COMPETITIVE FEDERALISM AND INTERSTATE RECOGNITION OF MARRIAGE

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INTRODUCTION

Recent proposals to recognize innovative forms of marriage (e.g., same-sex unions in Hawaii, covenant marriages in Louisiana) have generated a boom in the scholarly literature on the substantive merits of the proposals, as well as on the host of choice of law issues raised by them in a federal system. With respect to the latter issues, most of the writing employs tools of legal discourse familiar to students of conflict of laws. Under what choice of law principles can a state refuse to recognize a marriage performed or celebrated in another? To what extent do the Full Faith and Credit Clause and Act bear on that question? Is a marriage a public record, a judgment, or both? Is the Defense of Marriage Act ("DOMA") constitutional? How should it and its state counterparts be interpreted? And so forth.

I will address these questions from a somewhat different angle, from the perspective of economic and social science theory. My initial premise is to assume that these admittedly contested legal issues have been resolved in favor of state authority. That is, I will assume that there are no federal constitutional or statutory barriers to states taking any position with respect to recognizing the validity of a marriage performed in another state. Instead, I will in the main focus descriptively on how state courts and legislatures have approached recognition of sister-state marriages, and attempt to explain and evaluate those patterns with insights from the social sciences. While I will not pursue what states should be doing on this issue (from moral or other perspectives), or consider the legal issues listed above, some of my discussion might inform development of those issues.

The Article proceeds as follows. First, it considers how regulation of the validity of marriages has generally been left to the states,

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whether states have competed to have such ceremonies performed in their jurisdictions, and whether such competition is optimal in our federal system. Next, it addresses whether and how choice of law rules have facilitated or inhibited state regulation of and interstate competition with regard to marriage, and the apparent declining support for the venerable choice of law rule that the law of the place of celebration governs the validity of the marriage. Finally, the Article evaluates alternative choice of law rules for recognition of marriage, and considers whether federal intervention, through the Defense of Marriage Act or otherwise, is necessary or desirable to support the development of such alternative rules.

I. STATE REGULATION OF MARRIAGE IN A FEDERAL SYSTEM

A. FEDERALISM VALUES AND REGULATION OF MARRIAGE

The entire issue of interstate recognition of marriage would be moot, of course, if marital validity were governed by federal law. Why isn't this the case in the United States? Why hasn't the law of marriage (and other domestic relations and family issues) been federalized? Court opinions frequently point out that the states, and not the federal government, have since the founding of the republic exercised primary regulatory authority over marriage and related issues. Why the federal government has not taken a more active role is rarely dis-

1. It is of course true that the federal government, through federal constitutional law, tax and welfare legislation, and in other ways has increasingly subjected the marital institution and other family matters to national regulation. See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1721-29 (1991) (discussing various federal statutes regulating families). However, Anne Dailey rightly points out "that the core domain of family law, which includes marriage, divorce, child custody and support, alimony, property division, adoption, foster care, child welfare, and termination of parental rights, may properly be characterized as still 'belonging' to the state..." Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1821 n.113 (1995). That is, almost all of the substantive law governing the matters listed will be the particular law of one of the states, not that of the federal government.

2. For example, both the majority and one of the dissents in the much-discussed Commerce Clause case, United States v. Lopez, observed (albeit in dicta, albeit with virtually no discussion) that even expansive interpretation of the Clause would not justify federal regulation of "marriage, divorce, and child custody..." United States v. Lopez, 514 U.S. 549, 564 (1995); Lopez, 514 U.S. at 624 (Breyer, J., dissenting). See generally John P. Feldmeier, Federalism and Full Faith and Credit: Must States Recognize Out-of-State Same-Sex Marriages?, 25 PUBLIUS: J. FEDERALISM 107, 115-16 (1995). For an extensive discussion of and challenge to the apparent assumption of Lopez and other cases that Congress has been historically uninterested in marriage and other family law issues, see Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297, 1302 (1998), discussing the fact that "noninvolvement in family matters has hardly been the federal government's — or the Supreme Court's — consistent regulatory practice."
cussed. Much of the reason is probably historical inertia. The colonies, and then the states in the early republic, apparently adopted wholesale English domestic relations law.\(^3\) To be sure, until the New Deal most spheres of private and public life were left unregulated by federal institutions. It has been only late in this century that the federal government has made any effort to regulate marriage and its incidents, and then only indirectly. Given the historic and obvious importance of the family in our society, it is no shock that government has stepped in to regulate marriage. But the jurisdictional unit that has done almost all of the regulating has been the states. And the 'state in which the parties live as a family' has traditionally been acknowledged as having the greatest interest in regulating marriage.\(^4\)

The history of state regulation of marriage resonates with functional justifications for a federalist government structure. Among other values, power vested in the states in a federation can protect liberty by checking the aggrandizement of authority by the national government. Decentralization of power to states also makes it more likely that the diverse interests of many peoples in a large nation will be recognized and served by smaller government units. Similarly, different policies pursued by different state governments can in effect "serve as laboratories of experimentation," which experience can benefit other, observant states and the nation as a whole, should the federal government decide to act.\(^5\)

Anne Dailey has persuasively argued that these values are served by state, rather than federal, regulation of marriage. As she puts it, the "law of domestic relations necessarily promotes a shared moral vision of the good family life," and in confronting fundamental questions about "the rights and obligations of marriage . . . state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children."\(^6\) National politics is a poor vehicle to sort out these problems. States are not fungible, and each state has a particular history, geography, climate and population that may generate different cultural norms with regard to mar-


\(^4\) Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921, 940 (1998) (citation omitted).


\(^6\) Dailey, 143 U. Pa. L. Rev. at 1790.
riage.7 And because national law is difficult to evade, “[t]he existence of fifty bodies of state laws on the family provides some degree of choice for families who care to relocate and offers at least some opportunity for exit to families who feel themselves oppressed.”8

Similarly, as Andrew Koppelman has observed, if a “state need not be neutral concerning all controversial moral matters, and also that there is more than one decent and tolerable comprehensive moral view,” then a federalist model, “in which different regions are permitted to arrive at different answers,” provides one solution to grapple with difficult moral issues.9 Take, as an example, the issue of same-sex marriage. If Hawaii, or some other state, wishes to recognize same-sex marriage, so be it. But it does not follow that, given the highly controversial nature of such a recognition, that a national, uniform solution is appropriate. Rather, the values of federalism should be permitted to work, and the Hawaii experiment, if it indeed takes place, can be observed and evaluated by the rest of the nation.10 And, it would seem to follow, these other states should not be forced to subvert their solution to that of the experimenters through choice-of-law principles or otherwise.11

A less sanguine evaluation might look like this.12 There is no guarantee that the federalist solution will in fact yield a diversity of viewpoints. As this Article is being written, the Hawaiian litigation

7. Id. at 1875. Dailey mentions, but does not explore at length, alternative models for state treatment of marriage, such as simply not regulating the institution at all (presumably, not even through the lens of contract law), or permitting political subdivisions within a state to regulate marriage in potentially different ways. Id. at 1828. Such models are beyond the scope of the present article as well.

8. Daily, 143 U. Pa. L. Rev. at 1878. Dailey does argue that the federal government has a role to play in facilitating exit and settling interjurisdictional disputes. Id. at 1880-81. For a fuller discussion of this issue, see infra notes 70-82 and accompanying text.

9. Koppelman, 76 Tex. L. Rev. at 927-28. To be sure, excessive emphasis should not be placed on state boundaries in this regard. Different political subcultures are apt to exist in each state, particularly in large states like California or New York. Kramer, 47 Vand. L. Rev. at 1559. Kramer argues that states “have an important role to play in protecting individual rights,” and gives as an example “recent developments in the area of gay and lesbian rights, where states have been very active (on both sides) in the face of federal diffidence . . .” Id. at 1499 n.27. So while a state acts through its political institutions, it is nonetheless difficult to pretend that a state truly speaks with one voice on moral (or other) issues. Yet, as Vicki Jackson has pointed out, there are functional reasons for retaining state boundaries that cut across racial, ethnic and other lines. Such boundaries may force otherwise disparate groups in the state to cooperate, even on (or especially on) divisive issues. Jackson, 111 Harv. L. Rev. at 2221-22.


12. Dailey argues that while “the issue of gay marriage shows that state sovereignty does not eliminate moral uniformity altogether — significant diversity in the sphere of family regulation nevertheless exists.” Dailey, 143 U. Pa. L. Rev. at 1879.
with regard to same-sex marriage is not complete, and the experiment in that state may not eventually get underway, or be replicated in other states. Moreover, a national solution was (eventually, at least) imposed for what were at least at one time morally contested issues, such as slavery and interracial marriage. Proponents of federalism in family matters acknowledge the point but find it difficult to distinguish those issues from, say, same-sex marriage.\textsuperscript{13} Why does a ban against interracial marriage violate fundamental rights, while banning same-sex marriage does not? I am not arguing that moral and legal differences cannot be drawn between the two types of bans. Instead, I am questioning why a national solution is necessary for one but not the other.

B. RACES TO THE BOTTOM AND TO THE TOP

One way to approach resolving that dilemma is through the model of competitive federalism. According to its classic formulation,\textsuperscript{14} the governing unit of various jurisdictions can compete to provide public goods. Citizens unhappy with the goods provided can vote with their feet and go to another jurisdiction. A resulting market for public goods, including law itself, is thus created, which should in theory produce diverse menus of goods to satisfy differing citizen tastes, and allocate activity among jurisdictions in an efficient manner. The model depends on a number of assumptions, most critically the ability of a citizen to literally exit the jurisdiction, or escape the effect of that jurisdiction's law. The resulting jurisdictional competition should in theory produce a race to the top, making uniform national rules both unnecessary and undesirable.\textsuperscript{15}

However, such competition can produce a race to the bottom if a state exports its costs to noncitizens, or if other assumptions of the competition model do not obtain. In other words, the competition does not lead to optimum results if negative externalities are visited upon other states. In these circumstances, the federal government might be

\textsuperscript{13} See Dailey, 143 U. PA. L. REV. at 1881 & n.289 (discussing national solution by Supreme Court in \textit{Loving v. Virginia}); Koppelman, 76 TEx. L. REV. at 927 n.16 (stating that a region cannot violate any "fundamental liberty or equality right" or else "a federalist solution is inappropriate[,]" giving slavery as an example).

\textsuperscript{14} The seminal work is Charles Tiebout, \textit{A Pure Theory of Local Expenditures}, 64 J. Pol. Econ. 416 (1956).

\textsuperscript{15} See William W. Bratton & Joseph A. McCahery, \textit{The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World}, 86 Geo. L.J. 201, 207-16 (1997) (discussing the jurisdictional competition paradigm); Bruce H. Kobayashi & Larry E. Ribstein, Federalism, Efficiency and Competition 3-5 (Aug. 14, 1997) (unpublished manuscript) (on file with author) (examining the increased competition between two diverse theories concerning the economic efficiency of a federal system – that of state law makers seeking to overpower weak interest groups versus inherent competition in the federal system which limits state lawmakers ability to impose costs).
called upon to police the externalities by providing a national, uniform solution to the issue at hand.\footnote{16}

Until recently, the interjurisdictional competition model has not been vigorously applied to family law issues in general or marriage recognition in particular. Let us consider whether, and to what extent, states compete to celebrate marriages. Data breaking down the number of marriages by state (i.e., performed in the state) is found in the Appendix. The most recent data, from 1995, indicates that the overall marriage rate in the United States is 8.9 per 1,000 population. The marriage rates in almost all of the states hover slightly below or above that figure. Only three states are exceptions. Hawaii and Tennessee stand at 15.8 and 15.7, respectively, while Nevada is at an off-the-chart 88.1. It is not coincidental that the three states have higher marriage rates, as it is commonly reported that those states have actively sought to promote tourism by making it easier to marry within their borders.\footnote{17} This can be done by streamlining various marriage requirements within the state, such as eliminating waiting periods.\footnote{18}

Most Americans, it seems, do not travel far from the residence(s) of one or both partners to get married, hence the relatively similar marriage rate that obtains across most of the states. A few states do actively encourage marriages by non-residents to increase tourist


\footnote{18. Tennessee and Nevada, among other states, have eliminated waiting periods for marriage licenses and otherwise made it easier and quicker to celebrate a marriage. Jeff Zeleny, Trips Down the Aisle Turn Into Vacations as More Couples Marry Far From Home, Wall St. J., June 20, 1996, at B1. Nevada and Hawaii law makes no reference to a waiting period. Tennessee law states that there is no waiting period if the applicants are at least 18 years old; it is three days if either applicant is below that age. Tenn. Code Ann. § 36-3-104(b)(1) (Michie 1991 & Supp. 1995).}
business. To the extent there is competition among the states in this regard, it is more of a race to the top than to the bottom. In their recent review of the literature, William Bratton and Joseph McCahery have persuasively argued that the conditions that must obtain for optimal interjurisdictional competition (such as a large number of competing communities, costless mobility, perfect information, and no externalities) are rarely met. But they single out competition to confer legal status, including the setting of marriage rules, as meeting most of the conditions.

I think they are correct. All fifty states permit, under various conditions, many (though not all) persons to be married. Whatever their other circumstances may be, it is relatively easy for people to travel, if need be, to be married in a state different from their present or future residence. The one-time cost of travel may not be trivial, but neither is it likely to be a serious impediment. Information about the marriage requirements in various states is relatively easy to obtain and understand (no doubt facilitated by the tourist industry). The only doubt comes from the presence of spillover effects. Conferring marriage status can have effects beyond the married couple. Parents, children or former spouses in other states might have an interest in their union. The benefits and detriments of marriage are likely to be visited mainly in the state of residence, not in the state of celebration. But such externalities are difficult to quantify, to the extent they occur at all, and it would seem that they cancel out in the states that actively compete for marriages. Consider the tourist couple from, say,

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19. See Bratton & McCahery, 86 GEO. L.J. at 219-43 (discussing the consequences of relaxing the assumptions on which the model is based).


22. See Kobayashi & Ribstein, supra note 15, at 36 (stating that marriage “has arguably significant effects on those who lack a meaningful contractual interface with the married couple, including children and taxpayers who pay the cost of breakdown of the family”); Rasmusen & Stake, 73 IND. L.J. at 490 (noting effect on children who “have no opportunity to determine whether to recognize their parents’ marriage”).

23. See Kobayashi & Ribstein, supra note 15, at 36 n.182 (stating that external effects of marriage cannot be readily priced in markets). Consider as an example of this difficulty the argument that one state agreeing to (or being forced to) recognize, to some degree, a same-sex marriage performed in another state may have profound effects in the first state. To the extent at least some advocates of these marriages seek to transform a heretofore traditionally heterosexual institution, then recognizing these marriages from other states might give the stamp of approval to homosexuality. See
Nebraska, who travels to Nevada for a quick wedding and honeymoon. The benefits and detriments of that marriage, both to the couple and third parties, will be felt almost entirely in Nebraska. Nevada's sole benefit will be to retain tourist revenues.24

Contrast the resolution of the other morally contested issues mentioned above. To state the obvious, a national solution for slavery was justified based on (among other reasons) the lack of mobility and legal rights of American slaves prior to emancipation.25 The national resolution of bans on interracial marriage is a more difficult case from a competition perspective. In 1967, the Supreme Court, in Loving v. Virginia,26 held that antimiscegenation statutes violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.27 Was this national solution appropriate? The number of such statutes had previously declined, but sixteen states retained them as of the time of the decision.28 On the other hand, there is some evidence to suggest that these statutes were rarely enforced in the 20th century.29

RICHARD A. POSNER, SEX AND REASON 311 (1992) (stating that “permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality”); Richard F. Duncan, The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman, 6 WM. & MARY BILL OF RTS. J. 147, 163 (1997) (noting that laws permitting same-sex marriage might increase the acceptance of homosexuality); Linda C. McClain, Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage, 66 FORDHAM L. REV. 1241, 1251-52 (1998) (acknowledging that permitting same-sex marriage may transform the institution of marriage by questioning traditional roles, rights and duties based on gender). This stamp of approval is one that the second state seeks to avoid, it would seem, by not recognizing same-sex marriage in the first place. Nonetheless, it is difficult to ascertain how such effects would be priced in a market economy or otherwise quantified.

24. Nebraska and other states competing for marriages seek tourists in general, not just those who wish to be married. Hence, the public goods provided (tourism, marriage) are “bundled,” making it further difficult to tease out the externalities solely attributable to marriage competition. See Bratton & McCahery, 86 GEO L.J. at 222-25 (describing bundling of public goods and arguing that it reduces optimal competition).

25. To some extent the antebellum period can be characterized as an example of interjurisdictional competition with regard to slavery. The ultimate failure of choice of law rules to deal with the inevitable jurisdictional disputes during that period was one factor leading to the Civil War. Louise Weinberg, Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist, 56 Md. L. Rev. 1316, 1359-61 (1997).


28. Loving, 388 U.S. at 6 n.5. At one time or another, 41 states have had antimiscegenation laws. Peggy Pascoe, Miscegenation Law, Court Cases, and the Ideologies of “Race” in Twentieth-Century America, 83 J. Am. Hist. 44, 49 (1996). In the 15 years prior to Loving, 14 states repealed their statutes. Loving, 388 U.S. at 6 n.5.

29. PAUL C. ROSENBLATT ET AL., MULTIRACIAL COUPLES: BLACK AND WHITE VOICES 5-6 (1995) (citing D.L. Kitchen, Interracial Marriage in the U.S. 1900-1980 75 (1993) (unpublished dissertation, University of Minnesota) (indicating that as early as 1910, some 73% of interracial married couples lived in states where such marriages were illegal). Furthermore, almost all of the conflict of laws cases raised by such laws were decided prior to 1950. See Koppelman, 76 TEX. L. REV. at 949-62 (discussing such pre-
The best argument in favor of a national solution comes from the realization that interracial marriage bans had their origins in animus against black Americans, and a resolution grounded in the Reconstruction Amendment to the federal constitution is thus appropriate.30

Thus, the race to the top characterization seems correct. However, perhaps that conclusion comes too easy. Richard Revesz reminds us that externalities or lack thereof are not the only component of the proper characterization.31 Whether a race is to the bottom or the top unavoidably seems to have a normative component.32 To some, the spectacle of a few states clamoring to perform many quickie marriage ceremonies devalues, trivializes and ultimately undermines the institution.33 Prior to the widespread adoption of no-fault divorce, Nevada was often derided as a divorce haven.34 Why are Hawaii, Nevada and Tennessee not derided as marriage mills? Perhaps it is sim-
ply reflective of the widespread assumption that marriage is a good thing on the whole, especially as compared to divorce. Better to have too many marriages than too few.

Analogous characterization issues are raised when considering the profusion, since the mid-1990's, of “little DOMA's” in many of the states. Three years ago Jennifer Gerarda Brown predicted that Vermont and Alaska would follow Hawaii's lead (all being small in population, relatively homogeneous, politically liberal states) in recognizing same-sex marriage. The primary reason she advanced was the states' presumed desire to attract tourism dollars from gay couples who wanted to marry. To date, her predictions have not come about. Indeed, a majority of the states have taken the opposite tack, passing legislation in various forms that purport to deny recognition of same-sex marriage performed in that state, or elsewhere, or both.

In a smaller number of states such legislation is still pending or has been rejected. The relatively rapid diffusion of these laws is due no doubt to interest group pressures and the high salience of the issue.

35. An assumption with considerable empirical support, to be sure. Steven Flanders, The Benefits of Marriage, 124 PUB. INTEREST 80 (Summer 1996). Analogously, jurisdictional competition for divorce may be viewed as a race to the bottom. The complex choices of laws governing divorce usually permit one partner to obtain an ex parte divorce in his or her domicile. Wasserman, 39 WM. & MARY L. REV. at 29. And, while there may be benefits and detriments to the couple and third parties flowing from a divorce, the detriments are more quantifiable and overall, it seems fair to conclude, most people rank marriages over divorces. See Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. LEGAL STUD. 869 (1994) (noting that while marriage as an institution imposes some significant burdens upon the parties involved, overall the "opportunism" it affords generally outweighs the conveniences of a no-fault divorce).


38. The seminal work on adoption of legislation is Jack L. Walker, The Diffusion of Innovations Among the American States, 63 AM. POL. SCI. REV. 880 (1969). For a summary of the considerable literature since then, see James M. Lutz, Regional Leaders in
At least some of the states that have, so far, declined to pass such laws are, as suggested by Brown, those places considered more politically liberal (e.g., Vermont, Wisconsin, Maryland, Colorado). As a whole, are state legislatures racing to the bottom or the top? I believe it depends largely on one's substantive views of the merits of the legislation, given the ambiguous nature of the externalities in question.

II. FEDERALISM, MARRIAGE RECOGNITION, AND CHOICE OF LAW

A. CHOICE OF LAW AND COMPETITIVE FEDERALISM

Choice of law rules utilized by courts are closely related to models of competitive federalism. Those rules help determine whether the optimal conditions for the model obtain, such as a state exporting or internalizing its costs, or the ability of citizens to exit or enter a state's regulatory stance. Any given choice of law regime will not necessarily facilitate or inhibit competition between states. It will depend on the latitude given courts by the particular choice of law rules, and the incentives of state courts to act in parochial or reciprocal manners.

Consider several illustrative examples. Perhaps the best known is Delaware's phenomenal success in attracting charters for large corporations. The internal affairs doctrine, whereby the state of incorporation guides the management of corporations, helps determine whether Delaware is the optimal location for incorporation. Any given corporation will not necessarily prefer Delaware, however, as it will depend on the latitude given Delaware courts by the particular choice of law rules, and the incentives of state courts to act in parochial or reciprocal manners.

Public choice theory emphasizes the role of rent-seeking interest groups, and thus, is in tension with the more optimistic public interest goals of jurisdictional competition models. Bratton & McCahery, 86 GEO. L.J. at 213-14; Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 GA. L. REV. 49, 68-74 (1989). To the extent nationally-based interest groups are waging the war over little DOMA's, it would seem to undermine the optimal functioning of the competition model. See generally Thomas S. Ulen, Economic and Public-Choice Forces in Federalism, 6 GEO. MASON L. REV. 921 (1998).


A recent study applying diffusion models to the proliferation of little DOMA's in the states came to the conclusion that these laws were often the result of organized lobbying by conservative religious groups, rather than the result of regional communications between state officials, and were impacted by the internal characteristics of the state in question. Donald P. Haider-Markel & Alesha M. Doan, Bonfire of the Righteous: Geographically Expanding the Scope of the Conflict Over Same-Sex Marriage 7-13 (April 1998) (unpublished manuscript) (on file with author). By the same token, it is undisputed that liberal interest groups (i.e., the Lambda Legal Defense and Education Fund and the ACLU) supported the Hawaii litigation and otherwise campaigned for laws friendly to same-sex marriages or partnerships. David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 BYU J. PUB. L. 201, 225 (1998); H.R. REP. No. 664, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 2419) 2905, 2907-08 & n.7.

ration supplies the substantive law in such matters no matter where the company actually does business, is credited (or blamed) for Delaware's success. On the other hand, it has been argued that modern choice of law rules in products liability cases produce a race to the bottom, because they often lead to pro-forum and pro-plaintiff results, and force out-of-state manufacturers to internalize the costs and spread them to the entire nation. Finally, Bruce Kobayashi and Larry Ribstein have recently argued that optimal competition among states regarding contract law and other regulatory regimes can be usefully facilitated by greater enforcement of choice-of-law clauses in contracts.

B. THE RISE, FALL, AND REHABILITATION OF THE CELEBRATION RULE

Assuming, as argued in Part I, that states can optimally compete for marriage celebrations, what role have choice of law rules played in that competition? The First Restatement provided that most issues of marital validity would be governed by the law of the place of celebration, subject to the exception of violation of a strong public policy of the place of domicile. Many of the lex loci rules of the First Restatement were abandoned by the policy-oriented approach of the Second Restatement, but the provisions regarding marriage were largely left intact. The celebration rule is also codified in those states that have

40. The leading article arguing that Delaware's success was a race to the bottom, ultimately harmful to investors and suggesting the need for federal action, acknowledged the role played by the internal affairs choice of law rule. William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663, 669 (1974). More recent work, much of which argues that chartering in Delaware has been beneficial to shareholders and thus a race to the top, makes the same point. Roberta Romano, State Competition for Corporate Charters, in The New Federalism: Can the States be Trusted? 129, 147 (John Ferejohn & Barry R. Weingast eds., 1997).

41. See Michael W. McConnell, A Choice-of-Law Approach to Products-Liability Reform, in New Directions in Liability Law 90 (Walter Olson ed., 1988); Solimine, 24 GA. L. REV. at 50, 69-70 (stating that modern choice of law rules can lead to a race to the bottom and are pro-resident and pro-forum). The argument has been contested. See Bruce L. Hay, Conflicts of Law and State Competition in the Product Liability System, 80 GEO. L.J. 617, 617-18 (1992) (disputing that "apparent pro-plaintiff in both legislation and adjudication are mutually reinforcing and produce excessive aggregate manufacturer liability"); Thomas A. Eaton & Susette M. Talarico, Testing Two Assumptions About Federalism and Tort Reform, 14 YALE L. & POL'Y REV. 371, 377 (1996) (disputing that states are in a race to the bottom). For a brief overview of the debate, see Bratton & McCahery, 86 GEO. L.J. at 212 n.43, 276 n.306.

42. See Kobayashi & Ribstein, supra note 15, at 11-32 (discussing choice-of-law contract clauses' effects on the efficiency of state regulation in the context of corporate law, laws regarding unincorporated firms, and franchise protection statutes).

43. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121, 132 (1934).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). In line with most other provisions of the Second Restatement, the rule is that the law of the state with the most significant relationship to the spouses will control validity, and adds that the law of the place of celebration applies unless it violates the "strong public policy" of another
adopted the Uniform Marriage and Divorce Act and similar validation laws.\textsuperscript{45}

At first blush, the celebration rule seems to have greatly facilitated the competition model for marriage validity. The rule in most cases was said to be predictable, led to uniform results, and was generally easy to apply.\textsuperscript{46} Because the rule meant that state courts would often apply the marital laws of another jurisdiction, it seems to be a textbook example of reciprocity.\textsuperscript{47} One state would utilize the other state’s law, confident that the other state would (usually) apply its marriage laws in the appropriate situation. And it was a low risk proposition, since the non-celebration state had the convenient escape device of the public policy exception if it felt that its interests were truly undermined by validating the marriage. Finally, it appears, the celebration rule did not lead to great differences of substance in marriage validity laws among the states.\textsuperscript{48}

Yet despite apparently working well, the celebration rule is now under attack. It is being explicitly rejected, in the same-sex marriage context at least, in those states that have passed little DOMA’s. Perhaps this portends a more general abandonment of the rule for all marriages. Or perhaps it is restricted to discomfort with recognizing same-sex unions celebrated in another state. The threatened demise of the public policy exceptions in these (and potentially other) cases no doubt undermines the rule.\textsuperscript{49} More generally, I think, there is a widening fracture of a previously shared consensus that the celebra-

\textsuperscript{45} For a discussion of the similarities and differences between the two Restatements on marriage validity, see Linda J. Silberman, \textit{Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values}, 16 QUINNIPIAC L. REV. 191, 198-201 (1996).


\textsuperscript{47} \textit{Restatement (Second) of Conflict of Laws} § 283 cmt. b (1971).

\textsuperscript{48} For application of the reciprocity theory to the development of choice of law rules, see Lea Brilmayer, \textit{Conflict of Laws} 169-218 (2d ed. 1995), and Larry Kramer, \textit{Rethinking Choice of Law}, 90 Colum. L. Rev. 277, 399-444 (1990). For application to marriage validity, see Note, 109 Harv. L. Rev. at 2042.

\textsuperscript{49} Silberman, 16 QUINNIPIAC L. REV. at 197 (stating that differences among states often turn on “matters of formalities, such as licensing requirements or the number of witnesses to the marriage; the more substantial restrictions often involved age requirements, where the differences in state regulation were relatively minor”).

\textsuperscript{49} Legally correct or not, the assertion that the public policy exception invalid under the Full Faith and Credit Clause and Act was relied upon by supporters of DOMA. H.R. Rep. No. 664, \textit{reprinted in} 1996 U.S.C.C.A.N. (110 Stat. 2419) 2905, 2912-13.
tion rule generally advances the interests of all states. The rule makes it terribly easy to evade the regulatory interests of the domiciliary state, by the mere expedient of leaving the state on the most temporary basis. The state of domicile, or residence, has a far greater long-term interest than the state of mere celebration.

III. TOWARD OPTIMAL CHOICE OF LAW RULES FOR MARRIAGE RECOGNITION

A. ALTERNATIVES TO THE CELEBRATION RULE

There is no shortage of contenders to replace the celebration rule. Even assuming one of them would eventually be adopted by all or most of the states (thus, in theory, insuring uniformity and predictability), all suffer from various infirmities. Some argue that marriages can be analogized to corporations, and that the place of celebration is like that of the place of corporate chartering. Thus, the argument runs, the celebration rule can be retained with a corporate law patina. The analogy to corporations is strained, however, given the presence of third party effects which are arguably external rather than internal matters. Unlike shareholders, who can presumably sell their stock if dissatisfied with the corporate chartering decision (or anything else), children, parents and others affected by a marriage have much less freedom to exit. Similarly, there is a considerable debate on whether marriages should be treated like contracts. Merely enforcing the choice-of-law clauses in such contracts would slight the interests of third-parties to the contract.

Other alternatives to the celebration rule seem to have more promise. A state could follow the central organizing principle of the Second Restatement, and apply the law of the most interested state — no matter where the marriage was celebrated. That analysis, alas, is not always predictable or easy to apply. For example, there is already a debate on whether the celebration state in a same-sex marriage has any interests worth protecting by virtue of that fact alone.

54. See Posner, supra note 16, at 158-62; Rasmusen & Stake, 73 IND. L.J. at 481-94 (analyzing the advantages and disadvantages of treating marriages like contracts).
56. The present Second Restatement provisions on marriage validity come close to doing that. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 & cmt. b (1971).
57. Compare Note, 109 HARV. L. REV. at 2041-42 (stating that celebration state does have an economic interest), with Koppelman, 76 TEX. L.J. at 942 n.63 (stating
A similar but more straightforward rule would be to apply the law of the domicile or residence of the parties to the marriage at the time of celebration. That state presumably has the strongest regulatory interest in the marriage and persons affected by the union. Indeed, the corporate law analogy seems more apt here. The problem is one of application; not all the persons (not even both parties to the marriage!) may have domicile or residence in the same state. Additionally, there are difficulties in a modern, mobile society in determining domicile or residence at the time of celebration, compounded by the problem of the effect of subsequent changes in domicile.\(^5\)

From a federalism perspective, then, “it is necessary to find a neutral principle that would preserve states’ viability as independent regulatory entities while facilitating exit and competition as constraints on excessive regulation.”\(^5\) Kobayashi and Ribstein suggest that one such principle in the present context would be a rule “that requires states to enforce other states’ marriage laws only to the extent that failure to do so would undercut the law even within the celebration state.”\(^6\) Such a rule, they argue, would promote competition among states without negating the regulatory interests of other states. Thus, one of the mainland states would not have to recognize a same-sex marriage celebrated in Hawaii, but would be obligated to recognize incidents of that status. Perhaps one example would be recognizing a

\(\text{\ldots} \) this interest is wholly derived from other states’ nonrecognition of same-sex marriages. In a federal system, no state can have a legitimate interest in helping domiciliaries of a sister state evade the legitimate operation of the latter state’s laws.\(^5\)

\(^5\) See Koppelman, 76 Tex. L. Rev. at 982-84 (discussing the need for a “law of the domicile” rule in the face of mobility); Mark Strasser, For Whom Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages, 66 U. Cin. L. Rev. 359, 352-56 (1998) (discussing recognition by a domicile state of a marriage not performed in that state).

Determining domicile has long been a problem in choice of law. See Eugene F. Scoles & Peter Hay, Conflicts of Laws 161-214 (Hornbook Series, 2d ed. 1992) (discussing those issues important in considering domicile). One problem with a domicile rule is exit and entrance costs. While Americans are quite mobile, it is presumably much easier to briefly visit a state as a tourist, than to move more-or-less permanently to satisfy a domicile requirement. See Margaret F. Brinig & F.H. Buckley, The Market for Deadbeats, 25 J. Legal Stud. 201, 210-11 & n.35 (1996) (indicating that from 1985 to 1990, about 21 million people, 9.4% of the population, moved to a different state). Such higher mobility costs may lessen interstate competition.

\(^6\) Kobayashi & Ribstein, supra note 15, at 38-39. Given their stated quest for a neutral principle, why doesn’t the present celebration rule, grafted with a public policy exception, serve that end? Kobayashi and Ribstein do not appear to directly address the point. However, elsewhere they argue that some choice of law rules may permit avoidance of even efficient state regulation and perhaps the celebration rule, taken alone, leads to this result. Id. at 33. And they are critical of courts’ use of a public policy exception to ex post invalidate the parties’ ex ante contractual choice of law. Id. at 6-7. Perhaps they are also skeptical of the exception’s utility in other circumstances, such as marriage validity.

transfer of land in Hawaii based on a marital law of Hawaii, at least if Hawaii retains significant connections to the marriage. One problem with their proposal would be the difficulties of one forum determining how much the policies of the other forum are being undermined.

I believe that the status quo — the place of celebration rule coupled with a public policy exception — would also satisfy their principle. Simply using a celebration rule permits the married couple to easily avoid the regulatory interests of their home state. A public policy exception protects that interest. To be sure, that exception has been criticized for its inconsistent and confused application in marriage cases, though I think the criticism has been overstated. Perhaps a more narrowly focused exception could be utilized.

The case that makes it hard to defend my proposal, I'll concede, is Loving. There, two residents of Virginia, Mildred Jeter (an African-American woman) and Richard Loving (a white man) were married in Washington, D.C. (which permitted such unions) and returned to Virginia. Does not my proposal attack the eventual result in Loving, which I earlier defended? A pure celebration rule would have forced Virginia to recognize the marriage. The public policy exception, in theory, permits Virginia to negate the marriage. This is all true, and illustrates that fidelity to competitive federalism principles can

61. A similar solution is suggested by Koppelman, 76 TEX. L. REV. at 987-89 (arguing that courts should recognize the same-sex marriages of domiciliaries of the celebration state who are transient within their borders).

62. At least one choice of law theory, comparative impairment, does make such an inquiry. See Solimine, 24 GA. L. REV. at 67-68 (noting complexity of such an inquiry); Kramer, 90 COLUM. L. REV. at 315-18 (noting complexity of such an inquiry).

63. See supra note 51 and accompanying text. Making this point conceded that inter-jurisdictional competition for marriage does generate some negative externalities, despite my more positive portrayal in Part I.B.

64. E.g., Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965, 1972-75 (1997) (discussing the problems arising from the varied application of the public policy exception by courts); Richard S. Myers, Same-Sex "Marriage" and the Public Policy Doctrine, 32 CREIGHTON L. REV. 45 (1998) (arguing that the "exception" is better seen as an application of standard interest analysis). Historical evidence shows that the exception has been employed in an even-handed way. See John P. Feldmeier, The Exception to the Rule: Public Policy Exceptions to the Full Faith and Credit Clause and their Role in American Federalism 139-41 (1996) (unpublished Ph.D. dissertation, Miami (Ohio) University) (on file with author) (illustrating survey of seventy published court opinions that discussed public policy exception to marriage celebration choice of law rule and that found that the exception was invoked in thirty five of the cases).

65. One way would be to ground the exception on specific marriage evasion or other relevant statutes (e.g., little DOMA's). Koppelman, 76 TEX. L. REV. at 987.


sometimes lead to uncomfortable results. One way out, as I argued above, is to conclude that a national, uniform resolution of the *Loving* issue was appropriate. Another way is to narrowly cabin the public policy exception. That can be done, as suggested above, by tying it directly to relevant state legislation. In *Loving*, this might require a statute directly addressing the effect of an extraterritorial interracial marriage.68 Or, the exception could be keyed to the effect of negative externalities, particularly on third parties, in the home state. It is difficult to make the case that there are such externalities regarding interracial marriages.69 Under that view, *Loving* is correctly decided. In contrast, such externalities might be more readily discernable if, say, an underage couple runs off to another state to get married.

B. THE DEFENSE OF MARRIAGE ACT AND OTHER FORMS OF FEDERAL INTERVENTION

The suggested solution by Kobayashi and Ribstein is a federal one, though they do not elaborate on the point.70 Likewise, other suggested choice of law rules for marital recognition appear to call for a uniform, federal rule.71 This would be quite unusual for implementation of choice of law rules. Almost all such rules are premised on voluntary decisions by state supreme courts. The widespread adoptions of the First and Second Restatements are the best examples.72 Volun-

68. Alas, in *Loving*, there was such a law. *Loving*, 388 U.S. at 4.

69. For the most part, it appears that antimiscegenation laws were enacted for the frank purpose of keeping the races separate, and of publicly defining and supporting the purported “inferiority” of blacks. *See David H. Fowler, Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic State and the States of the Old Northwest, 1780-1930* 233 (1987). There seems to have been little if any effort to justify such marriage bans on functional grounds, i.e., regarding any purported effects to the polity as a whole, or to persons besides the two people desiring to marry. *Cf. Fowler, supra* note 69, at 215 (stating that unlike the strong justifications supporting the caste systems in India and South America, North America had comparatively weak support). To be sure, in modern times it is not unusual for ethnic or religious groups to frown upon marriages with members outside of the group. But those policies are not enacted into positive law by states.

70. *See Kobayashi & Ribstein, supra* note 15, at 39 (referring to a “federal rule”).

71. *Cf. Kramer, 106 Yale L.J.* at 1999 (stating that, in reference to the public policy exception, states should be permitted to utilize any kind of choice of law rule for marriage validity, but that such rules “cannot be designed or selectively manipulated to disfavor particular laws because their content is deemed especially odious”); Koppelman, 76 Tex. L. Rev. at 982-88 (discussing various approaches, and apparently calling for their uniform (or mandatory?) adoption by the states).

tary adoption of a Restatement, or of a Uniform Act, is of course quite different from imposition of a mandatory federal rule. 73

Federalized choice of law rules can in theory facilitate and encourage inter-jurisdictional competition. 74 Critics of perceived races to the bottom often call for such rules as the solution. For example, some have argued that federalized choice of law rules would cure races to the bottom in products liability litigation. 75 The efficacy of such rules to determine the validity of marriage is, however, problematic. I argued, in Part I, that state competition to celebrate marriage is more of a race to the top than to the bottom. Given that premise, the present choice of law regime (i.e., the place of celebration rule with the public policy exception) seems to have worked reasonably well, and no federal intervention is necessary. To the extent the present regime is suboptimal, it is not static and states are free to experiment with or adopt other rules. As with the Restatements, states can gradually adopt a new rule, or refuse to, as they see fit. Consider some version of the domicile rule for marriage recognition. If some states believe that such a rule better reflects their interests, then they can adopt it. Other states may wish to retain the celebration rule. 76 The result may be a patchwork of choice of law rules, because not all states may settle on one rule. But that is true today with respect to all choice of law rules.

To be sure, even advocates of the primacy of a state law role in family law regulation acknowledge a role for the federal government,

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75. See McConnell, supra note 41, at 97-100 (calling for federal choice of law rule of place of sale of product); Solimine, 24 Ga. L. Rev. at 89-90 (calling for federal choice of law rule of place of sale of product); Michael H. Gottesman, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 Geo. L.J. 1 (1991) (calling for a federal choice of law rule). An alternative solution is to federalize the substantive law at issue.

76. The evolutionary process may be complicated. Interest groups supporting tourist-related marriages in Hawaii and Nevada will be unhappy that other states are abandoning the celebration rule. So too might be citizens of the domicile-rule states who can no longer marry on their tours, confident that their home state will (usually) recognize the marriage. These pressures may influence state courts and legislatures to retain the celebration rule, perhaps with a reinvigorated public policy exception. On the other hand, the celebration rule would have less support if that exception were deemed unconstitutional or otherwise fell into disfavor.
which can insure rights to exit and settle jurisdictional disputes.\textsuperscript{77} But those are less of a problem for the issue of marriage validity. The costs of exit and entrance are low. Spillover effects, while not negligible, are not in my view overwhelming. Indeed, the federal government has acted with respect to child custody disputes, where third-party effects proved intractable for the states.\textsuperscript{78} Congress acted only after the states failed to cooperate.\textsuperscript{79} Similar failures for the possible new rules of marital validity in Hawaii, Louisianan, and perhaps elsewhere have yet to manifest themselves.

What does this have to say for the Defense of Marriage Act?\textsuperscript{80} Again, I operate under the contested assumption that the Act is a constitutional exercise of Congressional power. If states are free to reject or modify their celebration rule in order to respond to the prospect of recognizing same-sex marriages in another state, they would seem to be able to do that without federal aid. But if that freedom is limited by federal constitutional law, then federal action seems necessary to permit states the option of creating optimal choice of law rules in this regard.\textsuperscript{81} Moreover, there is no consensus on the optimal choice of law

\textsuperscript{77} Dailey, 143 U. Pa. L. Rev. at 1880-81. Of course, the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, was the initial action by the federal government to police interstate choice of law matters. See Baker v. General Motors Corp., 118 S. Ct. 657, 663 (1998) (discussing the purposes of the Clause briefly). There appears to be little discussion of the Clause from a competitive federalism perspective. See Posner, supra note 16, at 695-714 (discussing economics of federalism, with no discussion of the Clause); Richard A. Posner, The Constitution as an Economic Document, 56 Geo. Wash. L. Rev. 1, 4 (1987) (discussing the economics of the constitution with no discussion of the Clause). But see Posner, 95 Mich. L. Rev. at 1586 n.14 (discussing the Clause briefly, conceding that it may pose "difficulty . . . for experimenting at the state level with same-sex marriage"). The need for the Clause can be defended on functional grounds. The forum rendering the judgment at issue has an interest in its finality and enforcement, while another forum may have an interest, depending on its own law and its connection to the litigation, in not enforcing the judgment. These conflicts are difficult to balance in any given case, and in any event would appear to cancel out over time with repeated litigation. See Roger C. Cramton et al., Conflict of Laws: Cases-Comments-Questions 418 (5th ed. 1993) (analyzing the Clause as an example of reciprocity). Indeed, there is some evidence that prior to the adoption of the Constitution, the states were independently adopting rules recognizing each other's judgments. Kramer, 90 Colum. L. Rev. at 344.

\textsuperscript{78} In 1980, Congress passed the Parental Kidnapping Prevention Act ("PKPA") to deal with this problem. See 28 U.S.C. § 1738A (1994).

\textsuperscript{79} See Wasserman, 39 WM. & MARY L. Rev. at 59 & n.247 (stating that one of the reasons PKPA was passed was that the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 123-24 (1988 & Supp. 1997), had only been adopted by thirty-nine states, and it was subject to differing interpretations in those that had).

\textsuperscript{80} See 28 U.S.C. § 1738C (1994 & Supp. 1998) (providing that states are not required to give effect to the public acts, records, or judicial proceedings of other states respecting same-sex marriages).

\textsuperscript{81} Kramer, 106 Yale L.J. at 1999. This was one of the express purposes of the DOMA. H.R. Rep. No. 664, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 2419) 2905, 2913-14. Kramer argues "that the costs — to the values of full faith and credit and to the goals of minimizing parochialism and maximizing interstate cooperation — of permit-
rule for marital validity, and until there is, it seems inefficient to freeze one into place through federal legislation.

The post-DOMA world in the states may not be the most elegant one. The flurry of little DOMA's passed, both before and after the passage of DOMA, are not close to being uniform, and will no doubt be subject to varying interpretations and applications if they are ever called into operation. But that was true of the state of the public policy exception prior to the advent of the same-sex marriage issue, as well.82

CONCLUSION

Competitive federalism models can inform the descriptive analysis of present and future trends in interstate recognition of marriage, as well as the normative content of the appropriate choice of law rule. I have focused on the relatively narrow issue of recognition of a marriage (and particularly same-sex marriage), and found that the competitive federalism model works reasonably well.83 This means that the optimal choice of law rule should be one that permits prospective spouses to enter and exit marital law with relative ease, without ignoring the legitimate regulatory interests of the domiciliary state. Perhaps the current celebration rule, augmented by a public policy exception, does this best.

82. Koppelman argues that DOMA will lead to a lack of uniformity, promote forum-shopping, and encourage "interstate warfare" if it is read to permit states to ignore same-sex marriage recognition embodied in judgments, not merely in substantive law. Koppelman, 76 Tex. L. Rev. at 974. Accord Andrew Koppelman, Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional, 83 Iowa L. Rev. 1, 22-23 (1997). His reading of DOMA is beyond the scope of this article, but I think he overstates the case. Even under the unanimous adoption of the celebration rule today, there is some lack of uniformity (given varying application of the public policy exception), and some forum-shopping. The latter is not necessarily a bad thing from the perspective of competitive federalism.

83. Other family law issues may call for more complicated analyses and results under competitive federalism models. See, e.g., Kobayashi & Ribstein, supra note 15, at 38-39 (discussing divorce and covenant marriages); O'Hara, supra note 74, at 13-17 (discussing pre- and antenuptial agreements); Rasmusen & Stake, 73 Ind. L.J. at 465 (discussing marriage contracts specifying grounds for divorce).
## APPENDIX

### Marriage and Divorce Rates By State: 1980 to 1995

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(NA) = Not Available
