

*University of Illinois College of Law*  
Law and Economics Working Papers

---

*Year 2004*

*Paper 9*

---

A Standard Form Approach to Same Sex  
Marriage

Larry E. Ribstein\*

\*University of Illinois, [ribstein@law.uiuc.edu](mailto:ribstein@law.uiuc.edu)

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/uiuclwps/art9>

Copyright ©2004 by the author.

# A Standard Form Approach to Same Sex Marriage

Larry E. Ribstein

## Abstract

This paper attempts to find a path through the recent constitutional thicket regarding same sex marriage by analogizing marriage to a business association. This analogy provides a way to evaluate the justifications for traditional rules banning same sex marriage – specifically, by emphasizing the advantages of providing distinct standard forms for different types of relationships. Under this approach, the same sex marriage prohibition might be justified by the need to preserve the precise boundaries of the marriage standard form. The business association analogy also highlights what is at stake in state laws prohibiting same sex marriage, and therefore helps determine the appropriate burden to impose on defenders of the prohibition. Like business associations, the validity of a marriage generally is governed by the law of the state in which the marriage is celebrated. This offers the potential of allowing couples, including same sex couples, to select not only from among the standard forms in a particular state, but also from the menus of standard forms offered by various states. This analysis helps assess the infringement on liberty involved in a state’s prohibition of same sex marriage. Moreover, as with business associations, permitting the interstate market for standard forms to operate would provide an evolutionary approach to marriage laws that is preferable to the Court’s prematurely taking sides in the marriage debate.

## A STANDARD FORM APPROACH TO SAME SEX MARRIAGE

Larry E. Ribstein\*

Draft of September 21, 2004

### ABSTRACT

This paper attempts to find a path through the recent constitutional thicket regarding same sex marriage by analogizing marriage to a business association. This analogy provides a way to evaluate the justifications for traditional rules banning same sex marriage – specifically, by emphasizing the advantages of providing distinct standard forms for different types of relationships. Under this approach, the same sex marriage prohibition might be justified by the need to preserve the precise boundaries of the marriage standard form. The business association analogy also highlights what is at stake in state laws prohibiting same sex marriage, and therefore helps determine the appropriate burden to impose on defenders of the prohibition. Like business associations, the validity of a marriage generally is governed by the law of the state in which the marriage is celebrated. This offers the potential of allowing couples, including same sex couples, to select not only from among the standard forms in a particular state, but also from the menus of standard forms offered by various states. This analysis helps assess the infringement on liberty involved in a state’s prohibition of same sex marriage. Moreover, as with business associations, permitting the interstate market for standard forms to operate would provide an evolutionary approach to marriage laws that is preferable to the Court’s prematurely taking sides in the marriage debate.

---

\* Corman Professor, University of Illinois College of Law. Prepared for "The Implications of *Lawrence* and *Goodridge* for Recognition of Same-Sex Marriages and for the Validity of DOMA," Catholic University, May 20, 2004. Thanks to participants in that conference, Brian Bix, Tom Gallanis, Nelson Lund, David Meyer and Michael Solimine for valuable comments, and to Ryan Gwillim for research assistance.

<b>I. CONTRACTUAL CHOICE OF LAW</b>	<b>4</b>
<b>II. THE IMPACT OF THE RECENT CASES</b>	<b>6</b>
<b>III. A SECOND VIEW: STATUTORY STANDARD FORMS</b>	<b>8</b>
A. THE FUNCTIONS OF STANDARD FORMS	9
1. Contracting costs	9
2. Costs of litigation and legal advice	10
3. Framing effects	11
4. Signaling	12
B. EXCLUDING SAME SEX COUPLES FROM THE MARRIAGE FORM	12
1. Regulatory issues: the marriage subsidy	13
2. Effect on the interpretive network	15
3. Limitations on self-sorting	16
4. Framing and signaling effects	17
<b>IV. STANDARD FORMS, CHOICE OF LAW AND THE CONSTITUTION</b>	<b>18</b>
<b>V. CONCLUDING REMARKS</b>	<b>22</b>

There is a bitter culture and legal war raging over same sex marriage. Some see marriage as a moral foundation of our civilization and same sex marriage as a profound threat to the stability of marriage. Others see same sex marriage as the key battle in the war for gay rights. Still others may be agnostic about same sex marriage, but see laws banning same sex marriage as an unwarranted intrusion on liberty.<sup>1</sup> The courts have stirred the pot, most notably in the Massachusetts cases of *Goodridge v. Dept. of Public Health* (“*Goodridge*”)<sup>2</sup> and *Opinion of the Justices to the Senate* (“*OJS*”),<sup>3</sup> the Supreme Court’s opinion in *Lawrence v. Texas* (“*Lawrence*”),<sup>4</sup> and a Washington lower court decision, *Andersen v. King County*.<sup>5</sup>

This paper attempts to find a path through the thicket of moral absolutes and legal complexity by analogizing marriage to a business association. The analogy is plausible

---

<sup>1</sup> See Richard A. Epstein, *Live and Let Live*, Wall St. J., July 13, 2004 at A14.

<sup>2</sup> 440 Mass. 309, 798 N.E.2d 941 (2003).

<sup>3</sup> 2004 WL 202184 (Mass. 2004).

<sup>4</sup> 123 S. Ct. 2472 (2003).

<sup>5</sup> 2004 WL 1738447 (Wash. Super., Aug. 4, 2004).

because both are long-term relationships featuring rules on issues like formation, dissolution, and ownership of assets. Indeed, some marriages *are* business associations. Before gay marriage was allowed anywhere, gay couples were using LLCs.<sup>6</sup>

The business association analogy offers two insights that could assist in resolving the marriage wars. First, the analogy provides a way to evaluate the justifications for traditional rules banning same sex marriage. *Lawrence* and *Goodridge* cast considerable doubt on traditional moral reasons for prohibiting same sex marriage, and therefore increase the demand for a more pragmatic analysis. The business association analogy emphasizes the advantages of providing different sets of rules, or standard forms, for different types of relationships. It also focuses attention on the most important issue in the same sex marriage debate – whether parties should be denied the right to use a standard form on the ground that it is inappropriate for their relationship. The challenge for the standard forms analysis is whether it can supply the sort of rationale for the same sex marriage prohibition that the recent cases demand.

Second, the business association analogy highlights what is at stake in state laws prohibiting same sex marriage, and therefore helps determine the appropriate burden to impose on defenders of the same sex marriage prohibition. Marriages are like business associations not only because both lend themselves to multiple standard forms, but also because the validity of a marriage generally is governed by the law of the state in which the marriage is celebrated. This offers the potential of allowing couples to select not only from among the standard forms in a particular state, but also from the menus of standard forms offered by various states. Most importantly for present purposes, same sex couples excluded from the standard forms in State A may be able to utilize the more liberal choice available in State B. The benefits of choice and experimentation, and the potential for ameliorating the costs of questionable restrictions, argue against judicially foreclosing the state process.

The article approaches these issues by presenting three views of marriage from the perspective of corporate law. Part I presents a non-constitutional analysis of marriage laws in the context of our federal system, drawing from my 2001 article with Frank Buckley on a choice-of-law approach to marriage.<sup>7</sup>

Part II introduces the constitutional framework that has become such an important part of the marriage debate. It shows how *Lawrence* and other recent cases demand refinement of the choice-of-law approach by undercutting the important moral justification for state restrictions on same sex marriage.

Part III presents an alternative analysis that emphasizes the function of statutory standard forms and the potential application of a standard forms approach to marriage law. This Part shows that there is significant justification for separate marriage-type standard forms and some support for blocking same sex couples, from using the specific marriage form.

Part IV discusses how the choice-of-law and standard forms analyses of Parts II and III illuminate the constitutional issues raised by same sex marriage. The standard

---

<sup>6</sup> See [www.relationshipllc.com](http://www.relationshipllc.com).

<sup>7</sup> F.A. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 ILL. L. REV. 561.

forms analysis shows that the notion of marriage as a “fundamental right” is unintelligible in light of the variety of legal packages the states are offering and can offer for ordering domestic relationships. The choice-of-law analysis suggests that, even if marriage is a fundamental right, it should be analyzed in the context of the national menu of domestic relationship statutes. This offers the important advantage over a constitutional resolution of the issue of providing an evolutionary and incremental approach to changing marriage law.

Part V contains concluding remarks, including some observations on the legal choices available in resolving the marriage debate.

## I. CONTRACTUAL CHOICE OF LAW

My 2001 article with Buckley proposed to analyze marriage from the perspective of contractual choice of law.<sup>8</sup> Like a corporation, whose internal governance is determined by the law of the state of incorporation, validity of a marriage is generally controlled by the law of the celebration state. It is also possible to use the analogy to an ordinary commercial contract. I found in an extensive study that choice of-law clauses in commercial contracts are quite generally enforced.<sup>9</sup> Both of these articles, in turn, draw from my and Erin O’Hara’s general economic and political insights on choice of law.<sup>10</sup>

A problem with this approach is that same sex marriage might not be treated like other marriage for choice of-law purposes. States might regard a foreign same sex marriage as invalid because they do not recognize the status of marriage.<sup>11</sup> Non-enforcement of a sister state’s celebration of the marriage might be consistent with the general conflict of laws “public policy” exception to enforcement of the laws of other states.<sup>12</sup> Prior to the constitutional cases discussed in Part II, it is unlikely that there were any constitutional constraints on states’ non-recognition of foreign marriage.<sup>13</sup>

It is not clear how same sex marriage ought to be treated from a choice of law perspective. One approach is to ask to what extent a rule of interstate recognition might impose costs in the enforcement state. This is a particularly complex problem when costs can include intangible effects. States might be thought to have a legitimate interest in

---

<sup>8</sup> See *id.* For a similar effort that was published around the same time, see Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255 (2002).

<sup>9</sup> See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 Ga. L. Rev. 363 (2003).

<sup>10</sup> See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).

<sup>11</sup> See Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS 433 (2d ed. 1992).

<sup>12</sup> See, RESTATEMENT (SECOND) OF CONFLICTS, §283(2) (1971); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?* 32 CREIGHTON L.REV.29 (1998).

<sup>13</sup> See Buckley & Ribstein, *supra* note 7 at 603-06. For a recent review of the state and constitutional law on this issue, see Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, \_\_ CREIGHTON L. REV. \_\_ (2005).

defining norms and preferences.<sup>14</sup> On the other hand, restricting same sex marriage denies social approval to a significant group of people.<sup>15</sup>

A choice-of-law rule that lets states deny local marriage but requires them to enforce foreign same sex marriages for most purposes arguably is a useful compromise between the state and individual interests in prohibiting and in permitting same sex marriage.<sup>16</sup> Prohibiting in-state marriage allows states to preserve their version of marriage-related norms. At the same time, enforcing out-of-state marriages for many purposes supports other states' policy on this issue.

Questions remain concerning which aspects of foreign marriage residence states should enforce. States clearly do enforce family-type contracts such as ante-nuptial agreements.<sup>17</sup> It follows that they should be willing to provide and enforce statutory standard forms, including marriage, that have analogous provisions.<sup>18</sup> Therefore it is necessary simply to determine the extent to which marriage is like an ordinary contract and enforce those aspects interstate. This would include contracting for control, division, acquisition, and disposition of community property, spousal support and post-divorce property division.<sup>19</sup> On the other hand, states would not have to recognize tax treatment, child custody arrangements, privilege and confidential marital communications, exemption from attachment or execution, the right to bring a wrongful death action.<sup>20</sup> In other words, states could decide the extent to which they want to subsidize marriage or force third parties to recognize marital status.

By preserving states' power to decide the extent to which they want to signal acceptance of homosexuality in general, and same sex marriage in particular, a choice-of-law approach lets states experiment and people vote with their feet. This, in turn, facilitates evolution of popular attitudes on this controversial subject. At some point, society as a whole may come to accept the notion that same sex couples should have the same right to marry as heterosexual couples, just as society ultimately came to adopt women's suffrage by Constitutional amendment rather than by an expansive judicial interpretation of the Constitution.<sup>21</sup> This would be an alternative to Cass Sunstein's

---

<sup>14</sup> See *id.* at 584-87.

<sup>15</sup> *Id.* at 580.

<sup>16</sup> *Id.* at 590-92.

<sup>17</sup> See Brian H. Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WILLIAM & MARY L REV. 145 (1998)

<sup>18</sup> See Buckley & Ribstein, *supra* note 7 at 596.

<sup>19</sup> See Jennifer Gerada Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 747, 785-86 (1995); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 902-04 (1988).

<sup>20</sup> See Buckley & Ribstein, *supra* note 7 at 599.

<sup>21</sup> See Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456 (2001) (discussing nineteenth century movement to obtain judicial recognition of

consensus approach to evolution of Constitutional doctrine,<sup>22</sup> except that the consensus would evolve rather than being imposed by judicial fiat.<sup>23</sup>

In short, the contractual choice of law analogy provides a promising way to compromise seemingly polar positions on same sex marriage. Neither side in the marriage wars wins a total victory, but neither suffers total defeat. Ultimately, the two sides may evolve a compromise rather than remaining in separate armed camps, as happened with abortion and slavery when the Court prematurely declared winners in these battles.

## II. THE IMPACT OF THE RECENT CASES

*Lawrence* and other cases have forced a reexamination of the view presented in Part I. That analysis was predicated on the constitutional validity of the same sex marriage exclusion based on what had seemed to be states' legitimate role in providing moral guidance and shaping norms and preferences.<sup>24</sup> However, in overturning a Texas sodomy law on broad substantive due process grounds the Court cast significant doubt on this basis for validating state laws.

*Lawrence* is salient on two important aspects of the same sex marriage issue. First, in overruling its earlier sodomy case, *Bowers v. Hardwick*,<sup>25</sup> the Court emphasized that the "liberty interest" that was entitled to due process protection was not merely one to engage in a particular act, but more generally to choose a homosexual lifestyle without condemnation by the state. The Court reasoned that the statutes "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."<sup>26</sup> The Court concluded:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.<sup>27</sup>

In short, Due Process guarantees homosexuals not merely the right to engage in particular activities, but also to regulation that accords them "respect," at least in a case involving criminalization of homosexual conduct.

Second, *Lawrence* bears on acceptable state rationales for regulation that implicates homosexuals' due process rights. The *Lawrence* majority observed that

---

women's right to vote).

<sup>22</sup> See Cass R. Sunstein, *LEGAL REASONING AND POLITICAL CONFLICT* (1997).

<sup>23</sup> See Buckley & Ribstein, *supra* note 7 at 602-03.

<sup>24</sup> See *supra* text accompanying note 14.

<sup>25</sup> 478 U.S. 186 (1986).

<sup>26</sup> 123 U.S. at 2478.

<sup>27</sup> *Id.* at 2484.

condemnation of homosexual conduct “has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>28</sup> Thus, “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. . . . ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”<sup>29</sup>

Justice Scalia, dissenting, emphasized the breadth of the Court’s decision, pointing out that it is difficult to distinguish from the Texas sodomy statute

criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. . . . This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

It is not clear how or whether *Lawrence* applies to marriage. The Court emphasized the general liberty to pursue homosexual relationships “absent injury to a person or abuse of an institution the law protects.”<sup>30</sup> It also said that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>31</sup> With regard to her equal protection argument, Justice O’Connor noted:

Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted state interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.<sup>32</sup>

She also said that her holding “does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review.”<sup>33</sup>

Despite this equivocal language, there is strong reason to believe that *Lawrence* applies to marriage.<sup>34</sup> Justice Scalia emphasized the difficulty of the task ahead for defenders of the same sex marriage ban. He noted that the Court “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual

---

<sup>28</sup> 123 S. Ct. at 2480.

<sup>29</sup> *Id.* (quoting *Casey*).

<sup>30</sup> *Id.* at 2478.

<sup>31</sup> *Id.* at 2484.

<sup>32</sup> *Id.* at 2487-88.

<sup>33</sup> *Id.* at 2487.

<sup>34</sup> See Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=534343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=534343) (noting that the case “certainly points toward the abolition of all laws denying any of the benefits of marriage, including the dignitary benefits associated with the term “marriage,” to homosexual couples”).

and homosexual unions, insofar as formal recognition in marriage is concerned” because such distinctions are based on “moral disapprobation of homosexual conduct” which is no longer a legitimate state interest.<sup>35</sup> Justice Scalia questions whether there could be any other justification for “denying the benefits of marriage to homosexual couple,” adding that “[t]his case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”<sup>36</sup>

The Massachusetts and Washington decisions, which directly concern marriage laws, convey worse news about the fate of the same sex marriage exclusion.<sup>37</sup> The *Goodridge* majority, in holding that the state’s same sex marriage ban violated the state’s equal protection clause, noted the “liberty interest” in choosing whom to marry.<sup>38</sup> It specifically rejected rationales for the same sex marriage exclusion based on procreation, child rearing and preserving state and private resources rationales. The majority in *Opinion of the Justices*, relying on *Goodridge*, held that the state cannot ban homosexuals from marriage because this would foster a “stigma of exclusion.”<sup>39</sup> *Andersen* held that Washington’s same sex marriage prohibition violated the privileges and immunities and due process provisions in the Washington Constitution. The court quickly dismissed justifications based on morality and tradition and, after a more extensive analysis, on the state’s interest in supporting families and children.

If *Lawrence* does apply to marriage, states will have to find some non-moral, non-religious ground for blocking same sex marriage. The rest of this Article provides some guidance in this task.

### III. A SECOND VIEW: STATUTORY STANDARD FORMS

Although there is ample room for debate on the cases discussed in Part II, particularly including whether the state should be able to legislate morality, I will leave those questions for others and work within the existing constitutional framework. I will therefore consider whether there are justifications for barring same sex marriage that the courts might recognize. Specifically, is there a non-“moral” basis for restricting marriage by same sex couples?

The analysis in this part is based on my work on business associations, where the law provides for a multitude of statutory “standard forms” from which firms can choose. Separation between these standard forms allows for development of distinct and coherent

---

<sup>35</sup> *Lawrence* at 2498. It has been said that *Lawrence* defined the due process right in that case as one “not just to engage in sodomy, but to enjoy the government’s *respect* for engaging in sodomy.”

<sup>36</sup> *Id.*

<sup>37</sup> These cases’ implications for other states are unclear. The *Goodridge* court emphasized that the Massachusetts constitution is “more protective” of liberty and equality than the U.S. Constitution. 798 N.E. 2d at 948. *Opinion of the Justices* noted that the states have more freedom to enforce individual liberty than the federal government. 2004 WL 202184 at \_\_\_. *Andersen* relied on the Washington constitution.

<sup>38</sup> 798 N.E.2d at 960.

<sup>39</sup> 2004 WL 202184 at 4.

bodies of law suitable for different types of business relationships.<sup>40</sup> Based on this analysis, as discussed in Subpart A, there are strong arguments for distinct statutory standard forms for different types of family relationships.<sup>41</sup> Subpart B applies this analysis in attempting to answer the important question for present purposes: whether there is some justification for restricting use of the specific marriage standard form by same sex couples.

## A. THE FUNCTIONS OF STANDARD FORMS

This subpart discusses reasons why the state might have an interest in offering several distinct statutes that are suited for different types of family relationships. The following subsections discuss the roles of statutory forms in minimizing contracting costs, minimizing litigation, facilitating regulation of family relationships, and assisting in the application of social norms and signaling.

### 1. Contracting costs

Statutory default rules can reduce contracting costs. This is especially so in a long-term relationship where the parties, were they to bargain over their relationship, would have to foresee many eventualities and consider many contractual alternatives. However, the benefits of statutory default rules in reducing contracting costs for parties to a particular relationship depend on whether the statutory form provides default rules that suit that relationship.

Because of the importance of fit, states might reasonably provide different sets of default terms to suit different types of firms. With respect to business associations, for example, a small professional firm needs different rules than either a large, publicly traded corporation, a small professionally managed investment firm or a family business. The optimal number of standard forms depends on balancing the costs of promulgating and learning about forms against the benefits of reducing contracting costs by meshing default rules with types of relationships.<sup>42</sup>

People need the same range of standard forms to govern their personal relationships as for their business relationships – rules on formation, duties, dissolution and the like. This can be demonstrated by articulating the specific relationship for which the standard form called “marriage” is appropriate. This relationship traditionally has provided a suitable context for procreation, which is obviously important in a heterosexual relationship. This has implications for designing rules suitable to this relationship. Among other things, the marriage standard form fosters stability that is conducive to child-raising by impeding dissolution; provides inheritance rights for the children of the relationship; fosters close-knit collaboration between the spouses necessary for effective child rearing; and promotes fidelity so fathers can be more

---

<sup>40</sup> See Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L. Q. 369 (1995).

<sup>41</sup> For similar suggestions of offering a menu of options for domestic arrangements, see Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM.L.Q. 255, 265 (2002); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 810-11 (1994).

<sup>42</sup> See Larry E. Ribstein, *Limited Liability Unlimited*, 24 Del. J. Corp. L. 407 (1999).

confident the children they are supporting are their biological offspring.

Marriage rules supporting stability deserve particular attention.<sup>43</sup> There is an asymmetry inherent in the traditional heterosexual marriage. The wife invests in child-raising and home building in the early part of the relationship in the hope that she can later share in the fruits of higher earnings that the husband builds up in his career. But the husband might behave opportunistically because he can remarry later in life more easily than his wife can. The marriage standard form can protect against this opportunism by encouraging men to stay in the relationship. This might be done by restricting the availability of divorce. Though no-fault divorce is now widespread, elective share, community property, marital partnership and non-need-based alimony impede opportunistic exit by the breadwinning spouse.

Although the marriage standard form is appropriate for many heterosexual couples, there are also obviously many domestic relationships for which it is arguably inappropriate. For example, the asymmetry discussed above is not as prevalent in same sex as in heterosexual relationships. One survey of homosexual couples shows substantially egalitarian, rather than asymmetric, relationships: A partner stays home in only 5% of cases, the partners rarely have a significant income disparity and children were rare.<sup>44</sup> These and other differences between same sex and heterosexual couples suggest that there should be a separate standard form designed for same sex couples.

States might approach the differences among domestic relationships in other ways. Same sex couples may increasingly want to have children, particularly if the law offers them a legal relationship with marriage-like stability. These couples may then have relationships that are enough like those of heterosexual couples that they can share the same standard form. Alternatively, states might offer a distinct “married no children” standard form for both heterosexual and same sex couples who decide not to have children. Other couples, whether or not same sex and whether or not intending to have children, may want many of the default rules of marriage but without making a marriage-like commitment, such as a marriage with a defined but renewable term, a civil union or a domestic partnership.

## **2. Costs of litigation and legal advice**

The courts ultimately must decide the meaning and effect of contracts based on statutory standard forms. This depends to some extent on the contracting parties’ intent. It also may depend on legislative intent, where the court must decide whether a regulatory statute applies to a particular relationship.

Statutory standard forms can aid judicial determination of both types of intent, thereby reducing the costs and risks of litigating these issues. If there are multiple statutory forms, each with a coherent set of default rules, the parties’ decision to be

---

<sup>43</sup> See Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1987); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 25-37 (1990).

<sup>44</sup> See Antony W. Dnes, *The Life-profile Theory of Marriage, Cohabitation, and Same-sex Marriage*, 2004 Am. L. & Econ. Ann. Meeting, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1079&context=alea>.

governed by a particular standard form helps courts interpret their contracts.<sup>45</sup> For example, in business associations, where governance documents are ambiguous, courts may tend to circumscribe the power of managing general partners while assuming that corporate directors and general partners in limited partnerships have extensive inherent powers. In domestic relationships, the nature of the standard form may guide the courts as to such things as interpretation of ante-nuptial agreements and inheritance rights.

Statutory forms can reduce the costs of litigating issues and obtaining advance legal advice by encouraging the development of interpretive materials, including cases, treatises and legal forms.<sup>46</sup> A statute, by virtue of its prominence and publicity, is likely to attract more users than an equivalent private contract or privately developed standard form. A statute therefore will give rise to more cases, and lawyers and legal scholars will have more incentive to develop interpretive materials, than would be the case in the absence of a statutory form.

### 3. Framing effects

Conduct can be regulated not only by regulation and contracts but also by social norms. Violation of a norm produces an internalized punishment of shame or guilt.<sup>47</sup> The law assists in creating and enforcing norms by identifying particular conduct as violating norms.<sup>48</sup> For example, the law creates particular fiduciary relationships, such as partnership, in which the parties are expected to act with “the finest loyalty” rather than according to standards “permissible in a workaday world for those acting at arm's length.”<sup>49</sup> This has been characterized as a “framing” effect, where people’s behavior is influenced by whether their role calls for them to be self-interested or other-regarding.<sup>50</sup>

Characterizing the parties to a relationship as “married” encourages them to act according to the norms that have been associated with the marriage relationship. This includes acting as fiduciaries.<sup>51</sup> Also, married couples may be induced to behave faithfully, honestly and openly to each other, not only by specific legal consequences of

---

<sup>45</sup> See Ribstein, *supra* note 40 at 382.

<sup>46</sup> See Michael Klausner, *Corporations, Corporate Law and Networks of Contracts*, 81 Va. L. Rev. 757 (1995).

<sup>47</sup> See generally, Richard H. McAdams, *The Origin, Development, And Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

<sup>48</sup> See Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999).

<sup>49</sup> *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)

<sup>50</sup> See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

<sup>51</sup> Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2425 (1995) (stating that “[b]y establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty”).

misconduct,<sup>52</sup> but because they feel shame and guilt when they do not. Different, less stringent, norms may apply to casual acquaintances and to those who have entered into alternative domestic standard forms such as civil union or domestic partnership.

#### 4. Signaling

A standard form not only encourages the parties to act according to the rules of the relationship, but also enables them to signal their likely future behavior to others by their willingness to take on certain legal obligations. In particular, dissolution of the marriage triggers financial penalties and obligations as well as property sharing. Just as one who incurs debt and therefore risks the costs of bankruptcy signals that the firm is likely to be managed to avoid this event,<sup>53</sup> so couples who marry and risk the costs of divorce signal that they plan to stay together.

It follows that the mix of available legal standard forms helps determine the types of signals couples can send to each other. For example, alternative rules on breakup, including those in civil unions, renewable term marriages and covenant marriages, enable parties to send more precise signals about their willingness to commit to the relationship.<sup>54</sup> This is analogous to the signaling effects of choosing one or the other type of business association, each with its own set of mandatory rules.<sup>55</sup>

#### B. EXCLUDING SAME SEX COUPLES FROM THE MARRIAGE FORM

The main question for present purposes is what lessons can be drawn from this standard form analysis as to whether parties to particular relationships not only should be *able* to choose special standard forms that fit their relationship, but *barred* from a standard form, like marriage, that does not fit their relationship. As discussed above, while the marriage standard form may not now suit most same sex couples, it may suit some who choose to have children or others who want a stable relationship. Analogously, while the corporate and partnership standard forms have been designed for publicly held and closely held firms, respectively, there are both closely held corporations and publicly held partnerships. Why should firms or couples be constrained in their choice of form?

This raises the broader topic of the justifications for state interference in private parties' domestic arrangements.<sup>56</sup> As with other private arrangements, the state might

---

<sup>52</sup> For example, adultery may be a ground of fault-based divorce, which may determine rights on marital dissolution. See Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L. J. 773 (1996).

<sup>53</sup> See Stephen Ross, *The Determination of Financial Structure: The Incentive-Signalling Approach*, \_\_ BELL JOURNAL OF ECONOMICS 23 (1977).

<sup>54</sup> Couples also can send a commitment signal by choosing not to make pre-nuptial agreements that would reduce the cost of divorce. See Antonio Nicolo, et al, *Missing Contracts: On the Rationality of Not Signing a Prenuptial Agreement*, University of Padua Economics Discussion Paper No. 39-2003 (April, 2004), [http://papers.ssrn.com/paper.taf?abstract\\_id=555261](http://papers.ssrn.com/paper.taf?abstract_id=555261).

<sup>55</sup> See Reinier R. Kraakman, et al, *THE ANATOMY OF CORPORATE LAW*, 31 (2004).

<sup>56</sup> See generally, Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 University of Chicago Legal Forum 291; Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of*

legitimately refuse to enforce agreements that can injure non-parties. The most obvious non-party interest in marriage is that of children, but a relationship as important to society as marriage is likely to have other public ramifications. The state also might legitimately be concerned about the quality of judgments made by parties to the arrangement themselves given the emotional and long-term nature of marriage. The parties might behave irrationally, or their rationality might be “bounded” – that is, they may be seeing clearly but incompletely.<sup>57</sup>

As discussed in subsection 1, government might act, not by forbidding certain domestic arrangements, but simply by not facilitating or subsidizing them to the same extent as traditional marriage. Subsection 2 discusses justifications for the same sex marriage ban based on the need to preserve the interpretive value of the marriage standard form. Subsection 3 discusses whether we can rely on self-sorting by couples to ameliorate problems of fit between standard forms and particular relationships. Subsection 4 discusses the implications of same sex marriage for standard forms’ role in helping parties normatively frame their relationships.

### **1. Regulatory issues: the marriage subsidy**

By conferring benefits on the relationship defined in the marriage standard form that are denied those who enter into other domestic relationships, the state uses its resources to “channel” the parties into what it views as acceptable relationships.<sup>58</sup> Extending these benefits to same sex marriage might be thought to encourage the wrong types of relationships.<sup>59</sup> Analogously, extending the advantages of marriage to unmarried couples might encourage cohabitation.<sup>60</sup>

This, of course, simply poses the basic question in a new form – why should same sex couples be barred from taking advantage of the marriage subsidy? It would seem that the same things that make marriage good for heterosexual couples should make the state want to encourage same sex couples to use it. For example, for the sake of the partners and, especially, their children, we want heterosexual couples to marry rather than form a relationship that is less permanent or less concerned with the partners’ fidelity to or financial support for each other.

If the rationale for the marriage subsidy is focused on children, then the justification for limiting its availability might be that same sex couples are less likely than

---

*Their Citizens*, 55 U. MIAMI L. REV. 1 (2000); Brian H. Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WILLIAM & MARY L. REV. 145 (1998); Eric Rasmusen & Jeffrey E. Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L. J. 453 (1998); Michael J. Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in Peter Benson, ed., *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 45 (Cambridge 2001).

<sup>57</sup> See generally, Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

<sup>58</sup> See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

<sup>59</sup> See Richard A. Posner, *SEX AND REASON* 313 (1992).

<sup>60</sup> See Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 103 (2003).

heterosexual couples to have children. Accordingly, the state allocates resources to the most deserving relationships. To be sure, we let childless and even barren heterosexual couples marry. One might argue that the law cannot readily distinguish those heterosexual couples who plan to have children from those who do not. Even if we could set an age cutoff for births, there is still the possibility of adoption, even for older couples (for example, of grandchildren). Of course the same is true of same sex couples. But the state arguably only must do a reasonable, and not perfect, job of matching the reason for the subsidy to the class of those who are eligible for it. Cutting off eligibility according to the spouses' genders might be a reasonable classification.

There are, however, three problems with this argument. First, *Lawrence* indicates that the Supreme Court requires more justification than simply that the marriage standard form does not quite fit most same sex couples. If people have a fundamental right to participate in a homosexual relationship, marriage arguably should not be denied to same sex couples if some deserve the marriage subsidy even if most do not. Second, children are not the only reason for the marriage subsidy. The state arguably also has an interest in helping spouses commit to stable relationships. Third, if a concern for children does justify the marriage subsidy, then we must ask whether the children of same sex couples should be punished by denying them the stability of marriage.

The main response to these arguments, articulated by Justices Sosman and Cordy dissenting in *Goodridge*, is that the state has an interest in *discouraging* same sex couples from having children by barring them from the marriage subsidy. This brings in the protection-of-children rationale, while dealing with the concerns raised by giving the subsidy to childless heterosexual couples. Under this rationale, the question would be whether the costs of encouraging same sex parents to have children exceed the costs of barring marriage by same sex couples who have children.

The costs of encouraging same sex couples to have children cannot be fully evaluated because we still do not have significant long-term data about the welfare of children of same sex relationships. We also do not yet know if children of same sex couples are better off, or no worse off, if their parents are *not* married. The benefits for children of long-term monogamy may be limited to children of heterosexual parents. For example, the costs to children of parental separation might be mainly in growing up in a household without a parent of a particular gender, which would not be a problem in same sex marriages. Accordingly, such children might be better off if their parents separated than if they continued to live together in a loveless relationship.

These scenarios entail much speculation about costs and benefits of alternative arrangements. The question for present purposes is whether these are judgments states ought to be able to make. Though there is data on the effects of same sex relationships on children,<sup>61</sup> since legal sanctioning of same sex relationships is very recent, the data must be regarded as preliminary. What, then, should be the burden of proof on restricting same sex marriage? The court in *Andersen* noted that there were “no scientifically valid studies tending to establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple,” as compared with “the documented impact of children's exposure to domestic violence and

---

<sup>61</sup> See Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL. L. 291 (2001).

substance abuse in the homes of lawfully married heterosexual couples.”<sup>62</sup> Yet the conclusions underlying the same-sex marriage prohibition seem no more speculative than those the states make throughout family law and in many other areas. The court alludes to some requisite level of “documented impact” for family law legislation that is vague and elusive. Moreover, as discussed below in subpart IV.B., doubts about the correct rule support permitting experimentation under a state regime rather than shutting down this experimentation with a constitutional rule.

## 2. Effect on the interpretive network

The same sex marriage ban helps maintain the value of the case law, treatises and forms that add value to statutory law by facilitating interpretation. As discussed above, the development of these materials is an important justification for maintaining distinct statutory standard forms.<sup>63</sup> A coherent body of case law and background materials provides clarity and predictability that are especially important in long-term relationships. Permitting same sex couples to use the marriage standard form could reduce coherence by forcing courts and commentators to deal with disparate cases under the same statutory rules. Courts might relax or otherwise change rules in marriage to accommodate the different lifestyle situation of same sex couples. In particular, strict rules penalizing divorce may not survive if they cannot be justified by the risk of opportunism inherent in traditional heterosexual marriage. This argument for state intervention thus rests on the fact that the parties to domestic relationships cannot be expected to take into account the effect of their choice of form on the legal rules applicable to other parties in other relationships.

The effect on coherence depends on whether marriage rules crafted for same sex couples can be cabined within the particular category of cases involving such couples, or whether there is a significant risk that the same sex rules will be applied to heterosexual relationships. While the differences between same sex and heterosexual couples are apparent to courts and regulators, the difference in rules appropriate to the two groups may not be. For example, does the key difference between the two relationships concern the asymmetry between men’s and women’s life profiles that is more prevalent in heterosexual than in same sex relationships? If so, same sex partners whose relationships resemble those of heterosexual partners in this respect arguably ought to be treated like heterosexual couples for purposes of divorce and other marriage rules. Or is the difference between the two types of relationships inherent in the spouses’ gender, regardless of their particular relationship? For example, one might argue that both gay and straight men are less likely on average to interrupt their careers for children than both lesbian and straight women.

Even if different rules are appropriate for same sex than for heterosexual marriage, this might be accomplished by having different legislative consequences for two types of “marriage.” Labeling both standard forms “marriage” would avoid the stigma of denying marriage to same sex couples, while permitting states to make nuanced distinctions. Thus, we could have separate standard forms for “same sex marriage” and for non-“same sex marriage.” Then the debate would shift from marriage to the *consequences* of marriage. This is the opposite of the Massachusetts situation, where the same rights have different names, leaving only the stigma of a different name. But the

---

<sup>62</sup> *Andersen*, at \*10.

<sup>63</sup> *See supra* text accompanying note 46.

Massachusetts solution that *OJS* overturned was forced on the legislature by *Goodridge*, which forbade different treatment of same sex and heterosexual marriage. If different treatment is warranted, the state should be able to clarify its law by supplying standard forms that differ in more than name.

Corporate law presents an arguably appropriate analogy. Publicly held firms are not permitted to be “close corporations.” In such firms there may be a concern with dispensing with the board of directors, given the board’s arguable role in serving the multiple constituencies of publicly held firms.<sup>64</sup> Notably, however, these firms might dispense with a board in *other* forms, such as the limited liability company, while *closely held* firms can form board-less corporations through special close corporation provisions of some corporate statutes.<sup>65</sup> This indicates that what matters is not the particular rule or structure – that is, the presence or absence of a board – but a concern for preserving distinct rules in particular standard forms. Allowing board-less publicly held firms to use the corporate standard form might result in the creation of precedents and other interpretive materials for such firms that could carry over to conventional corporations. Forcing board-less firms to use a distinct standard form does not present this danger. Nor does permitting use of the corporate standard form by a distinct and clearly defined set of “close” corporations<sup>66</sup> present problems for the “standard form” corporation, provided that courts can readily separate the two contexts.

Same sex marriage may be different enough from heterosexual marriage with regard to applying marriage rules that interpretive spillover is unlikely. Yet this poses a conundrum. If courts may not be able readily to satisfactorily distinguish the relationships, this arguably supports a legislature’s segregating the relationships into separate forms in order to preclude interpretive spillover. On the other hand, if the relationships are inherently similar, this would seem to defeat a state’s justification for forbidding same sex marriage.

### **3. Limitations on self-sorting**

The above argument ignores the potential for self-sorting by couples. Only a subset of same sex couples may choose marriage if other, more suitable, standard forms are available. These couples might be those who are most eligible for treatment as married couples – that is, with a stay at home spouse. Accordingly, these couples should present little problem for the marriage standard form.

One problem with this response concerns the role of same sex marriage in the debate on social acceptance of homosexuality. Same sex marriage is being promoted by “norm entrepreneurs”<sup>67</sup> who seek to change society’s attitudes toward homosexuality by admitting homosexuals to the ultimate preserve of middle class acceptability. This

---

<sup>64</sup> See Larry E. Ribstein, *Why Corporations?*, forthcoming 2004 Berk. Bus. L. J. (discussing reasons for mandating board structure in corporations).

<sup>65</sup> See, e.g., Del G. Corp. L. §§341-356.

<sup>66</sup> For example, the Delaware close corporation provisions cannot be used by a firm that does not have a share transfer restriction in place. See *id.* §342(a)(2).

<sup>67</sup> See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining and explaining function of norm entrepreneurs).

encourages sex couples to marry whether or not an alternative available relationship would be more appropriate. At least some who rushed to marry in San Francisco contrary to California case or statutory law, despite the risk that a court ultimately would invalidate the marriage (as, indeed, happened<sup>68</sup>), seemed to be making a point as much as a commitment.

To be sure, many in the vanguard of the same sex marriage movement, including the name plaintiffs in *Goodridge*, are couples with long, committed relationships, some with children, who in many respects resemble conventional heterosexual couples. The court in *Andersen* wondered “if it clouds the Court’s view to decide a test case with a view to parties who may rise above the median in so many respects.”<sup>69</sup> The court decided to “[l]et the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.”<sup>70</sup> But this ignores the problem that the rush to same sex marriage is likely soon to include a more varied group, including people in more casual relationships for whom marriage may be inappropriate.

Thus, the norm-entrepreneurship function of same sex marriage may undermine marriage’s role for individual spouses and may indirectly threaten the coherence of the marriage standard form. Moreover, norm-entrepreneurship may encourage both same sex couples and society in general to neglect the development of other standard forms that might be more suitable for same sex couples.

Apart from the costs to society generally, the married parties themselves may incur costs from poor self-sorting. Same sex marriage is likely to have complex and unpredictable consequences for the couples who choose this relationship. They may not understand the problems of applying to same sex couples a large network of laws designed for heterosexual couples. More importantly, they may not realize the complications presented by legal variations among the states in an increasingly mobile society. For example, a same sex couple entering into a Vermont civil union may not have foreseen what would happen if the couple has a child and one partner moves to a state that does not recognize the union.<sup>71</sup> Although paternalism might not justify a state’s refusal to authorize in-state unions, it might call at least for pre-marital counseling. General marriage counseling is required for covenant marriages.<sup>72</sup> For same sex couples, this counseling arguably ought to address the specific interstate legal problems such couples face.

#### **4. Framing and signaling**

As discussed in section III.A.3, married couples traditionally see themselves as occupying a special kind of committed relationship. Traditional marriage may bring stability to same sex couples, not only because of the costs of divorce, but because entering a marriage relationship has a normative connotation that triggers emotional

---

<sup>68</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 17 Cal.Rptr.3d 225 (2004).

<sup>69</sup> *Andersen* at \*12.

<sup>70</sup> *Id.*

<sup>71</sup> *See infra* note 92.

<sup>72</sup> *See* La. Rev. Stat. Ann. § 9:272.

penalties when a spouse seeks to break or dishonor the marriage vow. In other words, the availability of marriage allows the parties to normatively frame the relationship so as to provide stability the couple would not have without being able to marry. Similarly, marriage allows the parties to signal to each other that they are willing to make a high level of commitment by exposing themselves to the legal complications of divorce on breakup. Both considerations support opening the marriage relationship to same sex couples to enable them to send the appropriate signals and to appropriately frame their relationships.

However, the signaling theory can cut the other way. First, the signal that gay marriage allows the partners to send each other may not be clear. If the marriage option is available, failure to marry may send a misleadingly negative signal of refusal to make a commitment. The recalcitrant party may be willing to make a lower level of commitment rather than none at all. Alternatively, the parties may wonder about the extent of their mutual commitment given uncertainty concerning the legal consequences in the marriage state or other states to which either or both spouses might move. Fuzzy signals are an inherent problem with a move to an untested standard form.

Second, making marriage available to same sex couples potentially weakens the clarity of the marriage signal for heterosexual couples. As discussed in subsection 2, courts might alter rules on issues such as divorce and inheritance to accommodate same sex couples, thereby reducing the level of commitment all couples make by getting married. The social costs of the potential weakening of the marriage signal may exceed the social benefits of enabling same sex couples to take advantage of the signaling and framing effects of marriage.

It is not clear how these arguments will register under the reasoning of *Lawrence* and the other cases. As discussed above in Part II, it may no longer be constitutionally permissible to ban same sex marriage on the basis of society's moral disapproval of homosexuality. The question for present purposes is whether the risk of diluting the normative and signaling connotation of marriage sufficiently differs from this argument that it is entitled to constitutional weight. The point here is not that homosexuals are morally or socially *inferior*, but simply that their relationships sufficiently *differ* from those of heterosexual couples that different norms and signals apply to these two relationships. Indeed, the normative connotation is ambiguous. The difference between same sex and heterosexual couples highlighted above focuses on the need for stability in the relationship arising from the dependence of one of the spouses. There would seem to be little stigma associated with making clear that parties to same sex relationships do not need this protection.

#### IV. MARRIAGE, CHOICE OF LAW AND THE CONSTITUTION

The analysis in Part III.B considers possible justifications for excluding same sex relationships from the standpoint of marriage as a standard form contract. The important question is whether these justifications will be constitutionally sufficient. This brings back into play the choice-of-law analysis discussed in Part I.

Assuming *Lawrence* applies to same sex marriage, the critical constitutional question is what states must do to accommodate the due process right the Court defined in *Lawrence*.<sup>73</sup> This article's standard forms analysis has shown that there are pragmatic

---

<sup>73</sup> See *supra* text accompanying notes 25-27.

bases for prohibiting same sex marriage that do not rest on moral or religious grounds. The question is whether these arguments suffice under the applicable constitutional standard of review.

The Court has characterized marriage as a fundamental constitutional right,<sup>74</sup> and one as to which couples are entitled to constitutional protection against discrimination.<sup>75</sup> It arguably follows that laws denying same sex couples the right to marry are unconstitutional. But it is not clear that all restrictions on the right to marry are suspect.<sup>76</sup> The precise question under *Lawrence* is whether, as a matter of due process, respect for the homosexual lifestyle requires letting homosexuals enter into the same relationship of marriage the state offers to heterosexual couples.<sup>77</sup> The analysis in this article suggests that the state may be able to justify under the due process standard a distinction between heterosexual marriage and the domestic relationships offered same sex couples.<sup>78</sup> Under an equal protection analysis, the Court might allow a distinction if it has a rational basis, as in *Goodridge*, or passes the “more searching form of rational basis review” required by Justice O’Connor.<sup>79</sup>

An additional level of analysis in *Lawrence* supports taking into account the current level of interstate recognition of same sex marriage. *Lawrence* cited an “emerging awareness” of acceptance of homosexual conduct in support of its decision.<sup>80</sup> The Court therefore recognized the relevance of conventional standards of conduct. It follows that the Court might await evolution of the sort of national consensus that supported the Court’s decision as to sodomy laws before it strikes down laws prohibiting same sex marriage.<sup>81</sup>

---

<sup>74</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (stating that “the right to marry is of fundamental importance for all individuals”).

<sup>75</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967). Although *Loving* also recognized a due process right to marry, the Court defined the right as one ensuring “freedom of choice to marry not . . . restricted by invidious racial discriminations.” *Loving*, 388 U.S. at 12.

<sup>76</sup> See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, And Marriage*, 55 S. CT. REV. 27, \_\_ (2003) (questioning whether the state must show that restrictions on marriage are “the least restrictive means of achieving a compelling state interest”).

<sup>77</sup> It is not clear why the homosexual lifestyle, in particular, is entitled to this level of respect, unless the Court is adopting its own “moral code” while rejecting the moral arguments against same sex marriage. See *supra* text accompanying note 27. For present purposes I set aside such arguments in order to focus on the logistics of applying *Lawrence* in the context of my choice-of-law/standard forms analysis.

<sup>78</sup> This assumes that the Court accepts that the state’s purported purpose of protecting the marriage standard form does not mask its actual purpose based on moral objections to gay relationships. See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>79</sup> *Lawrence*, 123 S.Ct. at 2485.

<sup>80</sup> See *Lawrence*, 123 S. Ct. at 2480.

<sup>81</sup> See Sunstein, *supra*, 55 S. CT. REV. at \_\_ (noting that “the major difference between *Lawrence* and a ban on same-sex marriage is that the sodomy law no longer fits with widespread public convictions, whereas the public does not (yet) support same-sex marriages”). But see David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEG. FOR. \_\_, \_\_ (arguing that *Lawrence* recognizes constitutional privacy

A problem with this approach is that it seems to leave fundamental rights at the mercy of majority rule. Thus, while the Court might have been willing to cite the “emerging awareness” regarding sodomy laws in support of its decision in *Lawrence*, it would not necessarily rely on the absence of such an awareness to justify a decision against same sex marriage. The Court might hold that, if the liberty interest recognized in *Lawrence* applies equally to marriage, it requires immediate judicial protection.

Here is where Part I’s contractual choice of law analysis comes into play. Specifically, evaluation of the infringement of gay couples’ liberty interest might take into account the prospects for evolution in same sex marriage laws facilitated by state competition in our federal system. First, even without constitutional protection, at least some states have strong incentives to authorize same sex marriage for the gay minority. Core advocates of same sex marriage have disproportionate political clout because their vote for politicians may depend on this issue. Their main political opposition may be the minority of the population that is equally committed to opposing gay marriage rather than the majority of the population who are heterosexuals. Thus, even if homosexuals are everywhere in the minority, the political strength of gay marriage advocates might differ from state to state depending on the relative strength of these two subgroups in each state. A federal system accordingly provides room for effectuating minority preferences.

Second, states have long-run incentives to permit same sex marriage even if the short-run political dynamic seems to run the other way. There have been many news reports of a business boom related to celebration of same sex marriages.<sup>82</sup> Accordingly, states that pioneer in the recognition of gay marriage may reap a financial bonanza from pent-up demand. Also, a state’s recognition of same sex marriage might signal a generally liberal environment that attracts heterosexual as well as homosexual residents. Conversely, continued rejection of same sex marriage might signal intolerance that repels these groups. Those who value such tolerance and are able to act on it may have more mobility and economic clout than those who are indifferent or rigidly opposed to same sex marriage. Business interests therefore have an incentive to favor liberal marriage laws.

There are instructive parallels here with the “internal affairs” rule in corporate law and enforcement of contractual choice of law in commercial contracts. A corporation can choose any state as its place of incorporation without physically changing its location. Contracting parties technically can choose any state’s law to apply simply by so providing in their contract, although courts often do not apply a state’s law without some link, particularly including residence, to a contracting party.<sup>83</sup> Accordingly, firms are likely to settle in states that offer favorable bundles of regulation on commercial and other matters that they care about. States’ competition for business is indicated by the adoption of choice-of-law statutes and the prominence of certain states in attracting incorporation and choice-of-law business.<sup>84</sup> Moreover, this competition, particularly for business associations, has resulted in significant deregulation of business forms. A

---

protection of the core values in family relationships, and that “there is . . . “an emerging awareness” in society that committed gay and lesbian partners and their children share in the essential values that define family”).

<sup>82</sup> See, e.g., Jonathan Finer, “At Expo, Few Disagreements on Gay Marriage,” *Wash. Post*, May 3, 2004 at A3; Robert Strauss, “Philadelphia Invites Gay Tourists in TV Ad,” *Wash. Post*, July 3, 2004 at A3.

<sup>83</sup> See Ribstein, *supra* note 9.

<sup>84</sup> See Ribstein, *supra* note 9.

prominent example is the rise of the limited liability company, which has broken down legal barriers imposed by both business associations and tax law.<sup>85</sup>

To be sure, the federal process will not necessarily lead to widespread recognition of same sex marriage. Many states have legislatively affirmed their commitment to heterosexual marriage.<sup>86</sup> This indicates that economic or other incentives to accept gay marriage are still weaker in many places than the religious and moral objections.

But the relevant question is whether the process is likely in the long run to disregard rights that deserve recognition. A decision invalidating laws against same sex marriage would leave many questions unanswered concerning potential differences between same sex and heterosexual relationships. Agnosticism is particularly important for family law, given the clash of normative views and the difficulty of getting reliable data. Among other things, there are questions about the optimal mix of standard forms that each state should offer, and the nature of the restrictions on who can use each form.<sup>87</sup> As discussed above,<sup>88</sup> a choice-of-law approach lets states experiment with various approaches. Courts and legislators can observe the results, particularly as children grow up under different regimes.<sup>89</sup> Evolution also permits the law to adapt incrementally to future, unpredictable, events and changing mores, provides feedback as to alternatives, and minimizes the cost of mistake compared to a Supreme Court decree.<sup>90</sup>

Defining the applicable liberty interest in terms of the interstate dynamic raises a question whether a state's same sex marriage ban may reach so broadly as to unconstitutionally limit in-state couples' choices even under this article's federalism-based approach. In particular, Virginia voids any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage."<sup>91</sup> This involves a materially greater infringement on freedom than a same sex marriage ban because it applies to a wider variety of non-Virginia statutes.<sup>92</sup> Indeed, it is not clear precisely what types of laws would "bestow the privileges or obligations of marriage." The state might defend the statute's reach by pointing to a need for a clear line between the sanctioned marriage relationship and other types of domestic relationships. This approach was implicitly endorsed by Judge Downing in *Andersen* when he observed that "[i]f there is indeed any outside threat to the

---

<sup>85</sup> See Larry E. Ribstein, *The Evolving Partnership*, 26 J. Corp. L. 819, 828-34 (2001).

<sup>86</sup> See David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition in the "Same Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3 (1998).

<sup>87</sup> See *supra* section III.A.1.

<sup>88</sup> See *supra* text accompanying notes 22-23.

<sup>89</sup> See Bix, *supra* note 60 at \_\_\_; Bix, *supra* note 56 at 18; Bix, *supra* note 13.

<sup>90</sup> See Lund & McGinnis, *supra* note 34 at \_\_\_.

<sup>91</sup> Virginia Affirmation of Marriage Act, 2004 VA H.B. 751.

<sup>92</sup> Thus, a Virginia court refused to honor a Vermont civil union. See S. Mitra Kalita "Vt. Same-Sex Union Null in Va., Judge Says," Wash. Post, August 24, 2004 at B1, <http://www.washingtonpost.com/wp-dyn/articles/A29965-2004Aug24.html>.

institution of marriage, it could well lie in legislative tinkering with the creation of alternative species of quasi-marriage.”<sup>93</sup> But this might not be enough if the Court imposes a higher burden of justification on this type of law.

## V. CONCLUDING REMARKS

Corporate law and contractual choice of law provide instructive examples for the same sex marriage debate, particularly in light of the analytical challenges presented by *Lawrence*, *Goodridge* and other cases. Marriage, like a business association, might be viewed as one of several alternative standard forms for domestic relationships that would be offered in various bundles by the states. States have good reasons for wanting to keep these bundles separate. Accordingly, forbidding state bans on gay marriage can be placed on grounds other than the moral condemnation of homosexuality that *Lawrence* instructed states to disregard.

The ultimate question, then, is what burden the states must meet in justifying laws barring same sex marriage. The burden should turn on the extent to which a state’s ban of same sex marriage restricts the liberty of homosexual couples. That, in turn, should be analyzed in light of the national market for marriage laws, and the prospects for evolution this market presents. The Court should wait before taking decisive action until this scenario has had a chance to play out. The costs of improvident or premature action are likely significantly to outweigh the costs of delay.

Just as the choice-of-law model argues against declaring same sex marriage bans unconstitutional, there are strong arguments against a constitutional amendment that would lock in current state restrictions against same sex marriage. To be sure, the process of amending the constitution, requiring votes in state legislatures, would give the states an opportunity ultimately to decide the issue. But once decided, a particular solution would be frozen indefinitely into place. By contrast, leaving this to state law would permit a variety of solutions to flourish, and allow for change over time.

The analysis differs, however, for *state* constitutional amendments forbidding same sex marriage.<sup>94</sup> State constitutional provisions preserve state competition over marriage laws, and therefore raise issues similar to those raised by state statutes for purposes of the federal constitution.

Finally, Congress is considering a federal constitutional provision that ensures that state *legislatures*, rather than federal or state judges acting under state or federal constitutional provisions, decide the issue.<sup>95</sup> The problem with this approach is that it is

---

<sup>93</sup> *Andersen*, at \*12.

<sup>94</sup> This would include the one up for referendum in Missouri. *See* Missouri Bill of Rights, Article I, §33 (“to be valid and recognized in this state, a marriage shall exist only between a man and a woman”), proposed by 2004, S.J.R. No. 29, to be voted upon at a special election or a general election to be held November 2004.

<sup>95</sup> *See* Federal Marriage Amendment, S. J. RES. 40 (July 8, 2004) (proposing Constitutional amendment providing that “[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”). *Cf.* Lund & McGinnis, *supra* note 34 (suggesting a possible amendment to take power away

ultimately impossible to isolate the appropriate judicial role. Among other things, there are subtle differences between interpretation and invalidation.<sup>96</sup> Moreover, the same rationales for committing the issue to state law experimentation emphasized in this article apply to state constitutional decisions as well as to state statutes. Indeed, if state court decisions increase the variety of legal choices that are available to same sex couples, this further decreases the need for a federal constitutional approach.

In short, courts and legislatures should hesitate to declare a winner in the marriage debate. States should be allowed to experiment with alternative domestic relationship laws, including laws that bar same sex marriage and marriage-like relationships. Before such experimentation has been done, we risk blindly either foreclosing socially beneficial progress in human relationships, or endorsing a risky future with unknown consequences.

---

from federal but not state courts).

<sup>96</sup> See Casto; Sack, this symposium.