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Toward More Parsimony and Transparency in "The Essentials of Marriage"

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TOWARD MORE PARSIMONY AND TRANSPARENCY IN “THE ESSENTIALS OF MARRIAGE”

*Anita Bernstein**

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INTRODUCTION

The federal Defense of Marriage Act (DOMA)¹—a malign, oppressive, and in the view of some writers unconstitutional piece of work²—has done American law and government one favor. In its secondary and tertiary layers of malfeasance this statute, enacted in 1996, puts one in mind of the Hyde Amendment,³ another federal enactment that set out to make a subordinated minority worse off. Just as the Hyde Amendment started out only by withholding federally funded Medicaid coverage of abortion, thus nominally complying with the right of self-determination announced in *Roe v. Wade*,⁴ and moved only later to interfering with health

1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended in 1 U.S.C. § 7 (2006), and 28 U.S.C. § 1738C (2006)).

2. See *Massachusetts v. U.S. Dep't of Health & Hum. Serv.*, 698 F. Supp. 2d 234, 248-53 (D. Mass. 2010) (holding that DOMA violates various provisions of the U.S. Constitution). On Valentine's Day 2011, the New York Times began an editorial with a denunciation: "The 1996 Defense of Marriage Act is indefensible—officially sanctioned discrimination against one group of Americans imposed during an election year." Editorial, *In Defense of Marriage, for All*, N.Y. TIMES, Feb. 14, 2011, at A26 [hereinafter *NYT Editorial*]. Writers have long contended that the statute is unconstitutional as well as pernicious. See Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2684, 2695-2707 (2004) (arguing that DOMA's definition of civil marriage as an "exclusively heterosexual institution" violates the Equal Protection Clause of the U.S. Constitution) [hereinafter *Litigating*]; Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 474 (1998) ("DOMA should be struck down because it picks out a disfavored minority for adverse treatment."); James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit, and the Constitution*, 38 SANTA CLARA L. REV. 939, 952-57 (1998) (arguing that DOMA violates the Full Faith and Credit Clause and the Effects Clause of the U.S. Constitution); Melissa Rothstein, Essay, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997) (suggesting that DOMA is unconstitutional under principles of federalism); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the public policy exception to the Full Faith and Credit Clause is unconstitutional).

3. Departments of Labor and Health, Education, and Welfare Appropriations Act, Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

care reform,⁵ DOMA started out by declaring a narrow federal definition of marriage—a relation that only one man and one woman could share together—and in this text did not offend against what the Supreme Court had ruled that same year: disapproval of homosexuality, the Court had said, may not constitute a basis for state action.⁶ DOMA also told states that they were free to use the federal rejection of same-sex marriage in support of a stance they could take not to recognize same-sex marriages formed in other states. Soon came a new generation of measures against same-sex marriage that augmented the oppressions of the federal ancestor: state DOMAs,⁷ state constitutional amendments declaring that marriage is between one man and woman,⁸ and destruction of same-sex marriage as it had become law in two states, California and Maine.⁹

5. See Editorial, *The Two Abortion Wars: A Highly Intrusive Federal Bill*, N.Y. TIMES, Jan. 30, 2011, at WK7 (lamenting abortion politics related to the Hyde Amendment as an impediment to health care reform).

6. See *Romer v. Evans*, 517 U.S. 620 (1996).

7. See Alliance Defense Fund, DOMA Watch, <http://www.domawatch.org/index.php> (last visited Mar. 30, 2011) [hereinafter Alliance Defense Fund] (“37 states have their own Defense of Marriage Acts (DOMAs).”). In addition to these thirty-seven states, most others also refuse marriage licenses to same-sex couples and do not recognize same-sex marriage.

8. See Alliance Defense Fund, *supra* note 7 (“There are 30 states that have constitutional amendments protecting traditional marriage, including the three states (Arizona, California, and Florida) that passed constitutional amendments in November 2008.”). Utah’s marriage amendment reads as follows: “(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.” UTAH CONST. art. I, § 29. By comparison, Alaska’s is relatively terse: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.” ALASKA CONST. art. I, § 25.

9. Regarding same-sex marriage, a survey: three states—Massachusetts, Connecticut, and Iowa—have legalized same-sex marriage by way of high court decisions. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The California Supreme Court recognized a state constitutional right to same-sex marriage in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). In 2008, however, California voters acted against the court’s decision by approving a measure banning same-sex marriages. Lisa Leff, *California Voters Approve Gay-Marriage Ban*, ASSOCIATED PRESS, Nov. 5, 2008, available at http://www.breitbart.com/article.php?id=D948TRV80&show_article=1. A federal district court decision invalidating this ballot measure, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), has been appealed.

Four jurisdictions—the District of Columbia, New Hampshire, New York, and Vermont—recognize same-sex marriage via statutes enacted without any judicial order to do so. D.C. COUNCIL 18-482 (2009) (codified at D.C. CODE § 46-401(a) (2010)); N.H. REV. STAT. ANN. § 457-A:1 (2010); VT. STAT. ANN. tit.15, § 8 (2000); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law* (N.Y. TIMES), June 24, 2011, <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?sq=samesexmarriage&st=cse&adxn1=1&scp=6&adxn1x=1309795208-PGblVvNGM/YeBD+lcQdjew>. Same-sex marriage in Vermont

Support for same-sex marriage as measured by opinion polls has risen since the enactment of DOMA,¹⁰ and a vibrant civil-rights movement presses a litigation strategy around the country. As of mid-2011, same-sex marriages may be performed in six states and the District of Columbia,¹¹ and are recognized in a couple of others.¹² In 2010, a well-received decision held that a ballot initiative declaring same-sex marriage unlawful in California had, by “singling out gay men and lesbians for denial of a marriage license,” violated the United States Constitution.¹³ The 1996 enactment of DOMA, in short, did not deal a death blow to what activists call marriage equality.

But a favor? My odd-sounding claim is the thesis of this Article: from the perspective of one who supports making marriage available to same-sex couples, statutes that purport to defend marriage by restricting it—DOMA and its state counterparts—have had a useful effect. They can, I argue, be used to foster more parsimony and transparency concerning what courts call “the essentials of marriage,” a troubling category shrouded in mystery.

As explicated by one scholar, “essentials” are aspects of the marital state so foundational that “a marriage entered into without them is [deemed] invalid and the law does not permit a couple to waive or alter these elements

replaced civil unions, a measure required by the Vermont Supreme Court in 1999. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). Maine was once in this group; in 2009, its legislature passed a bill providing for same-sex marriage. 2009 ME. LAWS 82. After the governor of Maine signed the bill, however, through a referendum similar to California’s the voters of Maine made same-sex marriage unavailable. Ros Krasny, *Maine Voters Latest to Turn Down Gay Marriage*, REUTERS, Nov. 4, 2009, available at <http://www.reuters.com/article/idUSTRE5A312O20091104>.

10. An August 2010 poll conducted by the Associated Press found that 52% of Americans believed the federal government should give legal recognition to same-sex marriages, compared with 46% in 2009. The AP-National Constitution Center Poll, <http://surveys.ap.org/data%5CGfK%5CAP-fK%20Poll%20August%20NCC%20topline.pdf> (last visited Jan. 27, 2011). Another August 2010 poll, by CNN, found that 49% of Americans answered “yes” when asked whether gays and lesbians have a constitutional right to get married and have their marriage recognized by law as valid (compared with 45% in 2009). Opinion Research Poll, CNN (Aug. 11, 2010), <http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a.pdf>.

11. See *supra* note 9.

12. See *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (dissolving a same-sex marriage formed in Canada by analogizing it to a common law marriage, which also may be recognized though not formed in Wyoming); Aaron C. Davis & John Wagner, *Md. to Recognize Same-Sex Marriage from Other Places*, WASH. POST, Feb. 25, 2010, at A1 (reporting a decision by the Maryland attorney general).

13. *Schwarzenegger*, 704 F. Supp. 2d at 1003; see also Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 943 (2010) (praising *Perry* and noting that “[t]he case against same-sex marriage has become increasingly unintelligible, which obviously will have implications when courts go looking for a rational basis for laws that discriminate against gay people”).

by private agreement.”¹⁴ This Article will pay heed to those essentials that make a union valid by their presence or invalid by their absence, but puts more emphasis on obligations that cannot be waived or altered because of marital status.¹⁵ Although by some measures these essentials are in retreat—fewer in number and weaker in force than in past decades—they still manifest signs of strength and even expansion.

Similar to the way “essentialism” about ethnicity and gender undermines civil rights reforms,¹⁶ the use of unarticulated beliefs about an essence to destroy arrangements that spouses make voluntarily to form or govern their marriage is worrisome. Two problems call for attention. First, judicial obstructions of private ordering can be understood to clash with a tradition that upholds privacy within a marriage. From the proclamation that husbands and wives sleep together in the “sacred precincts of marital bedrooms”¹⁷ through doctrines of immunity, nonintervention, and nonenforcement that prevent individuals from gaining redress for harms done to them by their spouses,¹⁸ American judges have declared that persons

14. Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 8 (2003).

15. One of my goals here is to fill a gap. Extensive decisional law and secondary writings now expound on the constitutional right to marry, first announced by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). After *Zablocki v. Redhail*, which clarified that the *Loving* right to marry could invalidate restrictions unrelated to race, scholars began to study positive laws blocking access to marriage as violations of this right. 434 U.S. 374, 383-84 (1978). Prerogatives of a married couple to make enforceable agreements *inter se* or otherwise veer from a unitary legal status, by contrast, have received relatively little scholarly attention. Case law about the essentials of marriage is extensive, but has not been gathered and synthesized; analysis and recommendations like those of Twila Perry are rare. See Perry, *supra* note 14.

16. “Essentialism is used to connote the idea that things, women, culture, races, have fixed, innate, and identifiable properties, or essences.” Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER, L. & JUST. 91, 121-22 (2009). The central writings on essentialism as an impediment to progress are Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

17. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

18. The early common law assumption that “the house of every one is to him as his castle and fortress,” *Semayne’s Case*, (1604) 77 Eng. Rep. 194, (K.B.) 195; 5 Co. Rep. 91a, 91b, underscores the ideals of familial privacy. “The last four decades . . . have witnessed the emergence of a doctrine of state non-intervention in marriage premised on solicitude for individual autonomy.” Milton C. Regan, Jr., *Marriage at the Millennium*, 33 FAM. L.Q. 647, 655 (2000). Principles of nonintervention have gone so far as to mask domestic physical abuse. Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 63, 71 (1991) (referencing the nonintervention by law to aid women victimized by their husbands); see generally Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN’S RTS. L. REP. 115, 116-17 (2001) (noting the inconsistency of theorists in law and economics who favor

married to each other share a bond powerful enough to supersede laws of general application. At the same time, judges rely on marital privacy to hold that these individuals may not write rules or terms to govern their relationship when their provisions contradict a notion of essentials—a roster that spouses who wonder about what they may bargain for cannot look up in any government-published rulebook.¹⁹ The association between marital privacy and state-of-nature lawlessness is familiar enough.²⁰ It remains perverse, however, to use privacy to deny or nullify the arrangements that a couple makes to govern its shared life.

The second difficulty—less familiar than marital privacy, but more central to my purpose—is that whenever the law declares that a couple may not “waive or alter” essentials by their initiative or “private agreement,”²¹ it gets in the way of private ordering, and that kind of obstruction by the state calls for parsimony and transparency now lacking in the essentials of marriage. In another context, I have had occasion to quote Oliver Wendell Holmes, Jr.: “‘State interference is an evil, where it cannot be shown to be a good.’”²² Certainly the law may stand in the way of what people pursue via bilateral agreement. That courts will refuse to enforce contracts containing extreme terms—the enslavement of individuals, the sale of babies or human limbs, promises to kill someone, and so on—is a truism.²³ A deal between individuals can even be unenforceable in court on the ground that it offends the United States Constitution.²⁴

nonintervention in heterosexual marriage based on freedom of contract while condoning government intervention against same-sex marriage).

19. See *infra* Parts I, II (giving examples of Essentials).

20. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 96-97, 101 (1987) (arguing that marital privacy shelters men who abuse women); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (expounding on the law’s refusal to recognize family members as individuals who negotiate with, make trades with, and have claims against one another).

21. Perry, *supra* note 14, at 8.

22. Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 312 (1999) (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 96 (1881)).

23. “In thousands of cases contracts have been declared to be illegal on the ground that they are contrary to public policy.” 6A ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 1375 (1962); see also Cynthia Fruchtmann, *Considerations in Surrogacy Contracts*, 21 WHITTIER L. REV. 429, 431 (2000) (describing refusals to enforce surrogacy contracts); William Bennett Turner, *News Media Liability for “Tortious Interference” with a Source’s Nondisclosure Contract*, 14 COMM. LAW. 13, 13-14 (1996) (analyzing contracts that prohibit disclosure of prosecutable crimes).

24. *Shelley v. Kraemer*, 334 U.S. 1 (1948). See generally Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 470-83 (2007) (reviewing critically the literature about this decision).

Because interferences by governments come at the expense of liberty, however,²⁵ the law is expected to proceed with care before imposing them. This Article commends as “parsimony” the inclination on the part of the state actors to keep their infringements to a minimum. State-imposed interferences also ought to be transparent—intelligible, comprehensible, clearly worded, and accessible—to individuals.²⁶ Applying parsimony in this realm honors what Robert Mnookin, in a defense of private ordering for divorce, has called “[t]he liberal ideal that individuals have fundamental rights, and should freely choose to make of their lives what they wish.”²⁷ Applying transparency means that persons who contemplate embarking on a marriage, or modifying the terms that will govern them in an ongoing marital relationship, will know better in advance how the law can impede bargains that they make.²⁸

For generations, courts would use essentials in a venerable rejoinder to private ordering: *Because we said so*. Neither transparent nor parsimonious, this judicial stance regarded sexual intimacy as a source of both emotional upheaval and new dependents. Sex, in this view, throws unruly Nature into the bargains that individuals write and try to impose on themselves, upending the order that they plan.²⁹ The state purported to have no choice

25. Elsewhere I expand on this point using controversies over tort reform as an illustration. Anita Bernstein, *The 2x2 Matrix of Tort Reform's Distributions*, 60 DE PAUL L. REV. 273, 273-74 (2011).

26. See generally 1 JEREMY BENTHAM, *Essay on the Promulgation of Laws, and the Reasons Thereof*, in THE WORKS OF JEREMY BENTHAM 157 (William Tait ed., 1843) (arguing that the state ought to present the law “to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it”). For writings that extol transparency in government action while also noting countervailing goals, see Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 386-87 (2009) (reviewing Internet censorship as practiced by national governments); Kenneth Feinberg, *Transparency and Civil Justice: The Internal and External Value of Sunlight*, 58 DE PAUL L. REV. 473, 474-75 (2009) (recounting public scrutiny of, and participation in, the federal 9/11 compensation scheme); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1199 (1999) (considering transparency in SEC rulemaking).

27. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1018 (1985).

28. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 502 (1998) (arguing that “the law should lift the veil of ignorance shrouding marriage”).

29. For Kant, adherence to the Categorical Imperative dictates that “[s]exual union in accordance with law is *marriage (matrimonium)*, that is, the union of two persons of different sexes for lifelong possession of each other’s sexual attributes.” IMMANUEL KANT, THE METAPHYSICS OF MORALS 62 (Mary Gregor ed., 1996). Contemporary marriage and sexual behavior challenge this austerity. GREG MARC NIELSEN, THE NORMS OF ANSWERABILITY: SOCIAL THEORY BETWEEN BAKHTIN AND HABERMAS 111 (2002) (“One of the most obvious changes that distances us from Kant’s discussion of action and Eros is that

but to step in. Today, even with “family planning” perceived as an attainable pursuit (rather than an oxymoron), and personal status as a parent (or not) often referred to as a choice,³⁰ the essentials of marriage retain their potential to destroy a deal that couples strike, regardless of whether children or other vulnerable third parties are harmed by their bargain. *Because we say so.* Courts have thus built an agent of destruction. To the extent that “the essentials” connotes enduring reality that cannot be altered, the term is a misnomer; participants in the marital relation cannot count on courts’ finding this condition implicated in their bargains. In recognition of a Frankensteinian power, I use the shift key of my keyboard to describe an agent that has no principal and answers to nobody.

Uncatalogued, judge-made yet not judge-controlled, influenced by religious antecedents in an ostensibly secular legal system yet beholden to no creed,³¹ the Essentials of Marriage roam unleashed through decisional and statutory law. DOMA and its state counterparts, by putting another Essential into legislation, serve to buttress what might have been a dwindling remnant of the common law. Litigants, judges, and legislatures invoke Essentials hoping to impose order, but the concept generates havoc instead. Its havoc derives from uncertainty.

This Article begins with the first inventory of the Essentials that preclude enforceable agreement to form and govern marriages.³² Lacking a fixed template or rules for inclusion,³³ a gatherer has to seek the Essentials of Marriage by ad hoc methods and criteria. Grounds for annulment may be the most fundamental source. If a condition demonstrates to the satisfaction of a court that a marriage never existed, one may infer that the condition references the Essentials of Marriage.³⁴ Fault-based grounds for divorce add

the legal consensus he had in mind is no longer held as a universal criterion for entering into sexual relations.”).

30. See *Planned Parenthood v. Casey*, 505 U.S. 833, 926-27 (1992) (Blackmun, J., concurring and dissenting); Jennie Bristow, *Commentary: Family Planning Should Mean Choice, Not Control*, ABORTION REV., Mar. 25, 2010, available at <http://www.abortionreview.org/index.php/site/article/716/>.

31. See *infra* Section III.B.

32. I used the same method when studying what American courts call the economic loss rule, a torts concept that denies recourse for financial losses that result from negligence. See Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 782-93 (2006).

33. Perry, *supra* note 14, at 8 (“There is no finite list of the essential elements and duties of marriage.”).

34. The majority rule in the U.S. is that for an annulment based on misrepresentation, the withheld or lied-about condition must implicate the essentials of marriage. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1680 (2007). New York is a leader among the states that follow a more lenient “materiality” criterion, but even this tolerant standard demands that the fraud be “vital” to the relationship. *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 104 N.E.2d 877, 880 (N.Y. 1952).

to the inventory. Not every fault ground implicates the Essentials: for example, I would exclude cruelty in the belief that a petitioning or plaintiff spouse who proves that the respondent or defendant spouse behaved in a wrongful and hurtful manner has established, without reference to Essentials, her or his entitlement to relief in the form of dissolution: faulty conduct that causes harm has long provided a basis for state action under the law of crimes and torts. Adultery and desertion, however, do implicate Essentials of Marriage, because they enforce entitlements held by the petitioning spouse—sexual exclusivity and ongoing intimate contact, respectively—where the respondent’s conduct would not generate a legal claim for relief in any context other than a marriage. A major source of Essentials of Marriage for this Article is judge-made law invalidating intranspousal agreements. When a husband and wife may not create a particular kind of enforceable bargain, it becomes plausible to conclude that the terms they want violate an Essential.³⁵ The criteria for forming a common law marriage (especially over the protests of a respondent) provide another Essentials of Marriage indicator.³⁶

My catalogue of the Essentials of Marriage builds on two recent works by Mae Kuykendall. In an article co-authored with Adam Candeub, Kuykendall has contended that individuals in the United States ought to be able to form marriages according to the law of a jurisdiction in which they are not physically present at the time of their ceremony.³⁷ Candeub and Kuykendall gather precedents that mark their idea as familiar rather than alien to American law.³⁸ Their choice is a wise tactic for any activist: law reform proposals are more likely to succeed when their proponents can

35. The *Restatement of Contracts* stands up forthrightly for the Essentials of Marriage. In a section captioned “Promise Detrimental to the Marriage Relationship,” it declares that “a promise by a person contemplating marriage or by a married person” is unenforceable “if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.” RESTATEMENT (SECOND) OF CONTRACTS § 190 (1) (1981).

36. Because parsimony and transparency pertain to freedom, in this Article I consider only those Essentials that individuals have protested as unjust constraints on their prerogatives. Focusing on freedom for individuals eliminates from the Article two Essentials, the barriers based on (1) age and (2) incest. The Essentials of Marriage as codified in statutory law do prevent children and members of an existing family from forming a new marriage, but few individuals have complained in the courts about this constraint. And because I am interested in impediments to bilateral agreements, this Article passes over the Essential that limits marriage to two people at a time. See generally Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1986-93 (2010) (observing that individuals in dyadic relationships form agreements differently from individuals in plural relationships).

37. Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011).

38. *Id.*

describe them truthfully as not radical.³⁹ In a companion piece, moving from activism to analytics, Kuykendall applies “constitutional considerations” to evaluate the Candeub-Kuykendall proposal;⁴⁰ I borrow the constitutional-considerations device later in this Article.⁴¹

Fresh thinking about the law of marriage takes the familiar and examines it as a source of honest puzzlement. Readers must commend Candeub and Kuykendall for having found yet another Essential that calls for scrutiny and can inform understanding of the law. In posing a new question—that is, why do governments demand that couples show up inside their geographic perimeter in order to form a marriage governed by the law of that state when they make no such demand on individuals who pursue other ends, notably persons who write business documents expressing their wish to be governed by the law of the jurisdiction? Why not offer marriage licenses to persons located out of state?—Candeub and Kuykendall have honed in on an overlooked Essential that, like Essentials generally, is inadequately theorized, a threat to the liberty of individuals, and obscure.

Obscurity will frequently mark an Essential. States do not publish or declare many of the prohibitions they enforce, and this stance pertains to their policy of denying marriage licenses to couples who marry in distant ceremonies. State actors do not account for their decision to thwart. No records of debate or dialogue about the issue can inform the persons affected.

In this Article, the unavailability of electronic marriage joins other instances of parsimony and transparency withheld from persons who have married or who wish to alter their marital status. My emphasis is on unjustified impediments that burden individuals rather than on theory or policy advocacy, although theory and policy advocacy arise here on occasion. I share the project of inclusion that informs the presentation of electronic marriage, but whereas Candeub and Kuykendall situate this method of marrying among other noncontroversial accommodations offered to persons and entities located outside a jurisdiction,⁴² this Article situates it among other examples of marriage-regulating rules as arbitrary (or non-parsimonious) and opaque (or non-transparent) impediments to the freedom of individuals who have come together to form a married couple.

39. See generally Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (contrasting successful with failed efforts by scholars to propose new causes of action in tort). The precedent that Candeub and Kuykendall use to particularly good effect is proxy marriage, available in five states. See Candeub & Kuykendall, *supra* note 37, at 742 n.25.

40. Mac Kuykendall, *Exporting Ceremonial Marriage: Constitutional Considerations* (2011) (unpublished manuscript).

41. See *infra* Section III.C.

42. Candeub & Kuykendall, *supra* note 37.

Bringing parsimony and transparency to the Essentials of Marriage joins a larger project underway for more than a century and a half in American law: the undoing of coverture. Interference with prerogatives based on the marital status of individuals originates in the common law precept that during a marriage "the very being or legal existence of the wife is suspended."⁴³ American jurisdictions started to undo coverture with the passage of Married Women's Property Acts in the mid-nineteenth century.⁴⁴ Courts joined legislatures in this reform. Equal protection arguments invalidated some marriage-related disabilities,⁴⁵ while other stances against coverture in American courts, such as the elimination of intraspousal tort immunity and the enforceability of antenuptial agreements, emerged gradually and diffusely in state decisional law.⁴⁶

Although no judge or legislator today will hew to the proclamation of Blackstone that "a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence,"⁴⁷ the Essentials of Marriage still force variations on that prohibition upon individuals. Persons in the United States certainly may "grant anything" to their spouses, but they cannot depend on the law to uphold and enforce the spousal bargains they strike. Americans were not permitted to "enter into [a marital] covenant" with persons of the same sex even when no governing statute barred their union; today, thwarted by Essentials that impose gender dimorphism without saying why, most people in the United States still have no access to same-sex marriage.⁴⁸

43. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (The University Chicago Press 2002) (1765-1769).

44. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

45. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) (invalidating a Louisiana statute that established the husband as "head and master" of the marital community, the last of its kind in the U.S.); *Samuel v. Univ. of Pittsburgh*, 375 F. Supp. 1119, 1131-34 (W.D. Pa. 1974) (holding that a financial aid rule identifying married women students' state of residence as that of their husband, regardless of what these students wanted, as a violation of the Equal Protection Clause); see also *infra* Section III.C.1.

46. *Bozman v. Bozman*, 830 A.2d 450, 467 (Md. 2003) (reviewing history of the abolition of tort immunity); Uniform Premarital Agreement Act § 6, 9C U.L.A. 35 (2001) (providing for the enforceability of antenuptial agreements in very broad terms); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.04 (2002) (approving of antenuptial agreements but adding both substantive and procedural requirements for their enforceability).

47. BLACKSTONE, *supra* note 43, at 430.

48. Understanding the reasons for enforced gender dimorphism is, in my opinion, necessary to making same-sex marriage available in the United States. Reformers cannot bypass that step. Take for example an editorial in favor of repealing DOMA. See *NYT Editorial*, *supra* note 2. Its writer contended that Congress moved against recognition of same-sex marriage out of bigotry and election-year pandering. *Id.* That motive may explain the enactment of DOMA, but not the prohibitions of same-sex marriage that prevailed before

Contemporary regulation of marriage is much less oppressive than what Blackstone described in the eighteenth century,⁴⁹ and in some ways it is more parsimonious and transparent.⁵⁰ Lingering interferences and obscurities rooted in coverture persist, however, and the Essentials of Marriage continue to impede freedom.⁵¹

Parsimony and transparency in the Essentials of Marriage do not, in this Article, demand the end of Essentials altogether. If marriage is to remain a status—a legal reality that I have defended, although my defense was thin⁵²—then it will necessarily impose results that differ from what private prerogatives and ordering would assert. Interference in the designs of individuals is what Status does and will continue to do. “The [s]tate of [m]arriage and the [s]tate in [m]arriage,”⁵³ however, must also attend to the liberties of individuals.

I. “ESSENTIALS” AS NON-NEGOTIABLE MARITAL TERMS: A COMMON LAW CATALOGUE

Here we review aspects of the marital state that the law has deemed non-negotiable.

1996. See *infra* Section II.B. Should Congress heed the editorial and repeal the statute, the availability of same-sex marriage around the country would not necessarily increase. Only clarity about the demand for gender dimorphism—transparency—can generate more restraint, or parsimony, in its application.

49. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1458-59 (1992) (noting a “demise of the state-imposed marriage contract”).

50. Not in all ways, however. Consider breach of promise to marry, a common law cause of action. A handful of states retain it; most abolished it during a law reform era in the 1930s. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 111-12 (4th ed. 2010). Whether this statutory rejection provides an illustration of parsimony by the state—whether individuals are freer with or without a remedy for this breached promise, in other words—is debatable. But current law undeniably lacks transparency. With respect to promises of marriage, the United States now contains (1) a common law doctrine (2) repeal of this doctrine by statutes in most but not all states (3) statutory limitations that burden plaintiffs in most states that have kept the cause of action and (4) vestiges of the doctrine in jurisdictions that have abolished it. See *id.* at 116-17 (reviewing judge-made law on gifts “in contemplation of marriage,” which deems the conveying of an engagement ring a conditional or inchoate gift rather than a completed inter vivos transfer).

51. Cf. Brian W. Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1771 (2007) (“I think we need to find more room for enforceable agreements in family law, to understand the circumstances where no significant public interests are threatened.”).

52. Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003).

53. Mary Lyndon Shanley, *The State of Marriage and the State in Marriage: What Must Be Done*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 188 (Anita Bernstein ed., 2006).

A. Services

According to one pertinent judicial definition of the word, "services" refers to "domestic affairs which pertain to the comfort, care, and well-being" of a spouse.⁵⁴ Judges applying the common law understood these "domestic affairs" as central to the marital bargain: wives perform services and husbands take what their wives render.⁵⁵ Like some other Essentials, the obligation of a wife to give services and the entitlement of a husband to receive them has emerged more through claims brought by third parties than intramarital disputes.⁵⁶

Consortium, the common-law claim for services that were diminished or made unavailable to a husband after a tortfeasor injured his wife, generated numerous judicial recitations of actionable losses that the husband-plaintiff suffered.⁵⁷ Blackstone said why he thought wives had no actionable rights to consortium:

[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior: and, therefore, the

54. *Ritchie v. White*, 35 S.E. 2d 414, 416-17 (N.C. 1945). The *Ritchie* court included the care and comfort of children in this understanding of "services," but seemed to regard the paterfamilias as among the recipients of these attentions rendered to children. *Id.*

55. Jennifer Wiggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 281 (2000) ("[A]t common law, the wife owed a duty to provide companionship and services to the husband, but the husband owed no such duty to the wife.").

56. As Roscoe Pound observed almost a century ago, this indirect enforcement of family law rights and obligations derived from coverture: when a wife lacked property rights, she could not assert a claim against her husband. Roscoe Pound, *Individual Interests in the Domestic Relation*, 14 MICH. L. REV. 177, 188, 195 (1916) (also noting obsolescence of coverture as a doctrine). Intramarital disputes did generate some decisional law that made reference to the services that wives owe husbands as part of their marital bargain. *See, e.g.*, *Lewis v. Lewis*, 245 S.W. 509, 511 (1922) (noting that although a wife "may have performed great services" working in her husband's general store, she could not receive any compensation for that work, because "the store belonged to the husband, and her assistance in the store was as a member of the family without pay or expectation of reward save to aid the husband in making a living for the family, including their 11 children.").

57. *See Deems v. W. Md. Ry. Co.*, 231 A.2d 514, 517 (Md. 1967) ("The loss of consortium, as used in the cases in Maryland and elsewhere, means the loss of society, affection, assistance and conjugal fellowship. It includes the loss or impairment of sexual relations."); *Gahagan v. Church*, 132 N.E. 357, 357 (Mass. 1921) ("The plaintiff's action is based on loss of consortium—that is, his right to the society, conjugal affections and assistance of his wife."); *Odom v. Claiborne Elec. Coop., Inc.*, 623 So. 2d 217, 226 (La. App. 1993) ("The claim for loss of consortium is broken down into several components including loss of: (1) love and affection, (2) society and companionship, (3) sexual relations, (4) the right of performance of material services, (5) the right of support, (6) aid and assistance, and (7) felicity.") (citation omitted).

inferior, can suffer no loss or injury. The wife cannot recover damages . . . for she hath no separate interest in anything, during her coverture.⁵⁸

Starting in the middle of the twentieth century, American courts rejected the rigid common-law gender divide and began to enforce parity for husbands and wives who brought consortium claims.⁵⁹ Judges also widened the old focus on lost toil in favor of a more capacious attention to “various intangibles, usually described as services, society, and sexual intercourse.”⁶⁰ Tellingly, however, “services” remains on the list of what a plaintiff-spouse has lost due to the tortious conduct of the defendant.⁶¹ In its move toward more gender equality, the common law could have shifted to a view “that *neither* spouse had a duty to provide such services and companionship to the other, but it did not.”⁶²

As a venerable Essential of Marriage, the wifely duty to render services slipped into the relationship of two individuals named Hildegarde Lee and Michael Borelli, who were parents and separate property-holders when they married in April 1984.⁶³ The day before they married, the couple signed an antenuptial contract keeping their property separate; and the California courts never questioned that agreement.⁶⁴ No Essentials in the way for our modern couple so far. But a postnuptial contract they executed fell under the Essentials shadow.

The Court of Appeal refused to enforce a deal that the spouses had made in October 1988, a few months before Michael died. Michael had told Hildegarde that he strongly desired not to move to a nursing home, “even though . . . he would need round-the-clock care, and rehabilitative modifications to the house, in order for him to live at home.”⁶⁵ Hildegarde and Michael reached an agreement in which Michael promised to bequeath

58. Julian E. Hammar, Note, *Breaking the Age Barrier in Alaska: Including Adult Children in Loss of Filial Consortium Actions*, 12 ALASKA L. REV. 73, 78 n.12 (1995) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (1758)).

59. The groundbreaking decision was *Hittaffer v. Argonne*, 183 F.2d 811 (D.C. Cir. 1950).

60. DAN B. DOBBS, THE LAW OF TORTS 842 (2000).

61. Case law issued after the 2000 publication of the Dobbs treatise, see *supra* note 60, has continued to include “services” in what a spouse may recover in a consortium or wrongful death claim. See *Martin v. Ohio County Hosp. Corp.* 295 S.W.3d 104, 107 (Ky. 2009); *Thorn v. Mercy Mem’l Hosp. Corp.*, 761 N.W. 2d 414, 414 (Mich. Ct. App. 2008); *Reeder v. Allport*, 218 S.W.3d 817, 819 (Tex. App. 2007).

62. Wiggins, *supra* note 55, at 281.

63. *Borelli v. Brusseau*, 12 Cal. Ct. App. 647, 649-50 (1993).

64. The American Law Institute has suggested that a person presented with an antenuptial contract needs more time to think it over and obtain advice. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.04 (2002) (providing for a rebuttable presumption that informed consent existed when, *inter alia*, the agreement was executed at least 30 days before the marriage).

65. *Borelli*, 16 Cal. Rptr. 2d at 17.

an extensive list of properties to Hildegard and in exchange Hildegard would care for Michael at home.⁶⁶ "Appellant performed her promise but the decedent did not perform his," wrote the court, before going on to hold that the contract was void for lack of consideration: Hildegard had owed Michael domestic services anyway.⁶⁷ By agreeing to care for him at home and thereby "avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended," she by the couple's contract had given her husband nothing to which he was not already entitled.⁶⁸

To reach this decision, the California Court of Appeal relied on two precedents. *In re Sonnicksen's Estate* refused to enforce a premarital contract that contained the following bargain: upon his death the man would convey a particular piece of real property to a woman if the woman had fulfilled her end of the exchange, which was to render "such companionship, care and nursing as may be required by [the man], and during such period to refrain from engaging in her nursing profession for the purpose of providing for the [man] the greater companionship and society" that he wanted.⁶⁹ No deal, said the court, because after forming their contract, the man and the woman married, and "one of the implied terms of the contract of marriage was that appellant would perform without compensation the services covered by said written agreement."⁷⁰ *Tant pis* for you, Martha Sonnicksen, said the court. Essentials of Marriage outrank what you negotiated.

The wife in *Brooks v. Brooks* was less sympathetic than Hildegard Borelli and Martha Sonnicksen—according to the court, she had been working as the husband's nurse when she told him she would leave his home if he did not marry her, and before he died she moved out of his house against his will—but she encountered the same ratio decidendi when she too lost her case.⁷¹ The court held that Bessie Brooks had

entered into an agreement to render services which she was bound to render as being incidental to her marital status with plaintiff and that the sums paid to her by plaintiff were for such services and that, since such an agreement is void as against public policy, there was no consideration for the sums of money which plaintiff paid defendant and he was entitled to bring an action to recover them.⁷²

Older cases outside California, surveyed in a *Borelli* dissent, also held that toiling wives could not claim compensation for the services they had

66. *Id.* at 17-18.

67. *Id.* at 18.

68. *Id.*

69. 73 P.2d 643, 644-45 (Cal. Dist. Ct. App. 1937).

70. *Id.* at 645.

71. 119 P.2d 970, 971 (Cal. Dist. Ct. App. 1941).

72. *Id.* at 972-73.

rendered pursuant to what they thought was an agreement.⁷³ After an elderly widower had offered marriage to a woman, proposing that she “nurse, care, and work for him for the remainder of his natural life” in exchange for property that he would convey to her in his will, and after the woman accepted this proposal and performed her part of the bargain, the Iowa Supreme Court refused to remedy the man’s failure to honor his promise on the ground of no consideration: “There is nothing in the petition to indicate that the work [the wife] was to do was other than the ordinary work of a housewife.”⁷⁴ Earlier, the New York Court of Appeals had reached the same conclusion: “A man cannot be entitled to the services of his wife for nothing, by virtue of a uniform and unchangeable marriage contract, and at the same time be under obligation to pay her for those services.”⁷⁵ Because “a uniform and unchangeable marriage contract” entitles husbands to receive services from their wives “for nothing,” this husband’s volunteering to pay for the services he received was a gratuitous promise that the court would not enforce.⁷⁶

Judges and other lawmakers could have put this Essentials conclusion about services to different uses. A legal system might undertake to compensate wives for ascribed labor they contribute, or include it in calculations of the national gross domestic product, or factor it explicitly into an entitlement for maintenance or property distribution following divorce. Instead, writes Marjorie Schultz, “contracts doctrine views everything that women do and value as donative or illusory, as being a moral obligation or a pre-existing legal duty, or as being in some other way noncognizable and unenforceable.”⁷⁷ When they declare a pre-existing duty to give away domestic services without compensation and use this doctrine to thwart and nullify intransposal agreements, giving husbands but not wives the benefit of the bargain, courts that invoke this Essential of Marriage impose a material detriment on women.

B. Support

The duty of support, frequently linked with the Essential of Marriage that obliges a married person to deliver services to her spouse, by tradition burdened husbands and not wives. When they were disabled by coverture, wives could not enforce the duty of support in court. Instead, third parties enforced the duty through the doctrine of necessities, which obliged

73. *Borelli*, 16 Cal. Rptr. 2d at 21 (Poche, J., dissenting).

74. *Bohanan v. Maxwell*, 181 N.W. 683, 685 (Iowa 1921).

75. *In re Callister's Estate*, 47 N.E. 268, 270 (1897).

76. *Id.*

77. Marjorie Maguire Schultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 64 (1991) (attributing the point to a student).

husbands to pay merchants for the goods that they had supplied to wives, if those goods were necessary to life.⁷⁸ The doctrine of necessities has survived; courts impose it on both husbands and wives. Almost all the contemporary necessities cases involve the furnishing of medical services: courts today apply the duty of support to require spouses to pay medical bills.⁷⁹

Older case law contains more sweeping rhetoric about this duty. In *Van Koten v. Van Koten*, for example, the Illinois Supreme Court posited a role for the government in enforcing this Essential.⁸⁰ The court declared that husbands and wives do not form enforceable bilateral contracts. Instead, the agreement is trilateral: "Marriage is a civil contract to which there are three parties—the husband, the wife and the [S]tate."⁸¹ The State is present at the time of enforcement and must acquiesce in the deal. "One of the contractual obligations of the marriage contract is the duty of the husband to support the wife, and this contractual obligation cannot be abrogated without the consent of the third party, the [S]tate."⁸²

Seeking to nullify the deal she had struck, Ida Van Koten accused her husband of fraud in the formation of a contract, but did not dispute that she had received consideration in exchange for what she gave up when she and her husband decided to separate.⁸³ The Van Koten separation contract gave her \$3000 in cash and all the possessions inside the marital home.⁸⁴ Pursuant to the contract, Clifford Van Koten also paid the household bills that were outstanding and agreed to pay Ida \$20 on the first of every month to support of the couple's daughter; he honored his bargain.⁸⁵

Like the California Court of Appeal in *Borelli*,⁸⁶ the Illinois Supreme Court chose not to modify a spousal contract to ameliorate the plight of a vulnerable spouse, a form of intervention familiar to family law that it might have been able to justify. Nor did the Illinois court entertain the plaintiff's accusations of fraud. It simply jettisoned the contract. Neither *Van Koten*

78. CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 294 (2d ed. 2000).

79. Perry, *supra* note 14, at 12-13 (citations omitted).

80. 154 N.E. 146 (Ill. 1926).

81. *Id.* at 147. For other recitations of the same contention, see *Posner v. Posner*, 233 So. 2d 381 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972) (stating that "in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses"); *Adams v. Palmer*, 51 Me. 480, 483 (1863) (observing that marriages begin with a contract, but once the marital relation is established, "the power of the parties . . . is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law.").

82. *Van Koten*, 154 N.E. at 147.

83. *Id.* at 146.

84. *Id.*

85. *Id.*

86. See *supra* notes 63-68 and accompanying text.

nor *Borelli* denied that the spouse-litigants had put thought into their deal, expressed wishes to each other, and executed a transaction for mutual benefit. The meeting of their minds and their exchange of consideration did not matter. Essentials—the services that Hildegarde Borelli had to render without the compensation she thought she had earned, the support that Clifford van Koten owed his wife even after he had given her money and personal property in lieu of that support—outweighed and displaced the law of contracts with no judicial statement about the circumstances that precluded enforcement.

In another notorious decision that came out against a husband, a federal court applying Michigan law invalidated an agreement between a husband and a wife whereby the wife would pay the husband three hundred dollars a month “until the parties hereto no longer desire this arrangement to continue.”⁸⁷ The contract recited no consideration, but when the parties divorced, the husband brought an action for back payments owed, alleging that his wife had in the deal sought to pay him to quit his job and be available as a travel companion to her.⁸⁸ One of the grounds that the court invoked to support its ruling was the husband’s duty of support. Any contract between a husband and wife that relieves the husband of that duty is void, said the court, and “if the husband can always call upon his wife for payments of \$300 per month he is in practical effect getting rid of his obligation to support his wife.”⁸⁹

As with the duty to render services, a reader might question whether elderly case law on the duty of support has any relevance to contemporary law and policy about the Essentials of Marriage, outside of the relatively narrow issue of necessities as applied to medical expenses.⁹⁰ The answer is yes, because maintenance following divorce (also known as alimony) remains available, and the duty to pay maintenance post-divorce maintenance originated in the duty of support.⁹¹ Without a duty of support, maintenance lacks a justificatory theory.

The list of seven explanations for maintenance gathered by one court⁹²

87. *Graham v. Graham*, 33 F. Supp. 936, 936 (E.D. Mich. 1940).

88. *Id.* at 936-37.

89. *Id.* at 939.

90. *See infra* notes 190-201 and accompanying text (exploring the same point with respect to the Essential of domicile).

91. *See Mani v. Mani*, 869 A.2d 904, 908-10 (N.J. 2005) (reviewing the history of alimony).

92. *Id.* at 909-10 (offering these explanations for maintenance: [(1)] as damages for breach of the marriage contract; [(2)] as a share of the benefits of the marriage partnership; [(3)] as damages for economic dislocation; . . . [(4)] as damages for personal dislocation (foregoing the chance to marry another); [(5)] as compensation for certain specific losses at the time of the dissolution; [(6)] as deterrence or punishment for marital indiscretion; and [(7)] as avoidance of a drain on the public fisc.) (internal citations omitted).

does not include an array of other contentions in scholarship.⁹³ Some or all of these explanations may be accurate; all rest on an anterior obligation of a husband to support his wife during his marriage. Absent a duty of support within marriage, the notion that one adult should make transfer payments to another adult and receive nothing in return would be hard for moderns to imagine.

C. Perdurability

Another Essential of Marriage provides that the union must be relatively hard to exit. Persons married to each other must manifest their commitment to what Marjorie Maguire Schultz has called "intended marital permanence,"⁹⁴ or what might be shortened to perdurability. Agreements between spouses that their marriage will exist only for a limited duration, or was undertaken temporarily for the purpose of "legitimizing" a child, are unenforceable; courts held steadfast to this stance both before and after the onset of no-fault divorce.⁹⁵ The perdurability Essential also enjoys support in the *Restatement of Contracts* and among scholars who write on the law of marriage.⁹⁶

In addition to rejecting attempts by married persons to characterize their legal union as temporary rather than permanent, American law enforced the perdurability Essential by making divorce hard to obtain. After the abolition of legislative divorce in the nineteenth century, judges and legislators formed criteria for divorce that kept marriages intact unless one spouse could prove wrongdoing by the other.⁹⁷ The pre-1970 position—that divorce could be obtained only on a showing of fault—rested on a premise that no-fault divorce would make quitting a marriage too easy;

93. See, e.g., Ira Mark Ellmann, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 42-43 (1989) (arguing that alimony gives wives a return on their marital investment); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. (forthcoming 2011) (contending that mothers who have physical custody of children after divorce have a claim on their ex-husbands' income, to compensate them for the costs of childrearing work).

94. Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 273 (1982).

95. *Id.* at 273 n. 244 (citations omitted).

96. See RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1981) ("A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy."); E. Christian Brugger, *The Jurisprudence of Marriage and Other Intimate Relationships*, 55 AM. J. JURISP. 225, 226 (2010) (Book Review) (noting that although contributors to a volume on marriage hold a diverse range of views, they all "do agree on one thing, namely, that the law should not formalize unions—designate them as marriages—that are not entered into with the presumption of permanence"). But see *id.* at 228 (reporting that one chapter proposes that the state offer two types of marriage, revocable and irrevocable).

97. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501 (2000).

explanations of the long resistance to no-fault in New York frequently made reference to the same belief.⁹⁸ Calling divorce “too easy” implies that it ought to be harder. Common law defenses to fault in divorce—including recrimination, condonation, connivance, and collusion—added another layer of perdurability by forcing the aggrieved spouse to refrain from particular prohibited conduct (or deny it under oath, perhaps falsely) at pain of forfeiting the divorce.⁹⁹

Persons forming contracts when they embarked on a new marriage or sought to regulate their existing marriage had to tread carefully around the Essential of perdurability. Until the late twentieth century, the perdurability rationale underlay judicial rejections of antenuptial agreements concerning the distribution of property after divorce.¹⁰⁰ Separation agreements received a similarly cold reception for decades in American courts.¹⁰¹

More recent years have marked a shift in favor of these forms of private ordering, but the perdurability Essential remains in place.¹⁰² Today states are willing to grant no-fault divorces and to honor antenuptial contracts and separation agreements not because they have abandoned their perdurability agenda but because the link between fault criteria or non-enforcement of property agreements on one hand and permanence on the other has grown harder for them to defend. Illustrating this shift, the Uniform Marriage and Divorce Act observes that enforcement of separation agreements serves to “promote amicable settlement of disputes between parties to a marriage attendant upon their separation.”¹⁰³ In other words, their separation being a *fait accompli*, spouses might as well part company without the stress of waiting for a judge to tell them how much property each of them will receive.

Even in the contemporary regime that deems antenuptial agreements enforceable, courts still read these contracts with attention to perdurability.

98. See J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 593 (2007); see also Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 556 (2000).

99. WEISBERG & APPLETON, *supra* note 50, at 510-16. Defenses to fault have not disappeared. New York, for example, recognizes several defenses to adultery as an asserted ground for divorce; when proved, they keep the marriage alive. See N.Y. DOM. REL. LAW § 171 (McKinney 2010).

100. WEISBERG & APPLETON, *supra* note 50, at 125.

101. *Id.* at 674.

102. Even the boldest contemporary judicial decision on the law of marriage—the first to hold that same-sex couples had a constitutional right to marry—embraced the Essential of perdurability. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (stating that “it is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage”).

103. UNIF. MARRIAGE & DIVORCE ACT § 306(a), 9A U.L.A. 248-49 (1998).

One lawyer with a matrimonial practice published an article in 2008 that warned of "[f]orbidden [p]rovisions in [p]renuptial [a]greements."¹⁰⁴ The first forbidden type of agreement discussed in "Forbidden Provisions" is the deal between spouses that courts reject on the ground that it encourages divorce.¹⁰⁵ It is odd that courts still purport to worry about this possibility, because the most popular type of antenuptial contract—the agreement that preserves assets for a spouse who has them—does indeed encourage divorce: when a wealthy individual knows that exit from his marriage will be relatively cheap, that exit becomes more thinkable as well as less costly, and thus easier.¹⁰⁶ If encouraging divorce were really fatal to an antenuptial contract, then many more of these contracts would be deemed unenforceable.

Although courts generally permit wealthy individuals to benefit from contracts that make the escape from marriage cheaper, they will also occasionally invalidate an agreement on the ground that it encourages divorce by making exit too lucrative for the poorer spouse. "Forbidden Provisions" noted two mid-1980s California cases, both involving couples of Middle Eastern ancestry, where courts did not give wives the benefit of their bargains because the deals paid the wives too much.¹⁰⁷ *In re Noghrey* invalidated an antenuptial contract where the husband promised his wife the value of their house plus either \$500,000 or half his assets, whichever sum was greater, in the event of a divorce.¹⁰⁸ This wife argued to no avail that the agreement had been made to give her the money she would need to live on without virginity-value, a key asset in the marriage market of the couple's Iranian-Jewish community: as a non-virgin this wife would struggle to find another husband.¹⁰⁹ *In re Dajani* involved a promised

104. Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL L. 413 (2008).

105. *Id.* at 414.

106. This belief that prenuptial agreements promote divorce may strike us today as quaintly Victorian, but to me it is naive to believe otherwise. Of course they promote divorce. If a married man knows that a divorce will cost him half his net worth, he will be less inclined to walk away from the marriage than if he knows that a premarital contract will keep those costs to a minimum. And even apart from these financial considerations, prenuptial agreements may be said to promote divorce by making the unthinkable thinkable

Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 375 (2005).

107. Fields, *supra* note 104, at 414 (discussing *In re Noghrey*, 215 Cal. Rptr. 153 (Cal. Ct. App. 1983) and *In re Dajani*, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988)).

108. 215 Cal. Rptr. at 154.

109. *Id.* at 154-55 (noting that because the bride's virginity was important to the couple, the bride had assured the groom that she was a virgin and had undergone a medical examination "for that purpose").

payment on divorce of 5000 Jordanian dinars, about \$1700 in 1988.¹¹⁰ Too much, said the court when it invalidated the agreement: too tempting for a discontented wife.¹¹¹

Although not necessarily evidence of any larger tendency, these two California decisions illustrate how judges can use Essentials selectively to achieve the results they want. A court could honor perdurability by rejecting all antenuptial contracts that allocate property upon divorce. Contemporary courts do not do so. As *Noghrey* and *Dajani* demonstrate, judges have felt free to impose this Essential on poorer spouses, forcing them to forgo a relatively generous provision in an antenuptial contract, while other decisions hold that richer people are free to leave on terms that hurt their vulnerable spouses.¹¹²

In another contemporary decision that came out badly for a woman, a Florida appellate court used perdurability as one rationale for refusing to honor a contract between two lovers, Gina and Brian, who had begun their sexual relationship while married to other people.¹¹³ Gina and Brian drafted an agreement with the help of a lawyer. The agreement provided that in consideration of Gina's having left "a secure house and marriage," Brian would either marry Gina within twelve months or support her "indefinitely" thereafter.¹¹⁴ The court deemed the contract void on two grounds. Relying on the abolition of breach of promise to marry by legislation in Florida, the court held that state law did not permit the honoring of a contractual promise to choose between marrying another person and paying out money.¹¹⁵ The court did not stop at the statutory point, however. It also deemed the contract unenforceable because the lovers' deal "promote[d] divorce."¹¹⁶ Divorce of Gina, that is, because of the marriage-quitting

110. 251 Cal. Rptr. at 871

111. *Id.* at 872 ("The contract clearly provided for wife to profit by a divorce, and it cannot be enforced by a California court.").

112. When they find the payoff for the poorer spouse too low, courts can use unconscionability or "substantial injustice," see AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05 (3) (2002), to invalidate the agreement. Courts rarely invalidate an antenuptial contract on the ground of substantial injustice, and when they do, see, e.g., *Clermont v. Clermont*, 603 N.Y.S.2d 923 (N.Y. App. Div. 1993), they do not condemn the agreement as tending to promote divorce. Yet a cheap exit from marriage promotes divorce no less than the expensive exits of *Noghrey* and *Dajani*. See *Crouch v. Crouch*, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964) (observing that "a mercenary husband" could "through abuse and ill treatment of his wife force her to bring an action for divorce and thereby buy a divorce for a sum far less than he would otherwise have to pay"); *Sherman*, *supra* note 106, at 375 (explaining how an antenuptial agreement makes divorce more attractive and convenient for a wealthy spouse).

113. *Hoffman v. Boyd*, 698 So. 2d 346, 347 (Fla. Dist. Ct. App. 1997).

114. *Id.* at 348.

115. *Id.*

116. *Id.*

consideration that the agreement recited. Obviously Brian and Gina had both believed that Gina's marriage was over when they signed their contract. Gina had left her husband.¹¹⁷ She had moved in with Brian and apparently had been hounding him to marry her.¹¹⁸ Yet perdurability—of the offstage marriage, to a husband unnamed in the decision—removed from Gina the value of the bargain she had negotiated.

Common law marriage, whereby two adults can become lawful spouses with no license or ceremony, offers another illustration of the perdurability Essential by making criteria out of a "present agreement to be married" and "holding out" to a community as husband and wife.¹¹⁹ Consistent with the mystery and obscurity that surround the Essentials, these terms do not define themselves even to trained lawyers, let alone the individuals who become bound together this way in jurisdictions that recognize common law marriage when they fulfill the other two criteria: capacity to be married (which is required of ceremonial marriage as well) and cohabitation.¹²⁰ It is at least peculiar, if not contradictory, to say that an individual had a present agreement to be married when she manifestly did not fill out a license application or go through a ceremony. What the two criteria mean, as far as courts are concerned, is behavior that embraces perdurability. The "present" in "present agreement to be married" translates to *I intend that we are married now. Not engaged, not planning to be married later; married now.* Holding out, similarly, means declaring to one's community that *We are husband and wife*, not a casual liaison. Perdurability—the declared stance that two people have come together permanently as a couple, rather than temporarily—distinguishes common law marriage from mere cohabitation.

Whereas common law marriage became a minority doctrine in the last decades of the twentieth century, another rule that rests on the perdurability essential, the disciplinary provision that bars a lawyer from charging a fee contingent on the amount of money obtained in a divorce settlement or judgment,¹²¹ shows almost no sign of retreat.¹²² One lawyer, building an end

117. *Id.*

118. *Id.*

119. *Beswick v. City of Philadelphia*, 185 F. Supp. 2d 418, 430-31 (E.D. Pa. 2001) (reciting elements according to Pennsylvania law); *Smereczynski v. Sec'y of Dep't Health & Human Servs.*, 944 F.2d 296, 298 (6th Cir. 1991) (reciting elements according to Ohio law).

120. *See Beswick*, 185 F. Supp. 2d at 430-31; *Smereczynski*, 944 F.2d at 298 (noting latter two elements).

121. MODEL RULES OF PROF'L CONDUCT 1.5(d)(1) (2007).

122. Very few states permit matrimonial lawyers to be compensated this way for representing a client in a divorce. The two jurisdictions that I know of that permit a contingent fee express disapproval of it in comments to their rules of conduct. D.C. RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2007); TEXAS RULES OF PROF'L CONDUCT R. 1.04 cmt. 9 (1995). No movement toward modifying the Model Rules prohibition is underway in the American Bar Association. The development on this front exists outside the legal

run around this rule, recently formed a business to invest in divorces by making funds available to poorer spouses in exchange for a stake in the distribution of marital assets to be attained by settlement or judgment,¹²³ analogous to the litigation financing that became available to personal injury claimants in the early 1990s and by 2004 had expanded to include dozens of businesses investing in tort litigation on a non-recourse basis.¹²⁴ Just as descriptions of the American-style contingent fee have associated this form of paying lawyers with expanded justice,¹²⁵ this entrepreneur described her motive as giving help to “the underdog.”¹²⁶ She bucked a tide. Lawyers may not make a living contingent on what they can attain for a poorer spouse in a dispute over winding up the distribution of marital property because the work of dividing property upon divorce cannot take place without a divorce, on which the perdurability Essential frowns.

D. Sexual Intercourse and Ongoing Conjugal Intimacy

Vernacular references to the consummation of a marriage, which date back to the sixteenth century,¹²⁷ bespeak a sexual Essential. Consummation (a word etymologically related to “sum up,” or completion)¹²⁸ suggests that a marriage does not form until a couple in question has gone through a rite sponsored by the state or a religious entity and also engaged in at least one act of vaginal intercourse. The law actually imposes no categorical requirement of sex on persons who seek to join together in marriage.¹²⁹ A marriage undertaken by two persons who have the legal capacity to wed each other has the force of law upon fulfillment of state criteria pertaining to a license and ceremony, with or without any physical act. Married couples may forgo every type of bodily contact yet remain legally married if they so choose.

profession: litigation financing of divorce, where the financing entity receives a fraction of the judgment or settlement, has become available. Binyamin Appelbaum, *Taking Sides in a Divorce, Chasing Profit*, N.Y. TIMES, Dec. 45, 2010, at A1.

123. Appelbaum, *supra* note 122, at A1.

124. Terry Carter, *Cash Up Front: New Funding Sources Ease Strains on Plaintiffs Lawyers*, 90 A.B.A. J. 34, 34-36 (2004), counted more than a hundred such businesses. The reference to “dozens” is intended to exclude other types of litigation financing, such as loans to plaintiffs’ lawyers and investments in commercial rather than personal injury litigation.

125. Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 9 (2010) (noting that without the contingent fee, the only persons who could prosecute personal injury claims are those who can afford to pay lawyers by the hour); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 607 (2010) (noting “the policy goal of broadening access to justice”).

126. Appelbaum, *supra* note 122, at A1.

127. See III OXFORD ENGLISH DICTIONARY 802 (2d ed. 2001).

128. *Id.*

129. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

Essentials related to sex have nonetheless endured. The Essential that pertains to sex will (like most other Essentials, as we have seen) reach the attention of the state only when someone protests. Inability to engage in intercourse—what statutes call impotence or impotency—is grounds for an annulment in many jurisdictions.¹³⁰ Student author Laurence Drew Borten notes that even though Maine statutory law had listed impotency as a ground only for divorce, and not annulment, its supreme court construed this criterion as sufficient for annulment too, using Essentials reasoning.¹³¹ When they annul marriages on the ground that the respondent spouse concealed an addiction to heroin, courts have focused on the effect of heroin addiction by one spouse on the couple's sex life, even though this drug presumably has other disruptive effects on any intimate relationship when encountered unexpectedly after concealment:¹³² essentials again. Borten also reports on the obscure "doctrine of 'triennial cohabitation,'" which "presumes impotence, without further inquiry, if the marriage has not been consummated after three years."¹³³ States that insist that grounds for annulment must pertain to essentials, rather than meet a lower standard like materiality,¹³⁴ regard refusal or incapacity to engage in sex as the quintessential Essential.¹³⁵

Sex as an Essential can reach the courts later in the span of a marriage, after the time or the criteria for an annulment have lapsed. The New York Court of Appeals in 1926 used this Essential to deny support to an estranged wife whose husband refused to fulfill their premarital agreement.¹³⁶ Before they married, the spouses had agreed that they would not have sex or live together until they had been through a Roman Catholic marriage ceremony as well as the civil one that had preceded it. The wife declared herself ready

130. Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1098-99 n.41 (2002) (gathering examples of ground for annulment that include a spouse's being "incapable of entering into the married state from physical causes" and "impotency") (quoting N.Y. DOM. REL. LAW § 140(d) (McKinney 1999)).

131. *Id.* at 1098 n.42 (quoting *Dolan v. Dolan*, 259 A.2d 32, 36 (Me. 1969) (relying on a plenary statute: "Whenever the validity of a marriage is denied or doubted, either party may file a libel for annulling the same")). Evidently, the *Dolan* court believed that an allegation of impotency constituted an expression of doubt about the validity of the marriage, even though no statute in the state declared impotency to be a ground for annulment.

132. *Id.* at 1102.

133. *Id.* at 1099 (quoting *Bissell v. Bissell*, 117 A. 252, 254 (N.J. Ch. 1922)).

134. See *supra* note 34.

135. John Parisi, Note, *The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497, 1507 (2010) (observing that one important annulment decision, *M.T. v. J.T.*, 355 A.2d 204, 209-10 (N.J. Super. Ct. App. Div. 1976), "explicitly held that the ability to have full intercourse determines the validity of a marriage").

136. *Mirizio v. Mirizio*, 150 N.E. 605 (N.Y. 1926).

to go through the church ceremony and then live together. Although the husband refused both the religious ceremony and cohabitation, the court declared the wife the abandoner for having refused sex and cohabitation until her husband joined her in the church ritual he had promised. "Public policy in such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations," wrote the court, ruling that the wife had forfeited her claim to support.¹³⁷

Divorce law presents two other sex-related Essentials. State laws providing for fault-based divorce will typically include adultery and desertion among the available grounds.¹³⁸ Adultery as a ground for divorce gives each spouse an exclusive stake in what could be described as the coital output of the other spouse. Just as an output contract obliges a buyer to purchase the yield,¹³⁹ a spouse also has to accept at least some of the coital output: refusal can constitute desertion or constructive desertion.¹⁴⁰ The premise of this Essential is that a married person must, and is also entitled to, share a monogamous sexual life with her or his spouse—even if this person knew or should have known, for whatever reason, not to count on being so supplied. By requiring a spouse who uses desertion as a ground for divorce to show the other's intent to abandon the marriage,¹⁴¹ and equating rejection of sex with abandonment of the marriage, this Essential reduces a relationship to one ascribed constituent. The exclusive output-entitlement extends only to sex. Courts do not find adultery or desertion when the respondent spouse has betrayed or abandoned the petitioner with respect to emotions, hobbies, career priorities, parental labors, or plans for a shared old age.¹⁴² The sexual Essential of Marriage privileges one facet of marital intimacy, again by making a priority of what might not have come first for the individuals affected.

For a concluding sexual Essential, consider what Twila Perry has called "a husband having a proprietary interest in his wife's body."¹⁴³ Consortium as a cause of action, which in its original form gave a husband damages when his own body was not harmed by a tortfeasor, recognizes such an interest.¹⁴⁴ The interest stays alive—surviving the death of a marriage—when an ex-spouse has to pay alimony: most states follow the

137. *Id.* at 609.

138. WEISBERG & APPLETON, *supra* note 50, at 470-71.

139. U.C.C. § 2-306; E. ALLAN FARNSWORTH, *CONTRACTS* § 2.15, at 82 (2d ed. 1990).

140. WEISBERG & APPLETON, *supra* note 50, at 458-61, 470-72.

141. *Id.*

142. *See, e.g., Reid v. Reid*, 375 S.E. 2d 533, 538 (Va. Ct. App. 1989) (refusing to consider a wife's claim of constructive desertion based on the husband's emotional and psychological withdrawal from the marriage).

143. Perry, *supra* note 14, at 27 n.95.

144. *See supra* notes 55-59 and accompanying text.

rule codified in the Uniform Marriage and Divorce Act that an obligation to pay maintenance ceases when one's ex-spouse remarries.¹⁴⁵

This Essential is wispier than others we have examined. It takes no overt form in the common law, and contemporary statutory law of divorce aspires to gender-neutrality. Yet because judges do not elaborate on the belief that it is "unreasonable for a dependent spouse to receive financial support from a former spouse and a present spouse at the same time"¹⁴⁶—and because cohabitation or de facto remarriage can also terminate an ex-spouse's obligation to pay maintenance even though no new spouse has volunteered for a legal duty of support,¹⁴⁷ eliminating the rationale that an alimony-paying ex-spouse has been formally supplanted—the conjecture about a proprietary interest in a body becomes plausible within the law of maintenance. According to this Essential, "an ex-husband should not have to support a woman who not only has a new man to support her," as Perry writes, "but is also now cleaning up for and having sex with this new man."¹⁴⁸

E. Gender Dimorphism

Postponing a discussion of state-level provisions—some of them codified well before the DOMA era—that limit marriage to opposite-gender couples in the form of statutory law,¹⁴⁹ we may note here the assertions that judges have made to enforce the same constraint. Venturesome couples made up of two men or two women have, over the decades, brought actions in state and federal courts seeking access to marriage. The subset of this case law that pertains to Essentials consists of judicial decisions that refused access to same-sex marriage even though codified law in the jurisdiction made no demand of gender dimorphism.

By telling individuals that they may not have what they want because their gender is wrong, even though controlling authority in the jurisdiction contains no gender-related demand on point, this strand of decisional law evokes the infamous *Bradwell v. Illinois*,¹⁵⁰ in which the Supreme Court

145. UNIF. MARRIAGE AND DIVORCE ACT § 316, 9A U.L.A. 102 (1998); Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971 (2006) (arguing against the rule).

146. *Amundson v. Amundson*, 645 N.W. 2d 837, 839 (S.D. 2002); see also Starnes, *supra* note 145, at 995 (reporting a belief, not shared by the author, that "to allow a woman to collect support from two men—her ex-husband and her current husband—would be positively unseemly").

147. See *Lucas v. Lucas*, 592 S.E. 2d 646, 652-53 (W. Va. 2003) (surveying varying positions in states' laws).

148. Perry, *supra* note 14, at 26; see also Starnes, *supra* note 145, at 995-96.

149. See *infra* Section II.B.

150. 83 U.S. (16 Wall.) 130, 130 (1873).

held that Myra Bradwell could not receive a law license even though she had the qualifications that her male peers possessed, and no statute in her state excluded women from the practice of law.¹⁵¹ Rejecting Bradwell's contention that her exclusion violated the Privileges and Immunities Clause, the opinion for the Court did not bother to study the governing statute.¹⁵² A more notorious concurrence mused on the nature of a woman. "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator," wrote Justice Joseph P. Bradley.¹⁵³ "And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."¹⁵⁴ By "exceptional cases," Justice Bradley referred to the existence of unmarried women. His concurrence also made approving reference to the decision of the Illinois Supreme Court, which had applied what Bradley called "the common law . . . [that] only men were admitted to the bar."¹⁵⁵

Just as one of the essentials of holding a law license was, to the Court in *Bradwell*, being male, an Essential of Marriage that judges have identified makes a rule of gender. This Essential demands dimorphism. A marriage must contain one man and one woman.

Judges reached this liberty-defeating conclusion in the face of silence from the legislature and a lack of any support from controlling precedent. In 1973, for example, one court decided that two women were "prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."¹⁵⁶ To locate how "that term is defined," the court referred to lexicons that described marriage as a category that contains one man and one woman.¹⁵⁷ It drew an Essentials impediment from two books whose content would have been inadmissible hearsay under the law of evidence.¹⁵⁸ Other case law from the pre-DOMA era insisted on gender dimorphism in the absence of direction from statutes or precedent.¹⁵⁹

151. *Id.* at 130-31.

152. *Id.* at 132-33.

153. *Id.* at 141.

154. *Id.* at 141-42.

155. *Id.* at 140.

156. *Jones v. Hallahan*, 501 S.W. 2d 588, 589 (Ky. 1973).

157. *Id.*

158. *See* FED. R. EVID. 803(18) (noting that in order to be admissible as a "learned treatise []," a statement must be established "as a reliable authority" either by expert testimony or judicial notice).

159. *See* *Adams v. Howerton*, 486 F. Supp. 1119, 1121 (C.D. Cal. 1980) (refusing to allow a male U.S. citizen to claim a man as his spouse for immigration purposes, even though the statute at issue, a section of the Immigration and Naturalization Code, contained no reference to gender when making provisions for "spouses"); *Anonymous v. Anonymous*, 325 N.Y.S. 2d 499, 500-01 (N.Y. Sup. Ct. 1971) (issuing a declaratory judgment that

A pioneering same-sex couple in Minneapolis, whose challenge to imposed gender dimorphism generated the first decision by a state supreme court on the issue, argued that "the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages."¹⁶⁰ The Minnesota Supreme Court scoffed in response, maintaining that "a sensible reading of the statute" refuted that possibility.¹⁶¹ Although no gender-dimorphous definition of marriage appeared in the statute, the court determined that "common usage" of the word marriage barred a same-sex couple from access; moreover, the draftsmen of "territorial days," the court speculated, surely intended to restrict marriage to one man and one woman.¹⁶² When petitioners reminded the court about *Loving v. Virginia*,¹⁶³ at the time a recent decision that had invalidated a categorical restriction on access to marriage, the court retorted that *Loving* had rested "solely on the grounds of [the statute's] patent racial discrimination."¹⁶⁴ *Loving* had said no such thing.¹⁶⁵ The *Baker* court retreated a bit a few lines later: "*Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment."¹⁶⁶ Making a last reference to what it called common sense, the court declared that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."¹⁶⁷

Gender dimorphism persists as a barrier even when one party seeking to marry or to have a marriage recognized has done all he or she can do to comply with this demand. Case law has considered whether an individual whose gender reassignment has been recognized by the state, typically in the form of a new birth certificate, may enter into a marriage that falls into the opposite-sex category, assuming that the new gender is accepted. The majority of American courts have withheld approval of such a marriage,

marriage was a nullity upon the initiative of a male plaintiff who had discovered that the person he thought was a woman and had married had male genitals). The closest that *Adams* came to finding statutory language on point was a quotation from a Colorado provision that "[a] marriage between a man and a woman licensed, solemnized, and registered . . . is valid in this state." *Adams*, 486 F. Supp. at 1122. Although that statute references gender dimorphism, it does not require that condition to make a marriage valid. See also *Singer v. Hara*, 522 P.2d 1187, 1189 n.5 (Wash. App. 1974) (inferring that although Washington did not make gender dimorphism a criterion for access to marriage, references to "the female" in its Revised Code must imply "that a male was contemplated as the other marriage partner").

160. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971).

161. *Id.*

162. *Id.* at 185-86.

163. *Id.* at 187.

164. *Id.*

165. See cases cited *supra* note 15.

166. *Baker*, 191 N.W. 2d at 187.

167. *Id.*

refusing to order the issuance of a license or declining to accept validity after the marriage is formed.¹⁶⁸

A contrary decision from a New Jersey trial court that refused to grant an annulment to a husband on the ground that his wife was “a male-to-female transsexual” remains the outlier decades after its publication.¹⁶⁹ In *M.T. v. J.T.*, a wife born male who became female—following sex-changing surgery paid for by her fiancé, who as her husband would go on to leave her and deny the marriage—was deemed married on the ground that she had “become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy.”¹⁷⁰ Her possession of a vagina with “a good cosmetic appearance”¹⁷¹ that permitted sexual intercourse showed that M.T. “should be considered a member of the female sex for marital purposes,”¹⁷² said the court, and thus the marriage was valid. Though more tolerant than other decisional law on point, *M.T. v. J.T.* also relied on an Essential of gender dimorphism. This one was contingent on the skill and luck of a surgeon, along with a patient’s psychological response to his handiwork.

Some courts that issued non-recognition judgments of marriages involving transgendered persons have called on their state legislatures to weigh in with new statutory law.¹⁷³ That position has a humble air—“the least dangerous branch”¹⁷⁴ bowing modestly to elected legislators—but like other judicial applications of the Essentials of Marriage, it is an action by the state that nullifies what persons wanted and went out of their way to choose. An individual cleared the many hurdles that make it difficult to change one’s assigned gender, received state recognition of the change, and then tried to embark on a marriage with a willing opposite-sex partner while

168. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002) (holding that a transgendered wife could not inherit after a husband died intestate); *Kantaras v. Kantaras*, 884 So. 2d 155, 155 (Fla. Dist. Ct. App. 2004) (refusing to dissolve a marriage between a woman identified as female from birth and a transgendered woman, declaring it void *ab initio*); *In re Marriage of Nash*, Nos. 2002-T—0149, 2002-T-0179, 2003 WL 23097095, at *9 (Ohio Ct. App.) (refusing to issue a license to a couple consisting of one woman identified as female from birth and one transgendered woman); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (refusing to allow a transgendered widow to bring an action for medical malpractice in her capacity as spouse).

169. *M.T. v. J.T.*, 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976).

170. *Id.* at 211.

171. *Id.* at 206.

172. *Id.* at 211.

173. *Littleton*, 9 S.W.3d at 230; *Kantaras*, 884 So. 2d at 161 (“Until the Florida legislature . . . amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth.”); *In re Ladrach*, 513 N.E. 2d 828, 832 (Ohio Prob. Ct. 1987).

174. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1982).

complying with all other criteria for entry into marriage.¹⁷⁵ Judges who say that they cannot cooperate with this life plan until a legislature takes some undescribed new steps that would "clarify the marital rights of a postoperative transsexual person,"¹⁷⁶ without saying what that demand would achieve, stray from parsimony and transparency.

F. Domicile: A Superseded Essential, With Lessons

The First *Restatement of Conflicts*, published in 1934, declared that the domicile of a married couple is the state in which the husband resides. "The husband is the head of the family," explained the *First Restatement*, "which includes the wife and minor children, and in normal cases the members of the family are domiciled at the place where he has his domicil. On marriage, the wife takes the domicil the husband has at that time."¹⁷⁷ The *Restatement* recognized one exception to its generalization about "normal cases": a wife who "lives apart from her husband without being guilty of desertion according to the law of the state that was their domicil at the time of separation . . . can have a separate domicil."¹⁷⁸ For example, the *Restatement* continued, the couple could have separated and chosen to live in different states by mutual consent, or the husband might have been the deserter when he changed his domicil.¹⁷⁹

Consequences followed for women who had had their own ideas about where they were living. In *Price v. Greenway*¹⁸⁰ the unnamed plaintiff, a native of Pennsylvania, had two years before filing her complaint married one Dana Price, whose domicile was Iowa. The couple separated a month after marrying and the wife signed up for the Women's Army Corps. When enlisting, she wrote Newburgh, New York as her home on a military form. Hurt while riding as a passenger on a bus, she brought a personal injury action in federal court against New Jersey defendants, giving New York as her domicile. Neither her adversaries nor the court agreed with her contention about where she lived. The defendants claimed she was a New Jersey resident on the ground that she had been stationed in Newark at the time of the accident. The court ruled that because Iowa was her husband's home state, she was domiciled in Iowa.

175. See Parisi, *supra* note 135, at 1501-04 (surveying the burdens of changing one's gender in the contemporary United States and relating these efforts to judicial non-recognition).

176. *Kantaros*, 884 So.2d at 161.

177. Comments *a* and *b* to RESTATEMENT (FIRST) OF CONFLICTS § 27 cmt. a, b (1934). In this Article I use the more familiar spelling of "domicile," except when quoting or paraphrasing the *Restatement*, as here, or referring to an individual herself as "a domicil."

178. *Id.* at § 28.

179. *Id.*

180. 167 F.2d 196 (3d Cir. 1948).

Some wife-litigants agreed that they lived in their husband's state of residence but disagreed about where exactly they resided in that state. In an opinion joined by Judge Cardozo, the New York Court of Appeals ruled unanimously in 1931 that a woman named Mabel Daggett did not reside in Manhattan because her husband's residence was in another county.¹⁸¹ Accordingly her will had to be probated in the county her husband had chosen as his home even though she, the wealthier partner to the marriage who had "determined substantially all questions of the movements of herself and her husband,"¹⁸² had declared in her will that she resided in New York County. "If Mrs. Daggett had been a single woman," wrote the court, "she would have been free to select her own residence or domicile without let or hindrance . . . but she was a married woman and a married woman cannot, to suit her convenience or pleasure merely, create a legal residence for herself apart from her husband."¹⁸³

Two women fighting to be school superintendent in Franklin County, Mississippi litigated the question of marital domicile. An election for the post held in December 1928 resulted in 724 votes for one and 719 for the other.¹⁸⁴ After the election, the plaintiff, Ada Guice, recipient of the 719 votes, married "one Raymond Weisinger, of Texas."¹⁸⁵ Her opponent, the recipient of 724 votes, promptly filed a motion stating that Mrs. Weisinger was now no longer a resident of Mississippi; and under Mississippi law, a nonresident of the state could not serve as school superintendent. The court sided with the opponent, dispatching Ada Guice Weisinger's political ambitions in Mississippi on the ground that Mr. Weisinger had never purported to live in that state:

It is not necessary for us to determine whether the evidence discloses where the domicile of the appellant's husband, in fact, is; for it is clear therefrom (there is no contention to the contrary) that he has never lived in Mississippi, from which it follows that his domicile, and consequently that of his wife, is not in this state. The appellant has lost her right to the office here in controversy.¹⁸⁶

Husbands, not just wives, suffered adverse consequences when courts applied this Essential. In *Gardner v. Gardner*, a divorce case decided in 1950, a husband was domiciled in New York yet sought a divorce in New Jersey.¹⁸⁷ The couple had lived together first in New York and then in Jersey City. After the wife deserted the husband in 1931, husband and wife then lived separately in New Jersey until the husband returned to New York.

181. *In re Daggett's Will*, 174 N.E. 641, 642 (N.Y. 1931).

182. *Id.*

183. *Id.*

184. *Guice v. McGehee*, 124 So. 643, 644 (Miss. 1929).

185. *Id.* at 647.

186. *Weisinger v. McGehee*, 134 So. 148, 150 (Miss. 1931).

187. 71 A.2d 131 (N.J. Super. Ct. 1950).

Both the trial and appellate court rejected his petition for divorce on the ground of desertion. Jurisdiction was not present, according to the Appellate Division: a wife may not "by her wrongful act, desertion, and the very process of its continuance, thereby release herself from the status our law imposes upon her with respect to her domicile being that of her husband."¹⁸⁸ If the court had been willing to recognize the wife's domicile in New Jersey, the husband would have been eligible for the New Jersey divorce he sought.

Quaint cases, as we have seen, raise the recurring question: why care? This vestige of the common law appears obsolete. The treatment of the subject in the *Restatement of Conflicts*, published in 1971, gives an answer. Section 21 reads in its entirety: "The rules for the acquisition of a domicil of choice are the same for both married and unmarried persons."¹⁸⁹ Continuing its project of modernization, in 1988 the *Restatement* switched its old topic heading for the section, "Married Women, Children, and Incompetents" to the neutral-sounding "Acquisition and Change of Domicil."¹⁹⁰ Transparent, parsimonious, egalitarian. The only complication is in the Comments:

The common law rule [is] that a married woman takes the domicil[e] of her husband by operation of law so long as she lives with him. It may be questioned, however, whether this rule is consistent with modern views as to the legal position of married women. It also seems probable that the principle reason for the continued application of the rule is that the courts have had little reason to reexamine it.¹⁹¹

In other words, although the Reporters did all they could to state a clear, gender-egalitarian, freedom-respecting rule about domicile and to expunge an old Topic that had lumped married women together with incompetent persons, the current *Restatement of Conflicts* lacks both statutes and case law to cite in support of its modernized revision. Prepared and published by a private nonprofit, Restatements do not make law.¹⁹² Uncertainty remains. A lawyer whose client asks about the domicile of a married woman who lives in a different state from her husband cannot give

188. *Id.* at 133.

189. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 (1971).

190. *Id.*, Reporters' Notes.

191. *Id.*, cmt. a.

192. See generally Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1665-67 (1995) (describing the Restatement-writing work of the ALI). In the Virgin Islands, alone among U.S. jurisdictions, ALI restatements have the effect of self-executing law. See V.I. CODE ANN., tit. 1, § 4 (2010) ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.").

a definitive answer.¹⁹³ A judge who holds enlightened “modern legal views as to the legal position of married women” is similarly bereft of precedent and statutory authority when faced with a question about a married woman’s domicile. All the *Restatement* can say to guide the perplexed is that the problem does not arise very often: “[I]n the vast majority of situations,” it declares, “a wife who lives with her husband in a certain place will regard that place as her home.”¹⁹⁴ Indeed. Yet the eight illustrations of debatable domicile supplied in the Comments—including a wife-politician resembling Ada Guice Weisinger¹⁹⁵—are not farfetched and do not exhaust the variations that can arise when persons marry each other and maintain households in two locations.

The example of domicile also shows that obscurity pervading the *Essentials of Marriage* makes it difficult to tell whether, or when, an *Essential* has become so unpopular over time that it no longer holds legal power over individuals. Consider desuetude, which courts have used occasionally to nullify disused prohibitions.¹⁹⁶ According to one paraphrase of this doctrine, “laws lapse, and can no longer be enforced, when their enforcement has already become exceedingly rare because the principle behind them has become hopelessly out of step with people’s convictions.”¹⁹⁷ The *Essentials of Marriage* might also be subject to invalidation by desuetude. The crucial distinction they introduce here, however, pertains to the freedom of individuals. To the extent it functions as a doctrine, desuetude extinguishes criminal laws, leaving individuals

193. The *Restatement* gives the example of a woman who lives in State X when she meets and marries a man who lives in State Y. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21, cmt. b (1971). This wife considers State X her domicile, and the couple spends most of its time in her home there. *Id.* The husband maintains his home in State Y. *Id.* In an effort to preserve her original domicile, the wife executes a written agreement with her husband reciting that State X remains her domicile. *Id.* According to the *Restatement*, if tax authorities in State Y insist that this wife became domiciled in State Y as a result of her marriage, they would be wrong, because the wife retained her domicile in State X. *See id.*

Undoubtedly this illustration is intended to help the reader, but it increases rather than lessens my puzzlement. The written agreement that the husband and wife executed seems otiose in light of § 21, which declares that all adults, married and unmarried alike, establish their domicile the same way. Why did the couple state their domicile in a document, when other people needn’t bother? Moreover, because the couple was spending “by far the greater part of each year in W’s house in X,” *id.*, I would have thought it was the husband, not the wife, who would need a recitation of his intent to remain domiciled in his original home state. Was the written agreement necessary for the wife’s retention of her domicile, or just a costly belt-and-suspenders precaution? The *Restatement* doesn’t say.

194. *Id.*

195. *See supra* notes 184-79 and accompanying text.

196. *See BICKEL, supra* note 174, at 62-63.

197. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 97 (2005).

freer to do what they want.¹⁹⁸ Like unpopular old criminal prohibitions, several Essentials of Marriage have deteriorated over time in their force and acceptance. But as long a judge can impose them to thwart individual choice, they retain their threat to freedom.

Because laws about domicile typically govern state action rather than agreements between individuals—judges use them to decide whether they have jurisdiction, which state's law to apply to a dispute, whether travel is a tax-deductible expense, which state debtor-creditor law protects or burdens an insolvent individual and so forth—they pertain to the relationship between equal protection doctrine and the Essentials of Marriage. I take up this discussion below.¹⁹⁹ For the moment, domicile as an Essential offers a useful illustration of how state action can spread beyond state actors.

Samuel v. University of Pittsburgh, the decision that struck down a tuition rule that ascribed to married female students the domicile of their husbands, regardless of where these women believed they lived, spent much time discussing whether Penn State, Temple, Pitt, and other Pennsylvania colleges and universities, along with their administrators, were "persons," "state actors," "state instrumentalities," and other terms of art.²⁰⁰ The rule had been written by the state Auditor General; private colleges in the state apparently had abided by it as well.²⁰¹ When the federal courts of Pennsylvania invalidated the tuition rule as unconstitutional under the Equal Protection Clause,²⁰² they caused private actors to change their treatment of tuition-paying women who were married. It becomes reasonable to infer that other Essentials that apply to state action will influence non-state action as well, extending the impingement that governments impose.

II. ESSENTIALS FORMED OUTSIDE THE COMMON LAW

So far our survey suggests that Essentials of Marriage, though still vital, have fallen into retreat. A few cases discussed in the last Part sound positively risible, as does William Blackstone's description of coverture as state-imposed forfeiture of a married woman's legal identity. The last Essential discussed, pertaining to the domicile of a married woman, was

198. For this purpose an older statement of the doctrine is more accurate: "'Desuetude' is the ancient doctrine that long and continuous failure to enforce a statute, coupled with open and widespread violation of it by the populace, is tantamount to repeal of the statute." Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976).

199. See *infra* Section III.C.

200. *Samuel v. Univ. of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *rev'd in part on other grounds*, 538 F.2d 991 (3d Cir. 1976).

201. *Id.* at 1132-34.

202. *Id.*

declared moribund by the American Law Institute in 1971.²⁰³ Declines in the Essentials of Marriage—or, in Jana Singer’s phrase, “the privatization of family law”²⁰⁴—have moved marriage along the famed axis that Henry Sumner Maine announced in 1864: “from Status to Contract.”²⁰⁵ As the Essentials of Marriage deteriorate and lose their hold on judges, however, a countermove by legislators resists this erosion, and another Essential, a rule of geographic presence, persists outside of both common and statutory law.

From 1996 to 2004, both Congress and the majority of state legislatures wrote a key Essential of Marriage, gender dimorphism, into newly codified laws.²⁰⁶ This legislation has generated an enormous critical literature.²⁰⁷ With the rush of defense-of-marriage lawmaking apparently stalled,²⁰⁸ this Article joins writings that look backward on the DOMA phenomenon.²⁰⁹ My commentary on DOMA in this Article examines it as a bolster of Essentials. Defense of Marriage legislation circa 1996-2004 demonstrates that not only judges, but legislators too, resist the move from Status to Contract, or toward privatization of family law, by acting to thwart what some same-sex couples pursue for themselves. The other Essential considered in this Part is the demand that couples be present within the geographic boundaries of a jurisdiction if they wish to marry under its laws.

A. DOMA as a Source of Federal Rights and Detriments

Until 1996, the American national government stayed out of defining and regulating marriage. It left this area of regulation to the states. “State control over marital status determinations predates the Constitution,” wrote one court in 2010, noting that before the American Revolution it was colonial governments rather than Parliament in Britain that regulated

203. See *supra* Section I.F.

204. Singer, *supra* note 49.

205. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Ashley Montagu ed., Univ. of Ariz. Press 1986) (1864).

206. See sources cited *supra* note 2 (reviewing literature on the federal DOMA); see also *supra* note 7 and accompanying text (noting state DOMAs).

207. See *supra* note 2. I made a small contribution to this corpus. Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL’Y 79 (2007).

208. A trickle of DOMA-style enactments continued after 2004. Arizona, for example, approved a constitutional amendment in 2008 after the measure failed in 2006. See ARIZ. CONST. art. 30.

209. See, e.g., Jerry Simon Chasen, *Is DOMA Doomed?*, PROB. & PROP., Feb. 2011, at 22; Koppelman, *supra* note 13; W. Sherman Rogers, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won’t Survive*, 54 HOW. L.J. 125 (2010).

marriage.²¹⁰ State judges and legislators around the country have generated divergent rules. Who may marry, how spouses may set the terms of their relationship, what constitutes grounds for divorce, how property is divided upon dissolution, which fraction (if any) of a decedent's estate a spouse may inherit, and other law-of-marriage questions receive different answers around the United States.

This variety has been provoking criticism and concern since the 1880s. Throughout the late nineteenth and early twentieth centuries, law reformers offered numerous proposals to federalize marriage by both legislation and constitutional amendment.²¹¹ Members of Congress steadfastly rejected these initiatives, maintaining that a federal law of marriage would usurp the power of the states.²¹²

Consequently the federal government had to live with contradictory stances on marital status. Before 1996, whenever federal law paid attention to this status—in contexts like immigration, Social Security transfer payments, jointly filed income tax returns, assertions of marital privilege under the Federal Rules of Evidence, for example—it routinely deferred to the states. Just as “the privatization of family law”²¹³ encouraged individuals “freely [to] choose to make of their lives what they wish”²¹⁴ regardless of what an outsider would think of their arrangement, the longstanding federal recognition of contradictory state rules on marital status condoned heterogeneity. There might be a One Best Way to identify which persons were or could be married to each other, and what followed from that determination. But for two centuries the United States government proceeded as if a multiplicity of marital-status regulatory regimes were better than one.

Enter the third and final section of DOMA:

Section 3. Definition of ‘marriage’ and ‘spouse’:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.²¹⁵

As we have already seen, the Essential of gender dimorphism had existed before Congress codified DOMA. Same-sex couples who protested their lack of access to marriage, along with litigants who contended that a

210. *Massachusetts v. U.S. Dep’t of Health & Hum. Serv.*, 698 F. Supp. 2d 234, 236 (D. Mass. 2010).

211. *Id.* at 237.

212. *Id.*

213. *See supra* note 49.

214. *See Mnookin, supra* note 27, at 1018.

215. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, § 7.

marriage lacked the force of law because one party to the marriage had been born into the same gender as his or her spouse, gave judges several opportunities to hold that a union between one man and one man or one woman and one woman could not be a marriage, even when statutes and case law in the jurisdiction had imposed no such barrier.²¹⁶ Section 3 of DOMA renewed the strength of this Essential. Its other substantive provision, Section 2, added only stasis.²¹⁷ In Section 3, for the first time Congress codified a federal definition of marriage that overtly included an Essential.²¹⁸

Consequences of this Essential rippled out. A report prepared by the General Accounting Office counted more than a thousand federal regulations and statutory provisions affected by this Essential of Marriage.²¹⁹ The report shows how far state-based determinations of marital status reach into the entitlements and requirements that the federal government imposes. Marital status affects federal law on the importation of flowers,²²⁰ the regulation of fishery,²²¹ and restrictions on importing cultural property,²²² among other esoterica gathered by the GAO.²²³ The announcement in early 2011 that the Department of Justice would no longer defend DOMA in court left the sprawl of these Essentials undisturbed.²²⁴ as long as the statute remains law, the federal government will continue to demand marital gender dimorphism in hundreds of its statutes and regulations.

216. See *supra* notes 146-67.

217. Responding in part to *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), a decision that members of Congress understood to encourage or even compel the Hawaii legislature to make same-sex marriage available in that state, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 170 (1999), DOMA set out to cabin this perceived eccentricity in its remote Pacific location. Section 2 reminded other states that they need not recognize same-sex marriages formed in Hawaii or any other jurisdiction.

218. The Justice Department announced in February 2011 that it would not work to enforce this Essential in court. See Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (announcing that the Attorney General had concluded that Section 3 of DOMA violated the Equal Protection Clause) [hereinafter DOJ Letter].

219. U.S. Gen. Accounting Office, *Defense of Marriage Act*, Gen. Accounting Office Rep. OGC-97-16, at 2 (1997) [hereinafter GAO Report]; see also *infra* notes 327-28 (praising this report for the information it generated).

220. 7 U.S.C. § 4311 (2006).

221. 16 U.S.C. § 1852 (2006).

222. 19 U.S.C. § 2606 (2006).

223. GAO Report, *supra* note 219, at 8 (flowers), 41 (cultural property), and 43 (fisheries).

224. DOJ Letter, *supra* note 218.

B. Gender Dimorphism as a Statutory Criterion for Entry Into Marriage

Before the enactment of DOMA, a few states had codified legislation limiting marriage to one man and one woman.²²⁵ The pattern before 1996 had been to mention gender dimorphism but not underscore it as necessary for a valid marriage. References to "one man and one woman" mark a post-DOMA modification; in the pre-DOMA era, gender dimorphism apparently ranked below other criteria, such as consent. For example, before DOMA, North Dakota had defined marriage as "a personal relation arising out of a civil contract between a male and a female to which the consent of the parties is essential."²²⁶ In 1997, the statute was amended to state that "[m]arriage is a personal relation arising out of a civil contract between one man and one woman"²²⁷ A statute in North Carolina dating back at least to 1945 provided that "[a] valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously, and plainly expressed by each in the presence of each other . . . ;"²²⁸ only in 1996 did North Carolina go on to say that "[m]arriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals who are of the same gender are not valid in North Carolina."²²⁹ Other states also put the Essential of gender dimorphism into stronger form by declaring that same-sex marriage was contrary to their public policy.²³⁰

Legislative supremacy, which holds that statutes outrank law as it is found or made by judges, gives a codified Essential more force than its common law counterparts. The Hawaii Supreme Court had encouraged marriage-equality activists with a liberal ruling in 1993,²³¹ but that encouragement came to an end in 1998 when voters approved a constitutional amendment providing that the state legislature had "the power to reserve marriage to opposite-sex couples;"²³² the legislature accepted that power, enacting a state-level DOMA.²³³ *Goodridge v. Department of Public Health*, the decision of the Supreme Judicial Court of Massachusetts that

225. See, e.g., MD. CODE ANN., FAM. LAW § 2-201 (West 2010); MONT. CODE ANN. § 40-1-103 (2009).

226. N.D.S.L. 1975, ch. 126, §1 (1975).

227. N.D. CENT. CODE ANN. § 14-03-01 (West 2009). Wyoming, another state that adopted DOMA, used similar language in its 1977 version of gender dimorphism: "Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential." WYO. STAT. ANN. § 20-1-101 (West 2010).

228. N.C. GEN. STAT. ANN. § 51-1 (West 2010).

229. *Id.* at § 51-1.2.

230. See, e.g., KAN. STAT. ANN. § 23-115 (West 2010); KY. REV. STAT. ANN. § 402.040 (West 2010).

231. See *supra* note 217.

232. HAW. CONST. art. I, § 23.

233. HAW. REV. STAT. § 572-1 (2007).

attained more success in making same-sex marriage available, could not have found a right of same-sex couples to marry if the Massachusetts legislature had done what the majority of state legislatures had chosen to do and enacted a state version of DOMA. Before the DOMA movement took hold, judges could decide that same-sex couples had no right to marry, but authority for that proposition had consisted of only of quotations from dictionaries, nouns and pronouns that might or might not imply a criterion of gender dimorphism, and spotty case law amounting to no more than persuasive authority.

C. Another Essential: Geographic Presence

Until recently no published recitation of the Essentials of Marriage had noticed that one Essential, even more unexamined than the others we have reviewed, is geographic presence in the state in which the parties form their marital union. This Essential is hard to classify. I have placed it here—along with other Essentials that originated away from the common law—even though it is different from the statutory Essentials that we have just considered. The geographic criterion for entry into marriage has been codified nowhere and spelled out in no decisional law.²³⁴ Individuals and governments simply proceed as if it were an ineffable truth. To recall Holmes once again:²³⁵ this Essential is “a brooding omnipresence in the sky” that looms over American marriage law, rather than “the articulate voice of some sovereign or quasi sovereign that can be identified.”

Adam Candeub and Mae Kuykendall summarize the geographic criterion for entry into marriage with reference to a lack of parsimony and transparency: “Current marriage procedure”—that is, the set of rules for entry prevalent in the United States that *Modernizing Marriage* challenges—“is archaic, often strange, and, oddly, rarely questioned.”²³⁶ By “archaic,” the authors mean that the reasons for requiring the couple to appear physically inside a jurisdiction have grown obsolete. Governments

234. The closest to legal authority on this point that I know of is a 2010 letter from the deputy clerk of the marriage bureau of the District of Columbia to the Reverend Sheila Alexander-Reid, who had celebrated the marriage of Mark Reed and Dante Walkup. During the ceremony, Reed and Walkup had gathered with friends in Dallas while Reverend Alexander-Reid, speaking from the District, performed the ceremony over Skype. The letter declared that because the marriage had not been performed “within the jurisdictional and territorial limits of the District of Columbia,” the return of the license by Reverend Alexander-Reid was invalid, and therefore the marriage could not be registered. The deputy clerk cited no authority other than the D.C. Code provision recognizing authorized officiants who may celebrate or witness marriages. Letter from Denise Johnson to Sheila Alexander-Reid (Nov. 22, 2010) (on file with author).

235. See sources cited *supra* note 22 and accompanying text.

236. Candeub & Kuykendall, *supra* note 37, at 740.

used to keep an eye out for bigamy and incest by requiring the physical presence of couples.²³⁷ Centralized and accessible recordkeeping serves that goal better today.

Just as the judge-made Essentials of Marriage have weakened in recent decades, procedural burdens imposed on a marrying couple have waned. Waiting periods, tests for sexually transmitted diseases, and understandings of marriage licenses as proclaiming the equivalent of banns are mostly absent from contemporary rules.²³⁸ Modern decisional law from the Supreme Court expounding on the constitutional right to marry swept out barriers that might be described as procedural. Until 1967, Virginia had "a prohibition against issuing marriage licenses until the issuing official [was] satisfied that the applicants' statements as to their race are correct."²³⁹ Wisconsin, until 1978, prohibited a class of its residents from entering into marriage, "within the State or elsewhere, without first obtaining a court order granting permission to marry."²⁴⁰ The Missouri Division of Corrections until 1987 would not allow prison inmates to marry unless they had permission from the superintendent of prisons, and this superintendent needed "compelling reasons," which in practice were limited to inmate pregnancy, to grant permission.²⁴¹ When the Court held that these impediments violated the Due Process and Equal Protection clauses of the Constitution, they eliminated procedural barriers, a cluster of impediments of which the geographic-presence Essential is a member.

As Candeub and Kuykendall document, the procedural impediment thwarting couples who seek to marry according to the law of a remote jurisdiction is very different from the regulatory law that governs corporations, a regime described in 1965 as "largely enabling."²⁴² Uncontroversial doctrines liberally permit "individuals to access and utilize state legal systems to facilitate their business purposes, with or without physical presence within the state."²⁴³ An oft-noted illustration is the popularity of incorporation in Delaware by entities whose managers, employees, and owners might never have set foot in that small state. Lured by laws they like—on incorporation criteria, internal affairs, ownership and transfer of stock, or any other point their management cherishes—these

237. See Memorandum from Mae Kuykendall to Aliza Cohen (Jan. 13, 2011) (on file with author) ("Conceptually, geographic regulation of marriage is an historical accident. It emerged to allow the Church and local communities to regulate bigamy and incest.").

238. Candeub & Kuykendall, *supra* note 37, at 774-75.

239. *Loving v. Virginia*, 388 U.S. 1, 6-7 (1967).

240. *Zablocki v. Redhail*, 434 U.S. 374, 375 (1978).

241. *Turner v. Safley*, 482 U.S. 78, 82 (1987).

242. Candeub & Kuykendall, *supra* note 37, at 783 n.209 (citing Elvin R. Latty, *Why Are Business Corporation Laws Largely "Enabling"?*, 50 CORNELL L. REV. 599 (1965)).

243. Candeub & Kuykendall, *supra* note 37, at 783.

businesses pick Delaware from a bounteous menu of jurisdictions.²⁴⁴ Commercial contracts routinely include choice of law provisions that name a jurisdiction whose law will govern their interpretation; parties are free to pick any state they want.²⁴⁵ When it comes to commercial choices often about which jurisdiction's law to use, states stay out of the way of lawful private ordering.

The electronic marriage proposal has a foundation not only in precedents like proxy marriage²⁴⁶ and doctrines pertaining to business,²⁴⁷ but also in pertinent scholarship. Property theorists Abraham Bell and Gideon Parchomovsky have urged that in some contexts "owners be permitted to adopt out-of-state property forms,"²⁴⁸ setting the stage for electronic marriage. Their essay, *On Property and Federalism*, may be read to have anticipated the proposal by Candeub and Kuykendall.

In a section pertinent to electronic marriage, Bell and Parchomovsky distinguish "defensive" from "offensive" uses of this opportunity to make clear that only the former, non-aggressive version ought to be accepted.²⁴⁹ Bell and Parchomovsky give the useful example of adverse possession. Because gaining title to land this way can hurt somebody else, encroachers should be constrained by in-state rules.²⁵⁰ Forming a new business or a new marriage, by contrast, encroaches on nobody else's interests.²⁵¹ Accordingly Bell and Parchomovsky, citing earlier work by Larry Ribstein,

244. Commentators celebrate this result. See, e.g., ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* 213 (2002) (praising the "race"); Leo E. Strine, *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 673-74 (2005) (arguing "that the United States' system of federalism, which permits corporations to govern their internal affairs through the laws of a state of their choosing, has enabled the evolution of a 'national corporate law'—i.e., that of Delaware—that better facilitates wealth creation than would the type of corporation law that Congress would likely produce."). But see George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499, 517 (2010) (noting limitations of the model).

245. Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 63, 64 (2006) (observing that choice of law clauses "abound" in business contracts).

246. See *supra* note 39.

247. See *supra* notes 242-45 and accompanying text.

248. Abraham Bell & Gideon Parchomovsky, *On Property and Federalism*, 115 YALE L.J. 72, 115 (2005).

249. *Id.* at 108-09.

250. *Id.*

251. Gregory Mitchell has argued that making electronic marriage available could hurt people. Gregory Mitchell, *Should it Be Easier to Get Married?*, 2011 MICH. ST. L. REV. 217. His concerns must be addressed by any state that implements the Candeub-Kuykendall proposal, but are not fatal to its adoption.

agree that the marriage-formation law of each state ought to be accessible to persons outside its geographic boundary.²⁵²

III. SOME DIFFICULTIES OF THE ESSENTIALS OF MARRIAGE

The obscure, uncatalogued nature of Essentials might counsel judges and legislatures to leave them alone. Why worry? This Part offers three answers to that question.

A. They Conflict with Modern Contractual Freedom in Marriage

A voluminous literature has investigated the relationship between marriage and contract. The two concepts are juxtaposed when one queries whether contracts alone can regulate the needs, obligations, and entitlements of persons who come together in a conjugal bond. Several writers have argued that the legal status of marriage ought to be abolished; they would reassign traditional noncontractual family law to the job of looking out for the welfare of dependents, particularly children.²⁵³ Defenders of marriage have responded to this abolitionist proposal by contending that this legal status is necessary.²⁵⁴ Individuals who form couples necessarily "will contract incompletely" and "turn to gap fillers provided by the state."²⁵⁵ At a general plane, the defenders are ascendant. Courts and legislatures manifest no desire to take the state out of the marriage business; most gay rights activists seeking sexual-orientation parity in the law of marriage have pressed for same-sex access to the institution rather than its abolition. The vaunted shift "from Status to Contract"²⁵⁶ has not yet resulted in the end of Status, or even a likelihood that this status will go away in the foreseeable future.

Equally manifest, however, is "a modern trend in favor of private ordering" within marriage.²⁵⁷ Some "private ordering" in the marital context will not be acceptable in American courts any time soon: agreements in which one party promises never to seek child support from the other party in exchange for some consideration, for example, or agreements with respect to marriage whose consideration is the termination of a pregnancy. But courts faced with intraspousal agreements have moved unmistakably in the direction of liberality and tolerance.

252. Bell & Parchomovsky, *supra* note 248, at 111-12.

253. See Bernstein, *supra* note 52, at 135 n.19 (citing sources).

254. See MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006).

255. Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1314 (2006).

256. See *supra* note 205 and accompanying text.

257. WEISBERG & APPLETON, *supra* note 50, at 674.

Antenuptial contracting offers a clear illustration of this development. Even before the Pennsylvania Supreme Court upheld an especially sharp deal in 1990, refusing to inquire into the substantive fairness of a contract executed on “the eve of the parties’ wedding,”²⁵⁸ American courts moved firmly toward acceptance of these bargains between spouses. In less than a generation, they shifted from deeming these contracts contrary to public policy—because they encouraged divorce and could also force the less wealthy spouse to become a public charge—to the view that couples are entitled to make their own arrangements with respect to their property and should have their contracts enforced.²⁵⁹ A uniform statute states this prerogative in especially tolerant terms, demanding that the party to the marriage who seeks to avoid enforcement prove either that she did not make the agreement voluntarily or that the agreement was unconscionable at the time of execution.²⁶⁰

In a parallel development, judges have also manifested their acceptance of separation agreements. The American Law Institute has observed that contemporary courts defer even more to separation agreements than to antenuptial ones.²⁶¹ One proponent of private ordering has conceded that the throes of separation might make it difficult for couples to attain “deliberative and well-informed judgments.”²⁶² Courts nevertheless honor the judgments that take form in these agreements. This stance expresses a belief that individuals are suited to set the terms for their lives.

B. They Lack Adequate Jurisprudential Justification

Making reference to jurisprudential writings—and with forthright acknowledgment that readers can disagree—I have elsewhere stated my view that legislators and courts ought to make the law as intelligible and defensible as it can be.²⁶³ Intertwined concepts of public reason, public reasonableness, and public justification support the endeavor. These jurisprudential ideals are especially pertinent to any legal doctrine that has,

258. *Simeone v. Simeone*, 581 A.2d 162, 163 (Pa. 1990).

259. WEISBERG & APPLETON, *supra* note 50, at 125.

260. UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 35 (2001).

261. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.09 cmt. b (2002). One court went so far as to hold that an ex-wife who had hired a hit man to kill her ex-husband did not by her gross misconduct forfeit the maintenance that her ex-husband owed her pursuant to their separation agreement. *Richardson v. Richardson*, 218 S.W. 3d 426, 430 (Mo. 2007). *Pacta sunt servanda*, indeed.

262. Mnookin, *supra* note 27, at 1020.

263. Bernstein, *supra* note 22, at 364.

or is suspected of having, religious antecedents.²⁶⁴ To comment on the Essentials of Marriage, I return briefly to public reason here.

Some restrictions on individual freedom pertaining to marriage appear to originate in antecedents that clash with modern secular precepts of government. Throughout this Article, I have been contending that coverture still limits what individuals can choose to govern their marriages. Coverture, in turn, may have origins in religion.²⁶⁵ Limits on freedom that the law imposes, especially those that burden wives, might not stem directly from theological dogma, but a theme of patriarchal control is shared by monotheistic religions and coverture.²⁶⁶ Inasmuch as the Essentials of Marriage entrench an illiberal tradition, they raise a question of legitimacy in a secular state.

Late in his career, John Rawls had occasion to reflect on public reason as applied to family law. He noted that the family was among "the institutions needed to reproduce political society over time," and the state had an interest in supporting and regulating this institution.²⁶⁷ "Given this interest," Rawls concluded, "the government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time."²⁶⁸ In considering the effect of religious antecedents on legal regulations of the family, Rawls discussed, without entirely accepting, a stance taken by the philosopher Robert Audi.²⁶⁹

Religious motivations and reasons behind secular laws exist, according to Audi, and these antecedents do not invalidate these laws.²⁷⁰ Instead, observers should consider whether these laws can stand with those religious bases removed.²⁷¹ This attention to what "we share as rational beings"²⁷² informs the examination of the Essentials of Marriage in a secular

264. Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

265. See Frances Raday, *Gender and Religion: Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2780 (2009) ("The monotheistic religions all have regulatory norms on marriage, which share the theme of patriarchy in a hierarchical gendered family. There are significant differences in the specific marital laws of each religion, but the patriarchal asymmetry in power between husbands and wives is evident in all.").

266. See, e.g., Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 42 (1995) (arguing that the legal treatment of single parents "is grounded in religion. It is connected to the regulation of sexuality, protection against uncertainty of paternity, and the preservation of patriarchal marriage."); Raday, *supra* note 258.

267. Rawls, *supra* note 264, at 779.

268. *Id.*

269. *Id.* at 779-80.

270. Audi, *supra* note 264, at 690.

271. *Id.* at 701.

272. *Id.*

democracy. Such attention gives few answers, however. It is not obvious, as Rawls notes, how to apply the directive that Audi offers without privileging a particular strain of “secular philosophical doctrines.”²⁷³

This Article escapes the privileging difficulty by not prescribing any particular doctrinal outcome. For example, I happen to support same-sex marriage and have questioned the Essential of gender dimorphism that makes it unavailable to American couples, but my parsimony-and-transparency thesis does not demand that this Essential go away. Instead, this Article would put Essentials of Marriage, including this one, to an Audi-Rawls test, urging inquiry into how these barriers function in a legal regime that aspires to political liberalism. Inasmuch as their proponents can defend them and the state can make their content transparent to affected individuals, Essentials—even ones that would not have emerged but for coverture or religious beliefs—can coexist with public reason.

C. They Do Not Comport with Decisional Law Interpreting Constitutional Provisions

Although most of the Essentials of Marriage do not take form as text, they do have the force of law. For purposes of analysis they may be grouped with statutes and regulations that have been challenged as unconstitutional, even though a court cannot invalidate them using judicial review. As a thought experiment, then, let us consider what would happen to the Essentials of Marriage if they were to take form in state statutes that go on to be challenged in court.²⁷⁴ Section 3 of the federal DOMA gives an example of such codification: “[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”²⁷⁵

Other Essentials catalogued in Part I of this Article—including the duty to support one’s spouse, the related duty to render services to one’s spouse, and an entitlement to ongoing sexual intimacy—could, with relative ease, be written into statutes. The Essential providing that a husband determines the domicile of his wife by choosing to live in a particular state is exceptionally easy to codify in our thought experiment: “The domicile of a married woman is that of her husband,” we might decree. To codify the Essential of perdurability, we could use section 190 of the *Restatement (Second) of Contracts* as the first draft of a statute providing that any

273. Rawls, *supra* note 264, at 780.

274. One scholar made a related argument that returning to a common law of crimes—prohibitions written by judges rather than legislatures—would have parsimonious and transparent effects. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588-91 (2001). Aware that this return cannot occur, Stuntz proposed constitutional rules that would permit judges to overturn crimes when the prohibitions fall short in parsimony and transparency. *Id.* at 588-91.

275. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, sec. 3.

contract or agreement that has the effect of encouraging divorce is unenforceable in the courts of the state.²⁷⁶ For our thought experiment, we apply the United States Constitution to these Essentials.

1. *The Equal Protection Clause*

Several Essentials impose constraints on individuals based on their sex or gender. Assuming that hornbook equal protection doctrine governs the constitutionality of these Essentials, and that a claimant would allege that the Essential as codified is unconstitutional because it discriminates against him or her on the basis of sex, a court would apply the standard of review known as intermediate scrutiny. "To withstand intermediate scrutiny under an equal protection analysis," according to an encyclopedia, "a statutory classification must be substantially related to an important governmental objective."²⁷⁷

What constitutes an important governmental objective, and which sex-based classifications flunk this test for constitutionality? Intermediate-scrutiny decisional law by the Supreme Court manifests what David Strauss has called a "modernizing" inclination.²⁷⁸ The Court has a governmental objective of its own, Strauss argues. It works against attitudes toward sex-based classifications that now are, or seem, archaic.²⁷⁹ This stance holds that a legislature may not pursue the entrenchment of regressive positions on gender. Rearguard objectives might be "important" to the writers of these laws, or central to a conservative position on sex roles, but to the Court they weigh against the constitutionality of the statute.²⁸⁰ Other commentators of varied political views share Strauss's assessment of how

276. See *supra* note 96. The Uniform Commercial Code offers a precedent for this kind of statute. Numerous provisions in the model statute recognize broad precepts, and jurisdictions that adopted the UCC kept them rather than deleted them as too vague. I thank Neil Cohen for his discussion of this point with me.

277. 16B AM. JUR. 2D CONSTITUTIONAL LAW § 861 (2009).

278. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009).

279. *Id.* at 874.

280. In the 1970s, for example, the Court struck down laws "that presumed that widows, but not widowers, were dependent on the earnings of their deceased spouses." *Id.* at 871 (citing *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Weinberger v. Wissenfeld*, 420 U.S. 636 (1975)). Congress could have been trying to address real dependency through the use of a proxy that saves administrative cost. *Id.* at 876. Whether one shares this goal or not, it is cogent. And yet it failed intermediate scrutiny. Strauss also notes that the Court has used the Equal Protection clause to strike down statutes that rested on "statistically valid generalizations." *Id.* at 870-71. Similarly, instances of sex segregation have had divergent fates in the Supreme Court based on whether the Justices believed that the challenged action originated in a modern or an archaic use of this segregation. *Id.* at 873 (discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

the Supreme Court has used its intermediate-scrutiny tier of review.²⁸¹ Applied to the Essential that had bestowed on husbands the prerogative to choose their wives' domicile, this "modernizing" use of equal protection doctrine has brought about an invalidation.²⁸² Judicial decisions finding a wifely duty to render services are also inconsistent with a gender-progressive approach to equal protection.²⁸³

Essentials of Marriage that impose gender dimorphism—in particular, denials of marriage licenses to same-sex couples and invalidations of marriages involving a transgendered spouse²⁸⁴—would fare equally poorly under Strauss's "modernizing judicial review."²⁸⁵ The Supreme Court has not yet ruled on which tier of scrutiny must be used to examine claims of sexual-orientation discrimination.²⁸⁶ Some courts have applied rational basis review, the most difficult tier for claimants to overcome.²⁸⁷ The Department of Justice has taken a position in favor of "heightened scrutiny," a term whose meaning is still evolving but that unquestionably demands more from the state than does rational basis review.²⁸⁸ According to the Department, homosexual persons fulfill the criteria announced in earlier decisional law: they have been subject to discrimination in the past; they exhibit characteristics that distinguish them as a distinct group; and they are a minority.²⁸⁹ Whether our court uses "intermediate scrutiny" or "heightened scrutiny," it would find it difficult to uphold the Essential that demands gender dimorphism as a condition for entry into marriage.

281. See, e.g., WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §11:3 (3d ed. 2011) (noting that the Court has upheld classifications aimed at redressing "historical lack of opportunities "while striking down those based on "traditional stereotypes"); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 307 (2005) (criticizing the Court's focus on stereotypes as insufficiently attentive to gender subordination); Angela M. Biamonte, Note, *The Progressive's View of the Defense of Marriage Act and Its Conflict with Conservative Society*, 4 WIDENER L. SYMP. J. 325, 331 (1999) (celebrating intermediate scrutiny for the support of women as disempowered people).

282. Samuel v. Univ. of Pittsburgh, 375 F. Supp. 1119, 1131-34 (W.D. Pa. 1974).

283. See *supra* Section I.B.

284. See *supra* note 168 and accompanying text.

285. Strauss, *supra* note 278.

286. See DOJ Letter, *supra* note 218; *Litigating*, *supra* note 2, at 2695.

287. See *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to a law that had invalidated protections of homosexual persons); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (arguing that the majority opinion applied rational basis review). Some cases have held that withholding same-sex marriage cannot survive even rational basis review. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998-99 (N.D. Cal. 2010); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1004 (Mass. 2003).

288. DOJ Letter, *supra* note 218.

289. DOJ Letter, *supra* note 218 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)); see also *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976).

2. The Contracts Clause

The United States Constitution provides that “no State shall . . . pass any . . . Law impairing the Obligation of Contracts.”²⁹⁰ This provision does not limit the Essentials of Marriage as now applied, for two reasons that we can assume away in our thought experiment. First, the Contracts Clause constrains only state legislation and, as was just noted, very few of the Essentials have been codified. Second, the Supreme Court has held that “marriage is not a contract within the meaning of the [Contract Clause] prohibition.”²⁹¹ If the Essentials of Marriage that limit marital contracting were written into state statutes, and if courts were willing to apply the Contracts Clause to marriage formation and marital agreements, would these Essentials statutes violate the Contracts Clause?

Two judge-made questions create hurdles for any claim of unconstitutionality under the Contracts Clause. First, the contract-related Essentials barrier must be big enough: a trivial impairment to spousal contracting will not invalidate the Essential.²⁹² Second, an impairment does not violate the Contracts Clause if it is necessary to serve “an important public purpose.”²⁹³ Because one premise of this Article is that the Essentials of Marriage are important, we can pass over the first hurdle and move to the more difficult challenge of the second. The idea of marriage as Status implies that individuals who marry must not be left to their own devices, which include their own transactions. In Contracts Clause decisional law, courts have insisted that the state has a stake in marital arrangements.²⁹⁴

That stake needs to be articulated.²⁹⁵ Several Essentials may affront the Contracts Clause as courts have interpreted it: the perdurability

290. U.S. CONST., art. I, § 10.

291. *Maynard v. Hill*, 125 U.S. 190, 210 (1888).

292. *Catawba Indian Tribe of South Carolina v. City of Rock Hill*, 501 F.3d 368 (4th Cir. 2007) (imposing a “substantial impairment” criterion); *United Teachers of New Orleans v. State Bd. of Elementary and Secondary Educ.*, 985 So.2d 184 (La. App. 2008) (requiring that the impairment be “of constitutional dimension”).

293. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977); *Retired Emp. Ass’n of Orange County v. County of Orange*, 610 F.3d 1099, 1102 (9th Cir. 2010); *Hageland Aviation Serv. v. Harms*, 210 P.3d 444, 453 (Alaska 2009).

294. *Maynard*, 125 U.S. at 211; *In re Marriage of Franks*, 542 P.2d 845, 850 (Colo. 1975) (“marriage is not a ‘contract’ within the meaning of the contract clause of the constitution”); *Noel v. Ewing*, 9 Ind. 37, 1857 WL 3556, at *8 (1857) (“as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate”); *see also supra* notes 82-85 (discussing *Van Koven v. Van Koven*, a case that did not advert to the Contracts Clause, in which the court described the state as a party to all contracts between husbands and wives).

295. *See generally* *Calef v. West*, 652 N.W. 2d 496, 501 (Mich. App. 2002) (noting “the well-settled rule that where freedom of contract and declared public policy are in

Essential, which has invalidated contracts to the detriment of women;²⁹⁶ the duty to render services, which has had the same effect;²⁹⁷ and the ban on attorneys' fees contingent on the outcome of a divorce, an agreement that both parties to the retainer agreement might want.²⁹⁸ To the extent it functions to impede contracting between husbands and wives,²⁹⁹ the duty of support is suspect as well. High time, I would contend, for whatever "important public purpose[s]" invalidate agreements between spouses to emerge for discussion, rather than simply be presumed. Applied to the Essentials of Marriage, a Contracts Clause analysis would force states to give reasons for the impairments they impose on marital contracting.

Constitutional challenges to the Essential of gender dimorphism provide a precedent. They forced lawyers representing various states to give reasons for the denial of marriage licenses to same-sex couples, a pressure that enhanced public debate of the issue.³⁰⁰ It would be useful to learn why judges invalidate or prohibit some contracts related to marriage while honoring others.³⁰¹ Important public purposes, now shadowy, ought to come to the fore.

IV. TOWARD MORE PARSIMONY AND TRANSPARENCY

In this Part, which focuses on the task of amelioration, the working definition of an Essential of Marriage is a state-imposed condition that limits the freedom of one or more parties to a marriage or prospective marriage. Essentials of Marriage include impediments to obtaining a marriage license, refusals to enforce provisions in contracts between spouses, and disabilities or barriers imposed on individuals based on their marital status rather than their conduct. The parsimony project urges states to keep these impediments to a minimum; the transparency project urges public disclosure of the Essentials that remain present.

conflict, the former necessarily must yield to the latter") (quoting *Feldman v. Stein Bldg. & Lumber Co.*, 148 N.W.2d 544, 546 (Mich. App. 1967)) (emphasis added).

296. See *supra* Section I.C.

297. See *supra* Section I.A.

298. See *supra* notes 121-26 and accompanying text.

299. See *supra* Section I.B.

300. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961-62 (Mass. 2003) (reviewing the state's arguments for denying marriage licenses to same-sex couples); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 414-15 (Conn. 2008) (summarizing the state's arguments that civil unions would fulfill the plaintiffs' rights under the Connecticut constitution).

301. See *supra* notes 100-18 and accompanying text (noting contradictory judicial stances regarding the enforcement of antenuptial contracts).

A. Parsimony: Fewer Essentials

What is marriage for?³⁰² "The central purpose of modern marriage," according to Marjorie Maguire Schultz, "is increasingly recognized to be the freedom of the individual."³⁰³ Should this priority appear misplaced, one must consider what else marriage might be for. Schultz lists "religion, community, family, economic necessity, and tradition" as the five rivals to individual freedom, and deems them obsolete: marriages no longer function as units of economic production, and governments have increased their reach into the rearing and education of children.³⁰⁴ Legal and socio-economic changes that brought more married women into the workforce and gave them more control over childbearing made marriage more of a locus of individualism in the late twentieth century, and these developments continue. Accordingly, Schultz concludes, the law of marriage ought to recognize "private choice," spousal agreements, and negotiation aimed at increasing the fulfillment of spouses as individuals.³⁰⁵ Accepting this framework, I offer a sketch of parsimony in the law of marriage.

1. *The Reason for Parsimony: Freedom from Unjustified Interference*

As we have seen, the law has moved considerably in the direction that Schultz recommends. Model statutes encourage planning, negotiation, and contracting within marriage.³⁰⁶ Reviewing the family-law landscape in 1992, Jana Singer found what she called privatization: fewer state-enforced Essentials, more power to make enforceable contracts *inter se*, more focus by courts and legislatures on married persons as individuals rather than constituents of a single unit, and fewer barriers to entry into marriage.³⁰⁷ Because same-sex marriage was not available anywhere in the United States before the onset of DOMA at the federal and state level—while judicial and legislative reform has made same-sex marriage available in several

302. See E.J. GRAFF, WHAT IS MARRIAGE FOR? (1999); see also Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002).

303. Schultz, *supra* note 94, at 250-51.

304. *Id.* at 251. But see Gallagher, *supra* note 302, at 787-91 (arguing that because living with married parents enhances the welfare of children, the legal regulation of marriage should focus on childrearing).

305. Schultz, *supra* note 94, at 252-53.

306. See *supra* note 103 and accompanying text (noting enthusiastic approval of separation agreements in the Uniform Marriage and Divorce Act). Another model statute provides that couples may form enforceable contracts not only about property but also "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." UNIF. PREMARITAL AGREEMENT ACT § 3(a), 9C U.L.A. 35 (2001).

307. Singer, *supra* note 49.

jurisdictions since 2003—the retreat that Singer documented has continued in this modification of gender dimorphism as an Essential.

This tendency accords with judicial endorsements of parsimony both in and away from family-law disputes. Upholding a settlement agreement, the Maryland Court of Appeals wrote that “in the absence of constitutional, statutory or clear important policy barriers, parties are privileged to make their own agreement and thus designate the extent of the peace being purchased.”³⁰⁸ A later decision by the Ninth Circuit quoted this passage, endorsed it in the name of “liberal individualism,” and reached a similar decision to uphold a settlement.³⁰⁹ Case law finding antenuptial contracts and separation agreements valid also makes reference to parsimony as a limit on state prerogatives to interfere.³¹⁰

2. *The Essentials, Streamlined*

The parsimony-and-transparency project concedes the truism that every legal status contains essentials. Parsimony and the Essentials of Marriage can coexist. Which Essentials ought to survive, which need to go, and which new ones might be installed are questions that this Article will not purport to resolve. I can nominate three Essentials, however, that in my opinion are worth adding or keeping.

The first Essential of Marriage that I would endorse is what Martha Fineman has called “the dependency component of the parent-child relationship.”³¹¹ By enforcing attention to this condition, a dependency Essential would invalidate spousal contracts harmful to children. It would also try to stop the government from treating nonmarital children worse than marital ones.

My second Essential, a kind of anti-coverture that nevertheless accepts a role for marriage as a state-sponsored status, rests on work by Linda

308. *Bernstein v. Kapneck*, 430 A.2d 602, 606 (Md. 1981).

309. *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988). Although both of these decisions found against individual plaintiffs who had brought personal injury actions, fidelity to contract does not preclude siding with an economically disadvantaged litigant. *See, e.g., Hodge v. Evans Fin. Corp.*, 707 F.2d 1566, 1568 (D.C. Cir. 1983) (denying summary judgment to an employer on the ground that the provisions of the contract were not well established: “A basic principle of contract law is the concept of freedom of contract—the right of the contracting parties to structure their transactions in accordance with their wishes.”).

310. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E. 2d 955, 962 (Mass. 2010) (noting the Supreme Judicial Court’s “established recognition that a marital relationship need not vitiate contractual rights between the parties.”); *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990) (decrying as “paternalistic and unwarranted interference” the suggestion that antenuptial contracts are unenforceable when one of the parties lacked advice of counsel).

311. Martha Albertson Fineman, *The Meaning of Marriage*, in *MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS* 29, 62 (Anita Bernstein ed., 2006).

McClain³¹² and, indirectly, John Rawls. Recall the contention by Rawls that family law serves the political purpose of building institutions over time.³¹³ McClain, arguing as did Rawls from premises of political liberalism, has put forth what might be framed as an Essential: the promotion of equality. Marital equality includes, *inter alia*, equality *within* families and equality *among* families.³¹⁴ This equality Essential would declare "an important public purpose"³¹⁵ not previously located among the Essentials, but amenable to classification with the pursuits of a liberal state.

Perdurability, the third Essential that I would defend, is the only one of the three already in force.³¹⁶ Consistent with my criticisms of how courts interpret and apply this Essential, I hope that judges will in the future deploy perdurability with more care than case law now manifests. Spousal choices that make marriages easier to exit, as well as actions by outsiders that undermine a marriage, can be healthy phenomena that this Essential should not obstruct. No-fault divorce, a force against perdurability, is in my opinion an almost unmitigated good.³¹⁷ The narrow form of this Essential that I favor functions to distinguish marriage from a less portentous dyadic relationship. Perdurability should, in my view, make marriage somewhat harder to exit than mere dating, courtship, cohabitation, or engagement to marry. Of all the Essentials of Marriage, perdurability appears most consistent with what individuals—both those who marry and those who eschew marriage—want for themselves.³¹⁸

B. Transparency: When an Essential Impedes Prerogatives for Individuals, Make It Clearer

Governments impose Essentials of Marriage onto individuals mainly via legislation and common law adjudication.³¹⁹ A concern for transparency

312. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

313. See *supra* note 267 and accompanying text.

314. MCCLAIN, *supra* note 312, at 117-19 (emphasis added).

315. See *supra* note 294 and accompanying text (summarizing Contracts Clause jurisprudence).

316. See *supra* Section I.C.

317. I especially value no-fault divorce for reducing domestic violence, female suicide rates, and the likelihood that a woman will be murdered by her husband. Les Picker, *Divorce Laws and Family Violence*, NAT'L BUREAU OF ECON. RESEARCH, Mar. 2004, available at <http://bpp.wharton.upenn.edu/jwolffers/Press/Mentions/nberdigestmar04.pdf>.

318. I thank Bryan Wildenthal for an enlightening conversation on this point.

319. Occasionally other means of foisting Essentials emerge. For example, clerk's offices relay misinformation about the law of name-changing upon marriage. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 824 (2007); see also *supra* note 234 (recounting the decision by a marriage clerk to invalidate an electronic marriage based on an implicit Essential of geographic

would strive to make these impositions of state authority known to the population that they affect. Ideally, individuals would know how the state can override their wishes before they enter into a new marriage or initiate a divorce. Because citizens often remain unaware of lawmaking by courts and legislatures, the transparency project has data-gathering to do.

1. *Transparency as a Desirable and Attainable End*

Soon after taking office, President Barack Obama announced a commitment to transparency, noting that it “promotes accountability and provides information for citizens about what their Government is doing.”³²⁰ How well the Obama administration went on to honor this promise may be debated;³²¹ the ideal, however, is unassailable, and can be applied to the Essentials of Marriage. Like electronic marriage as proposed by Adam Candeub and Mae Kuykendall, the transparency endeavor would be amply precedented.³²²

Quick examples: federal environmental law is replete with duties to disclose information to the public.³²³ Federal and state election laws demand numerous disclosures from donors, candidates, and political action committees.³²⁴ Securities law establishes disclosure, a source of transparency (in principle), as an entitlement for investors.³²⁵ Because transparency has been recognized as a right-and-obligation in settings of comparable importance, and because Essentials of Marriage obstruct what people want and think they have, the state ought to try to inform individuals of marriage-related obstructions that are likely to be obscure.³²⁶

presence). Referenda opposing same-sex marriage pressed the Essential of one-man-one-woman on individuals resident in California and Maine. Adjudication and legislation generate and enforce most Essentials, however.

320. Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 15, 4685 (Jan. 21, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1777.pdf>.

321. See Eric Lichtblau, *Report is Critical of Obama's Efforts at Transparency*, N.Y. TIMES, Mar. 15, 2010, at A12.

322. See *supra* note 36 and accompanying text.

323. Memorandum from Lisa Jackson to EPA Employees: Transparency in EPA's Operations (Apr. 23, 2009), available at <http://www.epa.gov/Administrator/operations/memo.html>.

324. Thomas H. Dupree, Jr., *Exposing the Stealth Candidate: Disclosure Statutes After McIntyre v. Ohio Elections Commission*, 63 U. CHI. L. REV. 1211, 1217-18 (1996).

325. See Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 417 (2003).

326. An analogy might be drawn to the notice requirement of criminal law. See Stuntz, *supra* note 274, at 588 (“A necessary condition of any free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment.”).

2. *How to Make the Law of Marriage More Transparent: Preliminary Thoughts*

Consider the Essential of gender dimorphism as made more transparent in 1997. When the General Accounting Office, in response to a request from the House Judiciary Committee, undertook to survey which laws were affected by the Defense of Marriage Act, it summarized its methods in a cover letter. The GAO wrote that it “conducted searches for various words or word stems (“marr,” “spouse,” “widow,” etc.), chosen to elicit marital status, in several electronic databases that contain the text of federal laws.”³²⁷ Next, it winnowed out the false positives—Marrakesh, bone marrow transplants, proper names containing “marr”—and settled on a count of 1049 federal laws “in which marital status is a factor.”³²⁸

This reporting could be replicated at the state level by researchers inside or outside the government. Because marriage is regulated more by states than the United States government, state codes contain a greater density of marriage-related terms, but dividing the job by jurisdictions would permit a variety of providers to complete the survey. Public-policy nonprofits and bar associations could receive relatively small government grants to launch a transparency project. Once the Essentials of Marriage that a state enforces are gathered and put into accessible prose, an information provider could prepare a pamphlet.³²⁹

New York offers an example of government-mandated transparency that other states could emulate. Its legislature revised the standard marriage license application to inform applicants that the law gives them several options with respect to their surnames after they marry. This modest reform suggests that governments could consider mandating the provision of information about other Essentials of Marriage on these license applications. Space on forms is finite, to be sure, and information overload looms atop any initiative to promote transparency.³³⁰ Yet, if New York (to date alone among the states) could find space to summarize and communicate this information,³³¹ then there must be room available for

327. GAO Report, *supra* note 219, at 1.

328. *Id.*

329. For an example of this kind of transparency as applied to health privacy, see U.S. DEP'T OF HEALTH & HUM. SERVS., OFFICE OF CIVIL RIGHTS, YOUR HEALTH INFORMATION PRIVACY RIGHTS, *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf.

330. See Paredes, *supra* note 325, at 417-18 (noting the clutter that disclosure rules generate).

331. Emens, *supra* note 319, at 842.

governments to provide more transparency about the Essentials of Marriage when new marriages are formed.³³²

CONCLUSION

Courts apply the Essentials of Marriage to individuals in freedom-defeating ways. They have excluded people from the status of being married, with and without statutory warrant. They have ascribed sexual entitlements and obligations to the marital relationship, making a priority of what individuals might have considered petty or peripheral. They have asserted, with little detail or evidence of reflection, a public policy rationale for nullifying spousal bargains. In short, they have impeded the choices that individuals make. Starting with the 1996 enactment of a federal statute that purported to defend marriage, legislatures have been adding to the Essentials impediments. In this Article, I have called for a shift: more parsimony and transparency in the imposition of these Essentials.

Although the parsimony and transparency efforts are distinct and can be pursued separately, they reinforce each other. Activists working toward parsimony-minded law reform will start by looking for existent Essentials, an undertaking that brings these conditions to the fore even when attempts to eliminate them fail. Transparency, achieved even in part, invites repeal or modification of the more egregious and arbitrary restrictions on freedom that investigators will uncover.

The parsimony-and-transparency agenda of this Article eschews particular substantive outcomes. It can be severed from the merits of marriage-related doctrines and law reform proposals. Consistent with this stance, I have tried to be candid about the marriage rules that I favor and disfavor while also emphasizing the unimportance of my opinions.

To underscore this priority, I conclude this Article by relaying a reform suggestion that I do not endorse yet is perfectly consistent with my project. Jeffrey Sherman has urged courts to return to the old stance of refusing to honor antenuptial contracts that provide for the division of property upon divorce.³³³ In his view, enforcing these contracts gives married people an asymmetrical set of privileges. Having chosen to marry, they ought to accept the detriments as well as the many benefits that attend this status: "You cannot have 'the perks without the works'," ³³⁴ Sherman writes. Fair enough. His nonenforcement proposal is amenable to

332. See generally Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REF. 217, 255-58 (1990) (praising the state of Louisiana for mandating disclosures about the economic rights and responsibilities of marriage to persons seeking marriage licenses).

333. Sherman, *supra* note 106, at 359-60.

334. *Id.* at 381.

transparency—spouses who initiate prenups are a well-counseled lot—and it also may be understood as parsimonious, because current law already treats antenuptial contracts as different from ordinary bargains.³³⁵ Unlike other Essentials that impede marital contracting, the Essential that Sherman proposes, which would prevent married persons from acting to protect their separate property, honors individual choice and does not ambush a couple with unexpected and unjustified coercion.

Limits on freedom are necessary to human flourishing and civic life,³³⁶ but the state ought to impose them with care. Parsimony urges attention to the coercive effects of an Essential; transparency commends clarity and accessibility in the content of state-enforced restrictions that individuals might not be expected to know. Vigilance about both goals with respect to the Essentials of Marriage enhances liberty for persons who marry or want to marry, without denying the public interest in a unique status.

335. See WEISBERG & APPLETON, *supra* note 50, at 126-27 (describing how courts add extra scrutiny to these contracts); see also Rasmussen & Stake, *supra* note 28, at 495 (conceding, in a robust proposal to expand antenuptial contracting, that "choice hurts").

336. See generally Bernstein, *supra* note 25 (juxtaposing security and freedom).

