint presence in a marriage granting jurisdiction, for a

[179] According to a student note written shortly after World War II, the most common means are proxy or telephone ceremonies, or contracts, signed by proxy or exchanged by mail. *See* Note, *The Validity of Absentee Marriage of Servicemen*, *supra* note 8 *citing* Reynolds, *Where There's a Will There's a Wedding*, N. Y. Sunday News, Sept. 3, 1944, pp. 23-9; O'Neill, *Most Married Man in America*, YANK, Oct. 5, 1945, p. 11 condensed in Reader's Digest, Dec. 1945, p. 75; Kan. City Star, Mar. 4, 1946, p. 3, col. 2 (attorney's 50th appearance as proxy in ceremony); N. Y. Times, July 29, 1945, § 4, p. 2, col. 7 (24th Tulsa proxy wedding). Sporadic instances of absentee marriage occurred in World War I. See N. Y. Times, Oct. 8, 1917, p. 7, col. 2 (telephone); id., June 1, 1918, p. 11, col. 4, and June 22, 1918, p. 9, col. 5 (telegraph). Interestingly, as the student note points out, the Judge Advocate General of the Army suggested advocated soldiers should have access to marriage by mail. *See* student note, *supra*, at 158. That same note pointed out that the Attorney General of Florida, while not recognizing the validity of common law, has ruled that marriage by telephone is valid. *See* Rep. Att'y Gen. 489 (1943-44).

[180] Hardin v. Davis, 16 Ohio Supp. 19 (Ohio 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 8.

marriage to be solemnized. This false assumption is prevalent throughout the legal literature, with respected hornbooks suggesting that distance marriage cannot be legal.[181] More important to today's prospective spouses than dusty legal tomes, many websites for local marriage bureaus and clerk's offices recite the recurring and false assumption that a state may only license a marriage within its territorial borders.[182]

While we concede that states' have at times limited themselves to only authorizing marriages on their own soil (as only a notary authorized to be a notary by the marriage granting state[183]), nothing in the law of marriage broadly understood requires this result.

IV. Legislative Considerations

A. General Overview of Goals of a Regime of E-Marriage

How might a regime of e-marriage within the United States look, taking into account both the values to be preserved in current marriage procedures and the possibility for improvements and modernization? The following lists some regulatory goals such a regime might further:

[181] *See* Note, *Marriage by Mail*, *supra* note 8, at 852 (citing *In re* Lur Lin, 59 Fed. 682, 683);I BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 326 ("a state or country cannot impose a status [*i.e.* marriage] on a person who is neither domiciled nor present within its territorial limits.").

[182] *See* Office of the City Clerk, Marriage FAQ, *supra* note 21 ("The contract must be signed by both parties and at least two witnesses and all signatures must be given within the State."); County Clerk, Marriage License Information, Clark County Nevada, *supra* note 21("In order to have a legal marriage, a ceremony must be performed in the State of Nevada within one year from date of issuance of the marriage license by any person licensed or authorized to perform ceremonies in Nevada."); Alachua County Clerk, Marriage Licenses, *supra* note 21 ("Do both parties have to be present at the Clerk's office to apply for a license? Yes."). *See also* U.S.MarriageLaws.com, Question & Answer, *supra* note 21 (providing a summary of each state's marriage laws and links to the state bureaus or clerk's offices).

[183] *See* Performing Marriage Ceremonies: A Guide for Florida Notaries Public, *supra* note 21 ("A Florida Notary may perform a marriage ceremony providing the couple first obtain a marriage license from an authorized Florida official and may only perform a ceremony within the geographical boundaries of Florida. Thus, a Florida Notary may not perform a marriage ceremony in another state.").

1. Make marriage readily accessible for those unable to be present together at a ceremony in the state solemnizing the marriage;
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. Give heightened protections against imprudent marriages based on only casual acquaintance;
9. Design 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 e-marriage 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 protocols for validation of marital bona fides that exceed the absent protocols in the current nominally regulatory but de facto "de-regulated" licensing regime.[184] Internet marriage procedure could recover aspects of the original concerns animating the publication of banns.[185] 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 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.

B. Examples of Legislative Language

We provide here a tentative few drafts of approaches a legislature could take to kicking off experimentation with e-marriage. We do not set forth a comprehensive menu of the variations that might be possible. Legislative approaches would depend on how many couples in what circumstances 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 e-marriage statutes for

[184] Abrams, *supra* note 20, at 1626-28.

[185] *See* RICHMOND & HALL, *supra* note 3, 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).

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.[186] We also do not draft a complete "e-marriage" statute in which the parties may be bound in accordance with rules for e-contracts. Such a statute requires more elaboration of the underlying protections, forms of screening, and involvement by officials than is indicated for this preliminary treatment. Such a statute is of the sort that could best be developed, in our view, through proposals for internet protocols developed by web experts in consultation with state legislators and administrators.

The following drafts select the current marriage code of Massachusetts as a starting point for possible e-marriage provisions. Some are quite modest and avoid extending simple internet marriage to couples; others specify limitations relating to the citizenship of members of the couple or their connection to Massachusetts. The last suggested draft provides for a state study to design a complete protocol for e-marriage.

OPTION 1: Teleconferencing, Limitation to Recent Domiciliaries

Massachusetts Section 59 E-Marriage of Commonwealth Domiciliaries

A marriage may be solemnized for persons physically located in any place outside the Commonwealth by any of those persons designated in Section 38, provided that such marriage shall be conducted by live teleconferencing in which all parties can see and hear all other parties, the officiant authorized by the Commonwealth is located physically within the Commonwealth, and the parties to the marriage have been legal domiciliaries of the Commonwealth within the past two years. The participation in the ceremony by teleconferencing shall be deemed to be legal presence within the Commonwealth for purposes of establishing the Commonwealth's jurisdiction over the parties. The officiant shall fully comply with all provisions of Chapter 207. Marriage specifying the obligation of the officiant.

Massachusetts Section 28 Certificate of intention of marriage; delivery; time

[186] *See* Abrams, *supra* note 20, at 1626-28

ADD AT END Delivery of the certificate, signed by him in accordance with this section, by the clerk or registrar may be accomplished by electronic delivery in a form consonant with best practices for electronic delivery of official signatures on official documents.

OPTION 2: Teleconferencing, Limitation to U.S. Citizens

Section 59 E-Marriage by United States citizens

A marriage may be solemnized for United States citizens physically located in any place outside the Commonwealth by any of those persons designated in Section 38, provided that such marriage shall be conducted by live teleconferencing in which all parties can see and hear all other parties and the officiant authorized by the Commonwealth is located physically within the Commonwealth. The participation in the ceremony by teleconferencing shall be deemed to be legal presence within the Commonwealth for purposes of establishing the Commonwealth's jurisdiction over the parties. The officiant shall fully comply with all provisions of the Chapter 207. Marriage specifying the obligations of the officiant.

OPTIONAL ADDITION: Authorization of Study of E-Marriage Formats

Section 60 E-Marriage Study by Governor of Commonwealth; Issues; Public/Private Collaboration; Schedule

The Commonwealth desires to develop a procedure for marriage to be solemnized by means of remote communication for persons physically located in any place outside the Commonwealth by any of those persons designated in Section 38, either designed and administered by the state secretary or other appropriate department of the Commonwealth, or designed and provided by e-marriage providers certified by the Commonwealth of Massachusetts as E-Marriage Screening and Marriage Solemnization Massachusetts Web Services. The Governor shall conduct a study, with requests for proposals for e-marriage protocols, to determine the alternatives for implementing a system of e-marriage that makes marriage widely accessible to couples wishing to make use of the Massachusetts marriage law, provides counseling to marriage applicants consonant with risks identified as associated with remote marriage or desired by applicants who choose e-marriage for the purpose of heightened screening of the bona fides of the parties filing a notice of intention of marriage, provides state-of-the-art security against identity fraud and misstatements concerning material background facts, takes appropriate account of federal interests in regulating immigration, and establishes a schedule of fees advisable for extending such e-marriage service. By two years following this act, the Governor shall report to the General Assembly on his recommendations for a system of e-marriage in the Commonwealth, including specific recommendations for public/private collaboration in delivering e-marriage services sound in design and reliable in administration. The Governor is authorized to consult with business entities expert in wedding practices and internet business models, other states contemplating e-marriage services, and immigration officials and experts. As used in this section, "remote communication" means any means by which one party may indicate an intention to be bound without being physically present with the

officiant or the other party; it may, but need not, be a form of remote communication in which the parties and the officiant are simultaneously able to make their presence known.

VI. Conclusion

E-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 probing the background and motives of both parties, 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 rely 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 choose the level of ritual and regulation they wish to a much greater degree than ever before.

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, e-marriage expands the expressive value of the marriage ceremony.

We recognize that, for some gay couples, the power of having the marriage is the power of 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, e-marriage is not optimal but it could offer significant satisfaction and happiness nonetheless. In response to the culture wars, e-marriage offers a provisional cease-fire. Couples in marriage-hostile states could have it without persuading the most socially conservative adherents of Biblical claims about marriage.

Building on our federalist design, states might very well offer more attractive and convenient regulatory regimes. States will always have a regulatory interest in verifying identity and eligibility for e-marriage, just as with marriage. Taking advantage of the ease of internet verification, e-marriage gives the states the opportunity to re-examine procedures. Not only could states make their procedures less burdensome, archaic, and bizarre, they actually could further informed decision-making and prevent fraud, which is presumably the purpose of marriage formation regulation. Using internet technologies, important personal information could be cheaply exchanged.

We do not foresee a "race to the bottom" in marriage procedure because individuals have an interest in thorough marriage disclosure. Signaling problems no doubt prevent prospective couples from demanding detailed dossiers on their betrothed, and current state procedure does little to require disclosure. However, e-marriage creates the credible threat that a partner might suggest that the couple seek marriage licensing from a jurisdiction with disclosure requirements. Such a suggestion could be made innocently, as the choice could be attributed to some

idiosyncratic regulatory convenience the state's licensing regime offers. This threat, as well as the possibility of disclosure, might very well lead to better decision-making.

Our review of marriage history shows that marriage authorization has been remarkably flexible and not tied to territorial jurisdiction, only calcifying in recent years. It is therefore within the power of a state to authorize e-marriage, a legal proposition not immediately apparent. More broadly, to the degree a ritual must have historical bases to have power, e-marriage has such bases. E-marriage answers contemporary needs for convenience, defusing cultural conflict over marriage and furthering forgotten regulatory goals for informed decision-making in marriage formation. Consonant with our values, history, and constitutional structure, e-marriage can recover lost goals of marriage law, enrich traditions, and remove needless barriers to marriage for many couples.