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## Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints

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## Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints

Cover Page Footnote

24-1

# **DEFAULTS AND CHOICES IN THE MARRIAGE CONTRACT: HOW TO INCREASE AUTONOMY, ENCOURAGE DISCUSSION, AND CIRCUMVENT CONSTITUTIONAL CONSTRAINTS**

*Andrew Blair-Stanek\**

*The law has long recognized the contractual nature of marriage. The trend, in recent decades, towards respecting autonomy has led to much greater freedom for couples to modify the terms of their marriage. This Comment explores how states may provide couples a choice of terms to include in their marriage contract. The potential benefits include premarital information disclosure, increased individual autonomy, and the ability to achieve policy goals that might otherwise conflict with constitutional jurisprudence.*

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\* A.B., Princeton University, 2000; J.D. Candidate, Yale Law School, 2008. Thanks to Ian Ayres, Robert Burt, Anne Alstott, Robert Hemm, Kristine Kalanges, and Bharat Ramamurti for their extensive commentary and feedback on this Comment.

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## **DEFAULTS AND CHOICES IN THE MARRIAGE CONTRACT: HOW TO INCREASE AUTONOMY, ENCOURAGE DISCUSSION, AND CIRCUMVENT CONSTITUTIONAL CONSTRAINTS**

### **INTRODUCTION**

Marriage has a long history as contract both in Anglo-American law and in cultures across the globe.<sup>1</sup> The vows exchanged in many American weddings constitute promises with return promises as consideration. In one illustrative case, the bride and groom exchanged vows and the groom died suddenly seconds thereafter.<sup>2</sup> The court held that normal standards of contract formation apply to marriages and the parties' vows sufficed to create a valid marriage contract.<sup>3</sup> Even though death cut the ceremony short, the bride had all the legal rights of a wife-turned-widow.<sup>4</sup>

Constitutional jurisprudence has long recognized contract and marriage as areas of state law.<sup>5</sup> Legislatures have added many defaults to contracts, one example of which is the implied but disclaimable warranty of merchantability in the Uniform Commercial Code.<sup>6</sup> The law

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<sup>1</sup> See generally GWEN J. BROUDE, MARRIAGE, FAMILY, AND RELATIONSHIPS: A CROSS-CULTURAL ENCYCLOPEDIA xi (1994) (discussing many similarities in marriage arrangements around the world). A number of state statutes explicitly define marriage as a civil contract. See, e.g., KAN. STAT. ANN. § 23-101 (2006); MINN. STAT. ANN. § 517.01 (2007).

<sup>2</sup> *Neiderhiser Estate*, 2 Pa. D. & C.3d 302, 305 (Pa. Ct. Com. Pl. 1977).

<sup>3</sup> *Id.* at 309.

<sup>4</sup> *Id.* at 309-10.

<sup>5</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (discussing *Nebbia v. New York*, 291 U.S. 502, 537, 538 (1934), which recognized a state's freedom to mandate contract terms); *Maynard v. Hill*, 125 U.S. 190, 207 (1888) (finding special divorce laws are "a legitimate exercise of state power").

<sup>6</sup> U.C.C. § 2-314(1) (2003). See also U.C.C. § 2-305(1) (2003) (indicating default price is a "reasonable price").

governing matrimony has likewise undergone extensive changes over time. Divorce law represents a combination of immutable and default terms inserted by state law into the marriage contract, and premarital agreements allow marrying parties to depart from these defaults. Indeed, the move towards greater individual autonomy in the last four decades has resulted in a much greater willingness on the part of courts and of legislatures to enforce premarital agreements.<sup>7</sup>

States have used their powers to set default terms of the marriage contract in only a very limited way, however, typically dealing solely with disposition of assets upon divorce.<sup>8</sup> Similarly, states have given couples very few options for modifying the terms of their marriage contract, instead offering a “one-size-fits-all” marriage. This Comment argues that legislatures have missed the following three potentially valuable uses of default and optional terms: (1) increasing autonomy; (2) revealing information; and (3) circumventing constitutional constraints.

Presenting couples with different optional terms as checkboxes on the marriage license application increases the autonomy of individuals to structure their marriages as they see fit without the considerable expense and aggravation of drafting a premarital agreement.<sup>9</sup> These terms can address issues well beyond asset allocation upon divorce. Moreover, properly chosen and presented optional terms and defaults

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<sup>7</sup> See *infra* Section I.C. See also Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 135-36 (1993).

<sup>8</sup> See Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEGAL F. 265, 267-68 (2004). The related issue of taxation also receives significant attention.

<sup>9</sup> Cf. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1162 (2003) (discussing the paternalistic consequences of government influence in private choices and posits that this interference may cause individuals to make poor choices “in terms of their own welfare”).

can encourage a couple contemplating marriage to reveal information to each other and to discuss issues of import to their relationship.<sup>10</sup> Lastly, the state can encourage consenting couples to agree to terms that would conflict with constitutional jurisprudence if implemented as mandatory terms.

This Comment proceeds in three parts. Part I reviews the history and theories of marriage as contract and the modern trend towards greater contractual autonomy. Part II presents the details of this Comment's proposal. These include the various ways legislatures can present terms on the marriage license application, as well as several example terms that exhibit the power and flexibility of this approach. Part III uses one of these example terms to demonstrate the feasibility of using this approach to circumvent constitutional constraints.

## **I. MARRIAGE AS CONTRACT WITH DEFAULTS**

The past four decades have witnessed a profound shift in the legal and theoretical understanding of marriage. The availability of marriage has expanded to include interracial couples,<sup>11</sup> same-sex partners,<sup>12</sup> and those who do not even marry.<sup>13</sup> The end of marriage has similarly changed, with the advent of no-fault divorces and the enforceability of

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<sup>10</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989) (arguing penalty defaults promote production of information). Marrying couples generally communicate well, but skillfully-crafted optional terms and defaults can facilitate communication and force parties to reveal many hidden agendas going into marriage.

<sup>11</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>12</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). See also *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

<sup>13</sup> *Marvin v. Marvin*, 557 P.2d 106, 110, 113 (Cal. 1976) (involving cohabitation contracts of non-married persons and the rise in unmarried individuals sharing a home).

premarital agreements.<sup>14</sup> In short, the contractual autonomy of marrying couples has vastly expanded.

### A. The History of Marriage as Contract

In many societies, negotiated marriages are the norm.<sup>15</sup> In these societies the contractual aspect of marriage seems most obvious. According to one survey, matrimony in nearly half of all societies involves a direct transfer of property between the families.<sup>16</sup> Ironically, the traditional Anglo-American notion of marrying for love, which leads some to recoil from viewing marriage as a contract, has historical roots in pre-Christian Germanic customs of free contract.<sup>17</sup>

Marriage also denotes status, indicating membership in a unique social and religious institution. The conceptions of marriage as contract and as status are not mutually exclusive, and both views find support in the law<sup>18</sup> and in everyday speech. When we say “*X* and *Y* are married” we convey both their contractual relationship and their status, just as saying “*A* and *B* are partners in a firm” implies both the existence of a partnership agreement and status within an institution.

The last four decades have witnessed a general shift in the em-

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<sup>14</sup> See *infra* Section I.C.

<sup>15</sup> PATRICIA UBEROI, *FAMILY, KINSHIP AND MARRIAGE IN INDIA* 2 (1993).

<sup>16</sup> See BROUDE, *supra* note 1, at 40. In a sample of 565 societies, forty-seven percent characterized marriage by a monetary transaction. *Id.*

<sup>17</sup> ALAN MACFARLANE, *MARRIAGE AND LOVE IN ENGLAND: MODES OF REPRODUCTION 1300-1840* 125-26 (1986). Indeed, another historian has commented that with respect to marriage and property, the English were “for the Middle Ages, an unusually individualistic people.” Charles Donahue, Jr., *English and French Marriage Cases in the Later Middle Ages: Might the Differences Be Explained by Differences in the Property Systems?*, in *MARRIAGE, PROPERTY, AND SUCCESSION* 339, 362 (Lloyd Bonfield ed., 1992).

<sup>18</sup> See *Maynard*, 125 U.S. at 213. “[Marriage] is more than a contract. . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.” *Id.* (quoting *Wade v. Kalbfleisch*, 58 N.Y. 282, 284 (1874)).



phasis of the law of marriage away from status and towards contract.<sup>19</sup> For example, in 1972 the Supreme Court declared a married “couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”<sup>20</sup> The Supreme Court of California, in *Marvin v. Marvin*,<sup>21</sup> recognized cohabitation contracts, which offer a contractual alternative to marriage.<sup>22</sup> Similarly, recent state court decisions mandating same-sex marriage<sup>23</sup> and civil unions<sup>24</sup> have moved state law towards ever-greater freedom for individuals to order their marital affairs.<sup>25</sup> This shift towards marital autonomy and marriage as contract has coincided with three interrelated trends: the secularization of the law;<sup>26</sup> the increased emphasis on individual sexual, reproductive and marital autonomy;<sup>27</sup> and the rise in popularity of the law and economics

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<sup>19</sup> See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446-47 (1992) (documenting this shift from status to contract and exploring the shift’s antecedents and consequences).

<sup>20</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down a Massachusetts law which criminalized the distribution of contraceptives to unmarried individuals).

<sup>21</sup> 557 P.2d 106.

<sup>22</sup> *Id.* at 110.

<sup>23</sup> *Goodridge*, 798 N.E.2d at 948 (holding state marriage law discrimination against same-sex couples impermissible).

<sup>24</sup> *Baker*, 744 A.2d at 867 (mandating that same-sex couples must have the option of either marriage or civil unions).

<sup>25</sup> Ironically, the strongly anti-gay-marriage reaction of Virginia also shows the contractual nature of marriage. “A civil union, partnership *contract* or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited.” VA. CODE ANN. § 20-45.3 (2007) (emphasis added). This statute’s interference with contractual autonomy—and its attendant harsh results—has attracted criticism. See, e.g., Laura L. Hutchison, *Couple Feels Forced to Leave*, FREE LANCE-STAR, Jan. 9, 2005, at 1, available at <http://www.fredericksburg.com/News/FLS/2005/012005/01092005/1627908>.

<sup>26</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971) (striking down laws providing public funding for religious schools as fostering excessive entanglement between the state and religion).

<sup>27</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Eisenstadt*, 405 U.S. at 438; *Goodridge*, 798 N.E.2d at 941.

movement.<sup>28</sup>

### B. A Law and Economics View

Taking a law and economics perspective, one can view married parties as rational agents who aim to maximize the benefits of commitment, intimacy, companionship, and child-rearing.<sup>29</sup> As with any contract, the parties enter marriage when the present expected value, or “marital surplus,” created by the relationship exceeds that of the alternative—being single. Similarly, a party will “breach” by divorcing when an alternative, such as being single or marrying another, offers a greater present expected value than remaining in the marriage. This insight, grounded in law and economics, provided great thrust to the no-fault divorce movement.<sup>30</sup>

Marriage bears little resemblance to contracts to buy a given number of widgets at a certain price per widget, but rather appears closer to “relational contracts,” which broadly define obligations and expectations, and which primarily rely upon continued value creation and norms for enforcement.<sup>31</sup> For example, relational contracts govern law firm partnerships and long-term dealings between manufacturers and essential part suppliers. Upon breach, the relational contract typically provides guidance in awarding damages. Just as the body of law surrounding the Uniform Partnership Act provides default terms for

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<sup>28</sup> See Singer, *supra* note 19, at 1508, (crediting, in part, the law and economics view of people as rational maximizers for this shift in the law’s view of marriage).

<sup>29</sup> Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1254 (1998).

<sup>30</sup> See Singer, *supra* note 19, at 1512.

<sup>31</sup> Scott & Scott, *supra* note 29, at 1229. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 145-54 (6th ed. 2003) (summarizing the law and economics views of marriage).

courts at the dissolution of a partnership,<sup>32</sup> family law guides divorces. Judges and legislatures typically aim to craft defaults that come closest to giving parties what they would have wanted, thereby reducing overall transaction costs by minimizing the amount of effort expended on contracting around the defaults.<sup>33</sup>

However, much of the criticism leveled against majoritarian defaults in general<sup>34</sup> also applies specifically to the current majoritarian defaults governing divorce. First, critics note that vague majoritarian defaults give parties incentive to shift issue resolution from the ex ante premarital situation to publicly subsidized courts for ex post resolution.<sup>35</sup> Divorce cases consume a substantial share of state court resources,<sup>36</sup> suggesting that marrying parties indeed leave many crucial issues unresolved ex ante.

Second, majoritarian defaults allow parties to withhold informa-

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<sup>32</sup> See UNIF. P'SHIP ACT § 31 (1997).

<sup>33</sup> The broad outlines of current no-fault divorce law come quite close to what a majority of individuals would include in their marriage contract, starting with certain basic assumptions about human behavior and without any preconception of marriage. Scott & Scott, *supra* note 29, at 1300.

<sup>34</sup> See generally Ayres & Gertner, *supra* note 10, at 93 (critiquing majoritarian defaults). This Comment does not deal with externalities to the marriage contract, such as to children. Note that there is one general critique of majoritarian defaults—that they ignore the possibility of certain subsets of the population who will already be more likely to contract around defaults. For example, individuals entering a second marriage are far more likely to sign a premarital contract than those entering a first marriage, presumably to protect the interests of children from the first marriage. See LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 153-54 (1981).

<sup>35</sup> See Ayres & Gertner, *supra* note 10, at 93.

<sup>36</sup> JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* x (paperback ed. 1983) (estimating divorce actions account for “more than half” of cases filed in state courts). See, e.g., JUDICIAL COUNCIL OF CALIFORNIA, COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1989-1990 THROUGH 1998-1999, at \*55 (2000), available at <http://www.courtinfo.ca.gov/reference/documents/2000csr.pdf> (approximately one-tenth of civil cases); ANNUAL REPORT OF THE COURTS OF KANSAS (2005), available at <http://judicial.kscourts.org:7780/stats/05/contents.htm> (14,735 divorces compared to 7,277 contract actions).

tion that increases their own welfare by less than it detracts from the well-being of the other party.<sup>37</sup> Parties may do this either strategically or unintentionally. As an example, one party may have an undisclosed disposition to physical violence, which no-fault divorce defaults give no incentive to reveal. Disclosure of this disposition might allow the other party to insist upon therapy as a precondition of marriage—or not get married at all. Fixing this failure of majoritarian defaults is one of the three benefits of using the approach outlined in this Comment: providing well-crafted defaults and optional terms leads parties to *reveal information* and discuss issues of import to the marriage.

### C. Departing from the Defaults: Premarital Agreements

Entering a marriage without a premarital agreement may be characterized as signing a form contract with hundreds of pages of fine print not even included on the contract itself and with terms that may change without notice. Written premarital agreements first appeared in English legal history more than four centuries ago.<sup>38</sup> Fathers' concern for their daughters' well-being provided the impetus for many of these contracts, which explicitly provided for the bride's maintenance if widowed.<sup>39</sup> However, until the landmark 1970 ruling in *Posner v. Posner*,<sup>40</sup>

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<sup>37</sup> See Ayres & Gertner, *supra* note 10, at 94.

<sup>38</sup> Courts of both law and equity were passing on the validity of premarital agreements in the sixteenth century. See 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 310, 311 (3d ed. 1945).

<sup>39</sup> See Lloyd Bonfield, *Property Settlements on Marriage in England from the Anglo-Saxons to the Mid-Eighteenth Century*, in MARRIAGE, PROPERTY, AND SUCCESSION 287, 305 (Lloyd Bonfield ed., 1992).

<sup>40</sup> 233 So. 2d 381, 385 (Fla. 1970) (holding premarital contracts do not contravene public policy).

American courts uniformly refused to enforce premarital contracts regarding property disposition upon divorce.<sup>41</sup>

Since then, the American Law Institute has proposed the Uniform Premarital Agreement Act (“UPAA”),<sup>42</sup> which twenty-seven of the states have enacted since 1983.<sup>43</sup> This statute gives presumptive validity to all premarital agreements so long as they fully disclose each party’s assets and do not contravene public policy.<sup>44</sup> Moreover, the courts of those states whose legislatures have not passed the UPAA now overwhelmingly enforce premarital agreements much like any other contracts.<sup>45</sup>

This legal shift has spawned a wide array of agreements covering many aspects of married life, ranging from random spousal drug testing<sup>46</sup> to football watching<sup>47</sup> to the preferred brand of gas.<sup>48</sup> Some scholars welcome this trend, arguing that premarital contracts generally

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<sup>41</sup> See Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 704 (1972).

<sup>42</sup> UNIF. PREMARITAL AGREEMENT ACT § 1-11, 9C U.L.A. 39 (1983).

<sup>43</sup> See UNIF. LAW COMM’RS, A FEW FACTS ABOUT THE UNIFORM PREMARITAL AGREEMENT ACT, [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-upaa.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upaa.asp) (last visited Jan. 8, 2008) (listing the states that have adopted the act, as well as those considering it).

<sup>44</sup> UPAA § 6(a)-(b), 9C U.L.A. 48-49 (2001). Agreements dealing with disposition of children are included as agreements contravening public policy. UPAA § 3(b). Also, some states retain their hostile stance towards premarital agreements executed prior to passage of the UPAA. See, e.g., CONN. GEN. STAT. ANN. § 46b-36 (West 2007).

<sup>45</sup> See *Brooks v. Brooks*, 733 P.2d 1044, 1049-51 (Alaska 1987) (listing reasons modern courts prefer to enforce premarital agreements). See also *Simeone v. Simeone*, 581 A.2d 162, 168 (Pa. 1990).

<sup>46</sup> Sandy Cohen, *Untying the Knot, Celeb-Style*, VENTURA COUNTY STAR, Dec. 20, 2005, Life, Arts and Living, at 1 (listing actual premarital agreement terms including financial penalties for failing random drug tests, impoliteness to in-laws, or more than one football game per Sunday).

<sup>47</sup> *Id.*

<sup>48</sup> One commentator recounts the terms of a sixteen-page premarital agreement regulating pocket money, gas brand, and frequency of healthy intercourse. Gary Belsky, *Living by the Rules*, CNN MONEY, May 1, 1996, [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1996/05/01/212090/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1996/05/01/212090/index.htm).

air secrets, clarify expectations, and reduce the trauma of divorce.<sup>49</sup> Others point out that premarital contracts empower women, who often have superior bargaining power at the inception of the marriage than at its dissolution when they have given up a career for childrearing.<sup>50</sup> One commentator even proposed making premarital contracts mandatory in order to ease the divorce process and recognize the diversity of marriages.<sup>51</sup> Meanwhile, others point out that the UPAA and various state court rulings narrow conscionability review of premarital agreements beyond what even normal contracts receive.<sup>52</sup> Calls for reform include requiring that each party employ independent counsel as a prerequisite for enforceability.<sup>53</sup>

The extraordinary complexity of default divorce rules means that only with premarital contracts will marrying couples get the contract they actually desire.<sup>54</sup> Empirically, marrying couples exhibit unwarranted optimism about their chances of remaining married<sup>55</sup> and perform only slightly better than chance in correctly identifying the statutory defaults.<sup>56</sup> Only one state aims to inform marrying parties of the outlines

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<sup>49</sup> See Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 895, 896 (1997).

<sup>50</sup> Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1229 (1993); Lloyd Cohen, *Marriage, Divorce and Quasi Rents; Or, "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1987).

<sup>51</sup> Zelig, *supra* note 50, at 1229, 1230.

<sup>52</sup> See Atwood, *supra* note 7, at 146.

<sup>53</sup> See Marston, *supra* note 49, at 913-14.

<sup>54</sup> See Zelig, *supra* note 50, at 1229.

<sup>55</sup> See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

<sup>56</sup> *Id.* at 441. Recently-married respondents correctly identified the property-disposition term statutorily included in the marriage contract only slightly more than fifty-two percent of the time. *Id.*

of the defaults by requiring distribution of an informative pamphlet to those applying for marriage licenses.<sup>57</sup>

Some states have taken this idea of marriage as contract to the next logical step, offering easily accessible alternative bundles of terms. In 1998, Alaska began giving couples the option of community-property marriage.<sup>58</sup> Since 1997, Louisiana has offered both standard no-fault marriages and “covenant marriages,” which retain immediate divorce in cases of fault such as physical abuse, but establish a lengthy waiting period for divorce without fault.<sup>59</sup> While these are blunt options, including an incredible number of terms in the contract all at once, they are natural in the path of evolution towards the proposal in this Comment.

## II. BASIC PROPOSAL AND APPLICATIONS

This Part sets forth the details of the proposal and considers the three routes that legislatures have for offering a term as well as how to ensure that courts will enforce a couple’s decision as conscionable and valid. Several example terms demonstrate the approach’s versatility. With these examples as a reference point, this Part concludes by show-

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<sup>57</sup> LA. DEP’T OF JUSTICE, LOUISIANA’S COMMUNITY PROPERTY LAW AND HOW TO CHANGE ITS EFFECTS BY CONTRACT 2 (2004), available at [http://www.ag.state.la.us/pdfs/community\\_property.pdf](http://www.ag.state.la.us/pdfs/community_property.pdf). See LA. REV. STAT. ANN. § 9:237 (2007). See also Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REFORM 217, 258 (1990) (commenting on the failure of other states to follow Louisiana’s decision to disseminate terms of the marriage contract).

<sup>58</sup> ALASKA STAT. § 34.77.030 (2007).

<sup>59</sup> LA. REV. STAT. ANN. § 9:293 (2007). See Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2515-16 (1998) (concluding covenant marriage laws would likely pass constitutional muster even if they are questionable public policy and have not received wide acceptance). See also James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 955 (2000) (comparing covenant marriage to state-sponsored premarital contracts).

ing that keeping choices private and allowing for changed circumstances furthers all three goals: increased autonomy; information disclosure; and circumventing constitutional constraints.

### A. Routes

This Comment will consider three routes for a term to be voluntarily included, or not included, in a couple's marriage contract: (1) *Opt-In*. The state allows marrying couples to opt-into contractual terms, including a term by checking a box on the marriage license application; (2) *Default with Opt-Out*. The state makes a term the default, and it is included *unless* the couple opts-out by checking a box on the marriage license application; (3) *Affirmative Choice*. The state puts *both* an opt-in *and* an opt-out checkboxes on the marriage license application and does not issue the marriage license unless the couple selected one.<sup>60</sup>

The three routes differ in a number of respects including the amount of information they encourage parties to reveal and the constitutional objections they might raise. One should note, however, that affirmative choice is simply a hybrid of the other two—it involves both opt-in and opt-out checkboxes. The name comes from the requirement that the marrying parties must make an “affirmative choice” whether they want the term in their marriage contract or not.

### B. Conscionability and Validity

As with any contract term, one party to the marriage could al-

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<sup>60</sup> Cf. Ayres & Gertner, *supra* note 10, at 97. Affirmative choices are a special type of penalty default, providing a default of complete legal non-recognition if a term is not explicitly included. See, e.g., U.C.C. § 2-201 cmt. 1 (1995) (requiring parties to affirmatively supply a quantity for a contract to be enforceable).



ways challenge a term included in any of the three methods above by arguing it is unconscionable. Courts since *West Coast Hotel Co. v. Parrish*<sup>61</sup> have recognized contract as an area of state law,<sup>62</sup> and have acknowledged marriage as state law since long before that.<sup>63</sup> As a result, the same legislation modifying the marriage license application could also instruct courts to presume such terms to be conscionable and valid, thereby rendering the point moot. Such legislation may be unnecessary, as judges may deem a term's inclusion fully compatible with public policy by dint of the legislature offering it. Additionally, such provisions do not constitute a "contract of adhesion" *regardless* of how presented because the parties can enter into the marriage contract without them.

When dealing with terms that waive constitutional rights, however, courts have found due process concerns if the term was not clearly a waiver.<sup>64</sup> Legislation could potentially address this concern in a number of ways. For example, simple, direct wording next to the relevant checkbox on the marriage license application would ameliorate these concerns, as would bolding the word "WAIVER" on the form. Additionally, the legislature could direct the distribution of a plain-language brochure explaining the terms to all marriage license applicants.<sup>65</sup>

### C. Example Terms

The routes listed above could work for any conceivable premarital contract term. This Comment now examines several possible terms

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<sup>61</sup> 300 U.S. 379.

<sup>62</sup> *West Coast Hotel Co.*, 300 U.S. at 398.

<sup>63</sup> *E.g., Maynard*, 125 U.S. at 210.

<sup>64</sup> *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) ("For a waiver of constitutional rights in any context must, at the very least, be clear.").

<sup>65</sup> *Cf. supra* note 57.

that exemplify the power and flexibility of this approach. Several of these terms might also prove controversial. However, this Comment proposes a broad policy lever and *not* these particular example terms.

### 1. *Gun Surrender*

Despite the frighteningly high prevalence of gun-related domestic violence,<sup>66</sup> judges hearing temporary restraining order (“TRO”) applications grant firearms-confiscation to an *astonishingly* low twelve percent of those applicants who request it.<sup>67</sup> Now consider the following clause:

Husband agrees that upon the request of wife, he or his agent will surrender all firearms in his possession to law enforcement for a period of at least fourteen days. The parties explicitly intend specific performance, and the husband knowingly WAIVES rights to pre-deprivation hearings and intends that the wife may obtain an ex parte judicial injunction enforcing this promise.

Such a clause would allow the wife to walk into a courthouse and get an injunction forcing her husband to surrender his firearms. She could do this in conjunction with a TRO or at any time when she has any reason to fear her husband might threaten or injure her with a gun. Unlike with a TRO, an injunction would require neither filing an affida-

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<sup>66</sup> Firearms account for approximately sixty-five percent of domestic violence homicides. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 10 (1998), <http://www.ojp.gov/bjs/pub/pdf/vi.pdf>. Moreover, having one or more guns in the home made a woman 7.2 times more likely to be the victim of a domestic violence homicide. See James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES INTERNAL MED. 777, 780 (1997).

<sup>67</sup> EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 238 (3d ed. 2003).

vit nor “detailed allegations” about “risk of immediate and irreparable harm.”<sup>68</sup> A wife could even use it if she suspected her husband might attempt suicide.<sup>69</sup>

Judges have long issued negative injunctions to enforce contracts,<sup>70</sup> particularly if the parties have expressly contracted for specific performance or if monetary damages are inadequate to protect the promisee.<sup>71</sup> Although it requires the actual surrender of firearms by the enjoined party, this injunction is essentially negative in nature: cease fire-arm possession. Moreover, monetary damages clearly fail to protect against death or serious injury from guns wielded by irate spouses. A fourteen day injunction is reasonable in duration.

Offering marrying couples the opportunity to include such a term would yield all three possible benefits: increased autonomy, information disclosure, and circumventing constitutional constraints. First, it would allow couples the autonomy to choose a nontraditional relationship with firearms. Second, the very presence of the option would encourage discussion of attitudes towards firearms and domestic violence. As described above in Section I.B., sometimes the information thus revealed could lead to society being better off. Third, a legislature bold enough to make such a provision mandatory in marriage contracts (as

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<sup>68</sup> See *Blazel v. Bradley*, 698 F. Supp. 756, 763-64 (W.D. Wis. 1988) (listing due process requirements for TROs, including affidavits “containing detailed allegations” and “risk of immediate and irreparable harm”).

<sup>69</sup> See Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992) (noting suicide is nearly five times more likely to occur in a household with a firearm than in one without).

<sup>70</sup> See *Lumley v. Wagner*, 42 Eng. Rep. 687, 687 (Ch. 1852). See also RESTATEMENT (SECOND) OF CONTRACTS § 357(2)(a) (1981).

<sup>71</sup> See, e.g., U.C.C. § 2-716 (2003). *Contra* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981). See RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981).

opposed to merely an option on the marriage license application) would run into a bevy of federal and state constitutional objections. Any ex parte injunction faces due process concerns, and this clause would not withstand federal constitutional jurisprudence if mandatory.<sup>72</sup> Further, its gender-specific nature would run afoul of equal protection law.<sup>73</sup> Finally, since it deals with firearms it might conflict with either the Federal Second Amendment,<sup>74</sup> or—more likely—the provisions in the vast majority of state constitutions that go beyond their federal counterpart.<sup>75</sup>

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<sup>72</sup> See *Blazel*, 698 F. Supp. at 763-64. Federal courts facing similar situations have discerned four required procedural safeguards for issuance of ex parte injunctions or restraining orders: (1) “participation by a judicial officer;” (2) “a prompt post-deprivation hearing;” (3) “verified petitions or affidavits containing detailed allegations based on personal knowledge;” and (4) “risk of immediate and irreparable harm.” *Id.* The term in question would fail to meet conditions (3) and (4). Permitting such a clause would also remove much of the discretion exercised by judges, mandated by safeguard (1), who often show a shocking insensitivity to the plight of battered women. See, e.g., JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* (1999) (noting that many have termed this “judicial harassment of battered women”). One woman who went before a judge to get a temporary restraining order stated that she “[f]elt like [she] did something wrong, embarrassing [sic] in front of all these people.” *Id.* at 154. A female judge from Massachusetts minimized a victim’s ordeal as a mere lover’s quarrel by stating, “Any chance of getting back together? . . . You took this out on Valentine’s Day.” *Id.* at 103. Another judge told a woman seeking a TRO, “[M]ost people get married and do not have illegitimate children. These things don’t happen to them.” *Id.* at 52. Yet another judge “ordered a woman seeking a restraining order out of the courtroom for wearing shorts.” *Id.* at 93.

<sup>73</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (holding that policies intended to benefit women may fail intermediate scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate standard of review for gender classifications); *Eckert v. Town of Silverthorne*, 25 F. App’x 679, 685 n.2 (10th Cir. 2001) (noting that the appellants did not challenge the statute on the ground that it requires only the arrest of men in a domestic violence situation because such a statute would not survive a challenge based on equal protection). *But see* *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (“The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 475-76 (1981) (upholding a gender-specific statutory rape law as constitutional); *State v. Wright*, 563 S.E.2d 311, 313 (S.C. 2002) (upholding gender-specific domestic violence legislation as constitutional).

<sup>74</sup> U.S. CONST. amend. II.

<sup>75</sup> See ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1, ¶ VIII; HAW. CONST. art. I, § 17; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. CONST. BILL OF RIGHTS, § 4; KY. CONST. BILL OF RIGHTS, § 1; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MASS. CONST. pt. I, art. 17; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art.

## 2. *Abortion Notification*

Consider the following hypothetical contract term:

Each spouse<sup>76</sup> agrees to notify the other prior to aborting any pregnancy, with compensatory damages for breach payable in the event of divorce. The damages are waived in case of: any medical risk to the spouse; inability to find the other spouse; separation; any sexual or physical assault, reported or unreported; pregnancy resulting from adultery; or, reasonable grounds to believe notice will cause the other spouse to react violently towards any individual *whatsoever*.

This term would provide encouragement—not a requirement—for a wife to notify her spouse prior to aborting a pregnancy that grew out of their marriage. This compares favorably to the Pennsylvania statutory provision<sup>77</sup> requiring abortion notification that the Supreme Court ruled unconstitutional in the landmark decision *Planned Parenthood v. Casey*.<sup>78</sup>

One reason the *Casey* plurality found the statute to constitute an undue burden was the weakness of its domestic violence exceptions,<sup>79</sup> which the notification clause above thoroughly addresses. Additionally, under the Pennsylvania statute, wives who did not meet the narrow ex-

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I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11, cl. 1; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.C. CONST. art. 1, § 30; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. 1, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

<sup>76</sup> This language aims to be inclusive of both female-male and female-female marriages.

<sup>77</sup> See 18 PA. CONS. STAT. ANN. § 3209 (West 2007).

<sup>78</sup> 505 U.S. 833, 837 (1992).

<sup>79</sup> *Id.* at 887-98; 18 PA. CONS. STAT. ANN. § 3209(b)(4) (West 2007).

ceptions<sup>80</sup> could either notify their spouses or face perjury charges based on the form provided by the state to verify compliance.<sup>81</sup> The statute relied upon a third party, the physician, to enforce its provisions under pain of loss of license and punitive damages if the wife did not provide a signed verification form.<sup>82</sup> In contrast, the proposed notification clause above has *broad* exceptions and leaves the choice *entirely* to the aborting spouse, enforceable by *civil* damages.

Allowing marrying couples to choose whether to include such a term in their marriage contract allows states to achieve all three possible benefits. First, in terms of autonomy, polls strongly suggest that a majority of Americans would prefer having the option of such a clause.<sup>83</sup> Approximately seventy percent of Americans approve of laws requiring spousal consent prior to abortion,<sup>84</sup> and many Americans who oppose mandatory notification laws might opt for such rules governing their own lives if given the choice.<sup>85</sup> Second, presenting couples with this

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<sup>80</sup> 18 PA. CONS. STAT. ANN. § 3209(b)-(c) (providing exceptions only for adultery, inability to locate the spouse, *actually reported* sexual assault, fear of abuse to *herself*, or medical emergency).

<sup>81</sup> *Id.* § 3209(a) states, in pertinent part:

[N]o physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

<sup>82</sup> *Id.* § 3209(e).

<sup>83</sup> See *Abortion, the Court and the Public*, PEW RESEARCH CENTER (Oct. 3, 2005), <http://people-press.org/commentary/display.php3?AnalysisID=119> (citing poll results from recent years that show majorities favor spousal notification).

<sup>84</sup> *Id.* See also Roper Center for Public Opinion Research, *Gallup/CNN/USA Today Poll #2003-03*, (2003) (finding out of a sample size of 1002, seventy-two percent favored a law “requiring that the husband of a married woman be notified if she decides to have an abortion.”).

<sup>85</sup> Of course, some might prefer the availability of such an option but not choose it for their own marriages. However, unlike popular laws that involve externalities, such as support for public transportation in cities, there is no “free-rider” effect in abortion notification that would

option would encourage disclosure and discussion about abortion, related values, and the role expected of the non-child-bearing spouse in raising children.

Finally, because the term is optional, it would likely allow the state to circumvent some of the constitutional constraints imposed by *Casey*. Part III discusses the constitutionality of this particular term in detail. Since the Court has recently extended *Casey*'s "undue burden" standard to many other areas of constitutional jurisprudence,<sup>86</sup> this term provides great insight into the efficacy of the much broader policy proposal in this Comment.

### 3. *Example Terms Seeking Only One or Two Benefits*

The firearms injunction and abortion notification terms already discussed exhibit all three possible benefits of the approach outlined in this Comment: increasing autonomy, revealing information, and circumventing constitutional constraints. However, not all terms offered to marrying couples need present all three benefits. Legislatures may want to adopt terms with the aim of achieving only one or two of the aforementioned benefits.

For example, a state could offer a term awarding substantial monetary damages in divorce to the party wronged by the infidelity that led to the marriage's end.<sup>87</sup> Simply making such a term mandatory

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predict public support but private opt-out. But, compare the low participation rate in Louisiana's covenant marriage. See Pam Belluck, *States Declare War on Divorce Rates, Before Any 'I Dos'*, N.Y. TIMES, Apr. 21, 2000, at A1 (noting couples in Louisiana choose covenant marriage at a three percent rate).

<sup>86</sup> See *infra* notes 106-07 and accompanying text.

<sup>87</sup> Cf. Zelig, *supra* note 50, at 1231. But see *Diosdado v. Diosdado*, 97 Cal. App. 4th 470, 473

would involve no reasonable constitutional concerns, as several states' divorce laws still penalize infidelity.<sup>88</sup> However, by putting the term as an option on the marriage license application, states could force parties to reveal hidden non-monogamous agendas, an example of the benefit of information revelation.

In *Georgia v. Randolph*,<sup>89</sup> the Supreme Court held one spouse did not have the power to consent to a warrantless search over the objections of the other spouse.<sup>90</sup> A state could offer a term whereby each spouse granted the other the perpetual authority to consent to such searches, thus making *Randolph* inapplicable to that couple. One would not expect offering such an option to result in meaningful information revelation,<sup>91</sup> but it would circumvent the constitutional constraint imposed on law enforcement by the Supreme Court's ruling.

Alternatively, states could offer some terms with an eye solely to enable couples to maximize their autonomy. Such legislation would bring many of the benefits of premarital agreements to the masses who do not have the money or inclination to hire an attorney to draft one. For example, a state could offer the ten terms most frequently seen in expensive custom-drafted premarital agreements.<sup>92</sup>

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(2002) (finding a similar term unenforceable due to California's strong public policy against fault in divorce proceedings).

<sup>88</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 959 (2002).

<sup>89</sup> 547 U.S. 103 (2006).

<sup>90</sup> *Id.* at 122-23.

<sup>91</sup> Such a term would not only affect the balance between the state and the individual, but also the balance between a law-abiding spouse and a law-breaking spouse.

<sup>92</sup> See Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 86 (1990) (proposing to offer a "menu of standard-form terms"). See also Eric Ras-musen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464 (1998) (arguing that the Rawlsian "veil of ignorance" "can lead to the misimpression that it is appropriate to try to devise a single set of rules to govern all mar-



#### 4. *Combinations and Synergies*

Given the usefulness of allowing couples to choose their own terms, it is easy to imagine states including many choices on their marriage license applications. However, the terms need not remain independent from each other. Legislatures can specify interrelations between terms, such as forcing a couple to choose term *B* if they also want term *A*. Legislatures could have a number of motivations in doing this, such as term *B* having a synergy with term *A* or because *B* ameliorates a possible side effect of *A*. For example, a legislature worried that a particular term would encourage overly-hasty divorces might only allow parties to choose that term if they also select a term mandating a month of mediation prior to divorce.

#### D. **Freedom to Opt-Out Unilaterally Later**

Life circumstances do change. Although they generally need not, legislatures can and should recognize this fact by allowing either spouse to unilaterally opt-out of a particular term by informing the other spouse of the opt-out, at any point before the time period relevant to the term. For example, with the gun disarmament term, opt-out becomes unavailable to one spouse when the other first perceives the threat of abuse or violence. The abortion notification term's relevant time period starts with pregnancy. Similarly, a spouse could no longer unilaterally withdraw from the term giving substantial damages for infidelity after an affair had started. Likewise, once a spouse has commenced criminal behavior, the option to withdraw from the *Randolph* circumventing term

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riages").

would terminate.

This freedom to opt-out later enhances all three benefits that can accrue from the use of optional and default terms. First, the freedom to opt-out obviously enhances individual autonomy. Second, a decision to opt-out can reveal information. For example, a spouse opting out of damages for infidelity makes a powerful statement of sexual and emotional dissatisfaction, starting a dialogue and hopefully leading to either a more satisfying relationship or the end of an unhappy marriage. Third, as demonstrated in Part III.C. below, when a term aims to circumvent constitutional constraints, the fact the spouse had later chances to opt-out unilaterally significantly increases the arguments for enforceability.<sup>93</sup>

### **E. Keeping Choices Private**

All three benefits accruing from offering a contract term improve when a couple's choices remain private—known only to each other—unless litigated in divorce. For example, a couple will feel greater autonomy in making their choices when they can decide whether and when to reveal their selections to friends, family, and others. A marrying couple could even check one box and tell friends that they left it blank, or vice versa. With this autonomy and anonymity also comes greater leeway to discuss the matters and reveal information to each other, free of unwanted influence from nonparties to the marriage.

Most importantly, keeping choices private neutralizes possible objections to using optional and default terms to circumvent constitu-

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<sup>93</sup> See *infra* section III.C.

tional constraints. Precedent recognizes that seemingly benign laws can stigmatize intended beneficiaries.<sup>94</sup> Unrevealed information cannot stigmatize. Additionally, privacy would prevent religious denominations from requiring checking (or not checking) a box as a prerequisite for a religious marriage ceremony, thereby avoiding any First Amendment free exercise challenge.<sup>95</sup> Finally, not providing public knowledge of choices prevents infringing a couple's First Amendment right *not* to speak.<sup>96</sup>

### III. EXAMPLES OF CIRCUMVENTING CONSTITUTIONAL CONSTRAINTS

The approach outlined in this Comment offers three benefits, the first two of which it has discussed at length: increased autonomy<sup>97</sup> and information revelation.<sup>98</sup> The third benefit, circumventing constitutional constraints, requires additional discussion because it is less intuitive and because it would receive substantial judicial scrutiny. This Part aims to demonstrate how the approach can indeed offer that benefit by showing

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<sup>94</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 516-17 (1989) (Stevens, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries.").

<sup>95</sup> See *Thomas v. Review Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an important benefit [e.g., marriage with terms the couple sees fit] upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

<sup>96</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943). An analogous situation exists when a married couple encounters the Presidential Election Campaign checkboxes on their 1040 Income Tax form asking, "Do you, or your spouse if filing a joint return, want \$3 to go to this fund?" and thereby asking what each spouse thinks of the state of presidential politics. In both the marriage license in this legislation and the tax form, the spouses reveal their preferences to each other and an anonymous government bureaucrat. Note also that checking or not checking the box on the marriage license application does not carry an "overwhelmingly apparent" meaning.

<sup>97</sup> See *supra* Part II.C-E.

<sup>98</sup> See *supra* Part II.C-E.

that courts would likely uphold its application to the abortion notification term from Subsection II.C.2.<sup>99</sup>

Since the broad policy lever proposed in this Comment would work with *any* premarital contract term, why investigate the abortion notification term's enforceability? The "undue burden" standard of review exemplified by *Casey* has deep roots in prior Supreme Court jurisprudence<sup>100</sup> and has been applied to many contexts outside of abortion. Since *Casey*, the Supreme Court has used the "undue burden" standard to deal with constitutional issues ranging from interstate commerce,<sup>101</sup> to affirmative action,<sup>102</sup> to the First Amendment.<sup>103</sup> Lower courts have also applied it in many other areas of constitutional law,<sup>104</sup> and numerous federal statutes and regulations refer to "undue burdens."<sup>105</sup>

<sup>99</sup> That term would partially circumvent a constitutional constraint imposed by *Casey*. *Casey*, 505 U.S. at 877.

<sup>100</sup> See, e.g., *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976). See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1220 (1996) ("[T]he *Casey* standard is not anomalous in the Court's privacy doctrine.").

<sup>101</sup> See, e.g., *Granholm v. Heald*, 544 U.S. 460, 493-94 (2005) (Stevens, J., dissenting) (applying the undue burden standard to the dormant commerce clause).

<sup>102</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) ("[A] race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'").

<sup>103</sup> See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 363 (2003) (Rehnquist, J., dissenting) ("unduly burdens the First Amendment freedoms of purchasers"); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 616 (2003) ("unduly burdensome" prophylactic rule").

<sup>104</sup> See, e.g., *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1462, 1464 (W.D. Wash. 1994) (applying the undue burden standard to assisted suicide), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>105</sup> E.g., 42 U.S.C.A. § 12182(b)(2)(A)(iii) (West 2005); 6 C.F.R. § 5.48 (2007). The Supreme Court has even used the term in interpreting legislative intent of an early twentieth-century law. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 875 (1999) ("Rejecting broader proposals, Congress chose a narrow reservation of the resource that would address the exigencies of the crisis at hand without *unduly burdening* the rights of homesteaders or impeding the settlement of the West.") (emphasis added).

*Casey* introduced the “undue burden” standard into the forefront of constitutional jurisprudence,<sup>106</sup> and its effect has gone well beyond abortion.<sup>107</sup> Yet, for all that, the *Casey* Court found that all but *one* of the challenged provisions of the Pennsylvania law passed the “undue burden” standard; only the law’s spousal abortion notification provision failed.<sup>108</sup> Because of this, and because of the well-developed body of abortion jurisprudence, a term dealing with abortion notification provides the ideal vehicle for showing the power of this Comment’s approach to circumvent constitutional constraints. This Comment proposes a policy lever with much broader applications than this particular, narrow term.

As a starting point, everyday American life involves signing away core constitutional rights. Most form contracts contain arbitration clauses waiving Seventh Amendment rights to civil jury trial—clauses that courts typically enforce.<sup>109</sup> Many routine transactions in high-technology and finance involve signing nondisclosure agreements forfeiting First Amendment rights. Some public housing authorities ask residents to sign waivers of their Fourth Amendment protections against warrantless searches to cut down on crime.<sup>110</sup> As part of plea bargains

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<sup>106</sup> See Lawton, *supra* note 59, at 2490-91.

<sup>107</sup> The Court has continued to apply the “undue burden” standard in subsequent abortion cases. See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>108</sup> *Casey*, 505 U.S. at 898 (“Women do not lose their constitutionally protected liberty when they marry.”).

<sup>109</sup> See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 695-96 (2001). See generally Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004) (discussing scenarios where individuals waive constitutional rights).

<sup>110</sup> Michael Briggs, *Public Housing Agencies Shun Gun Sweeps*, CHICAGO SUN-TIMES, May 9, 1995, at 61.

and other deals with prosecutors, criminal defendants often bargain away their constitutional safeguards. The Supreme Court has held that a “criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”<sup>111</sup> Other decisions have found that many Fourteenth Amendment civil procedural due process rights are also subject to waiver.<sup>112</sup> This background should make clear that the idea of waiving constitutional rights on the marriage license application does not stand far from the mainstream of American legal practice.

### A. In a Private Premarital Agreement

Suppose that two spouses included the abortion notification term from Subsection II.C.2 in a *privately drafted* premarital agreement. A constitutional challenge to the enforceability of such a clause<sup>113</sup> by a divorce court would most likely be grounded in the state entanglement doctrine exemplified by *Shelley v. Kraemer*.<sup>114</sup> That case held court enforcement of a private, racially-discriminatory real estate covenant impermissibly entangled the state in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>115</sup> Similarly, one could argue a divorce court’s acceptance of the proposed abortion notification clause would impermissibly entangle the state in limiting the constitutional right to choose abortion.

Predicting the constitutionality of enforcing a premarital agree-

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<sup>111</sup> United States v. Mezzanatto, 513 U.S. 196, 201 (1995).

<sup>112</sup> See, e.g., D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (“The due process rights to notice and [a] hearing prior to a civil judgment are subject to waiver.”).

<sup>113</sup> There is no reported case law on abortion-related clauses in premarital agreements.

<sup>114</sup> 334 U.S. 1, 20 (1948).

<sup>115</sup> *Id.* at 20-21. See also U.S. CONST. amend. XIV, § 1.

ment to notify is hampered by the disarray in “state action” jurisprudence, which Professor Charles Black famously referred to as “a conceptual disaster area.”<sup>116</sup> However, several striking differences exist between the exclusionary covenant in *Shelley* and the proposed clause. First, *Shelley* involved racially discriminatory action, violating the core purpose of the Equal Protection Clause.<sup>117</sup> Enforcing the abortion notification term, by contrast, imposes a burden merely incidental to the fundamental right to abortion. Second, enforcing the covenant in *Shelley* would have restrained a willing buyer and willing seller,<sup>118</sup> neither of whom had ratified the covenant.<sup>119</sup> In comparison, the marrying parties would have mutually assented to the notification clause and would even have had the opportunity to opt-out unilaterally. The buyer in *Shelley* did not even know of the covenant, let alone play a role in its drafting.<sup>120</sup> Finally, *Shelley* involved an injunction blocking a transaction,<sup>121</sup> but the abortion notification clause involves only damages,<sup>122</sup> payable after the constitutionally protected act occurs.

Another leading state entanglement case, *Bell v. Maryland*,<sup>123</sup> involved the arrest of sit-in protestors at a segregated restaurant.<sup>124</sup> The

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<sup>116</sup> Charles L. Black, Jr., “State Action,” *Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (“The whole thing has the flavor of a torchless search for a way out of a damp echoing cave.”).

<sup>117</sup> *Shelley*, 334 U.S. at 20. See U.S. CONST. amend XIV, § 1.

<sup>118</sup> *Shelley*, 334 U.S. at 19.

<sup>119</sup> *Id.* at 6.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> The Court has found damages enforcing racial covenants unconstitutional. *Barrows v. Jackson*, 346 U.S. 249 (1953). In *Barrows*, the plaintiffs asked for damages of \$11,600 for breach of the covenant. *Id.* at 255-56. However, the previously-discussed substantial differences between *Shelley* and the current case remain.

<sup>123</sup> 378 U.S. 226 (1964).

<sup>124</sup> *Bell*, 378 U.S. at 227.

majority voted to remand on non-constitutional grounds.<sup>125</sup> In a concurring opinion, Justice Douglas argued the enforcement of trespass laws by state police and courts in this case amounted to a denial of equal protection.<sup>126</sup> Realizing that such logic, when taken to an extreme, would require court monitoring of private dinner party invitations, Douglas balanced the competing interests.<sup>127</sup> He concluded that the rights of the sit-in protestors in their peaceful fight against the legacy of slavery easily outweighed the property rights of the restaurant owner.<sup>128</sup>

Under this same balancing approach, enforcement of the abortion notification clause<sup>129</sup> would likely be constitutional.<sup>130</sup> Precedent has long recognized the right of both child-bearing and non-child-bearing individuals to procreate as fundamental.<sup>131</sup> Also, state cases such as *Marvin v. Marvin*<sup>132</sup> and those granting marriage (or marriage-like) rights to same-sex couples,<sup>133</sup> as well as a line of federal cases

<sup>125</sup> *Id.* at 241-42.

<sup>126</sup> *Id.* at 260, 261.

<sup>127</sup> *Id.* at 252-55.

<sup>128</sup> *Bell*, 378 U.S. at 260.

<sup>129</sup> Justice Hugo Black's dissent in *Bell v. Maryland* argues that this balancing test is unclear in state action jurisprudence. *Id.* at 333 (Black, J., dissenting). Justice Black argued state action only occurred when enforcing a contract interfering with the actions of two consenting individuals, the willing buyer and seller in *Shelley*. *Id.* at 330. Justice Black's understanding of the entanglement doctrine would find the notification clause in question constitutional. See Black, *supra* note 116, at 95.

<sup>130</sup> The balancing test does not consider the First Amendment right not to speak, as notifying one's spouse does not curtail freedom of expression or thought. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

<sup>131</sup> See *Caban v. Mohammed*, 441 U.S. 380, 382 (1979); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 71 (1976); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). But see *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992); *Michael H. v. Gerald D.*, 491 U.S. 110, 130, 131-32 (1989); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>132</sup> 557 P.2d at 122 (recognizing marriage-like contract between an unmarried couple).

<sup>133</sup> See, e.g., *Goodridge*, 798 N.E.2d at 969-70 (finding that the Massachusetts Constitution compels recognition of same-sex marriage).



from *Griswold v. Connecticut*<sup>134</sup> to *Lawrence v. Texas*<sup>135</sup> have increasingly recognized the right of individuals to order their private relationships without state second-guessing.<sup>136</sup> The abortion notification clause has broad exceptions for situations where the spouse fears any sort of violent reaction, as well as for medical emergencies involving the woman's health. Moreover, *Roe v. Wade*<sup>137</sup> and *Casey* both explicitly recognized that the state has an interest in potential life.<sup>138</sup> A court would most likely find that these interests outweigh the burden of damages for not notifying, which is not itself a fundamental right, but is merely incidental to the constitutional right to choose.

Interestingly, Justice Stevens, as Circuit Justice, has suggested that when considering an *injunction* preventing an abortion, a balancing of the interests might be appropriate.<sup>139</sup> Stevens implied that a husband's desire not to abort might weigh heavily in favor of permitting an

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<sup>134</sup> 381 U.S. 479 (1965).

<sup>135</sup> 539 U.S. 558 (2003).

<sup>136</sup> *Id.* at 567, 578 (holding states may not interfere with consenting adults' sexual relations); *Griswold*, 381 U.S. at 485 (striking down a ban which proscribed distribution of contraception to married couples).

<sup>137</sup> 410 U.S. 113 (1973).

<sup>138</sup> *Id.* at 162-63 (noting the state's interest in potential life and protecting pregnant women grows "substantially as the woman approaches term and, at a point during pregnancy, becomes 'compelling' "). The *Casey* Court overruled prior abortion precedent which found a constitutional violation when the state mandated that health risk information be given to women. *Casey*, 505 U.S. at 881, 882. The Court reasoned these prior cases were "inconsistent with *Roe*'s acknowledgment of an important interest in potential life." *Id.* at 882. But see *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (upholding the Federal Partial-Birth Abortion Act, 18 U.S.C.A. § 1531); *Stenberg v. Carhart*, 530 U.S. 914, 937-38 (2000) (ruling that a woman's health always takes precedence over the state's interest in potential human life).

<sup>139</sup> *Doe v. Smith*, 486 U.S. 1308 (1988). In this case, Justice Stevens, considering an application for a writ of injunction, briefly addressed the issue of whether an expectant father can get an injunction to block an abortion. *Id.* at 1308. Stevens commented favorably on the Indiana Supreme Court's willingness to weigh competing interests in deciding whether to issue an injunction preventing the abortion. *Id.* at 1309. He agreed that the parties' not being married and not planning on ever marrying weighed heavily against injunctive relief. *Id.* at 1309-10.

injunction.<sup>140</sup> The clause in question deals only with damages and notification, not an injunction against the abortion itself, which would impose an exceptionally greater burden on the right to choose.

## B. Opt-In

The previous Section argued for the likely constitutionality of a divorce court's enforcing the proposed notification clause from II.C.2 if it were included in a *privately-drafted* premarital agreement. This Section considers whether it would be constitutional if the couple had instead incorporated it into the marriage contract by checking a *state-provided* box on the marriage license application to opt-in. It assumes that the state gives the presumption of validity and conscionability to the term as discussed in Section II.B, in addition to providing the freedom to opt-out unilaterally at any point before pregnancy as discussed in Section II.D. It also presumes the marriage license application prominently displays the text of the clause, and all couples receive a plain-language brochure explaining its meaning and ramifications.

Opponents of the constitutionality of such a measure might argue that it represents government coercion into accepting a restriction on abortion rights. The Supreme Court, however, has rejected similar coercion arguments before in a very similar context. In both *Maher v. Roe*<sup>141</sup> and *Harris v. McRae*,<sup>142</sup> the plaintiffs unsuccessfully attacked statutes funding childbirth but not abortion. In both cases, the plaintiffs

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<sup>140</sup> *Id.* at 1309, 1310.

<sup>141</sup> 432 U.S. 464 (1977) (upholding state denial of abortion funding).

<sup>142</sup> 448 U.S. 297 (1980) (upholding federal denial of abortion funding).

argued the statutes coerced poor women to choose childbirth.<sup>143</sup> The Court found the range of options faced by pregnant women was, in fact, *expanded* by childbirth funding, which put no obstacle whatsoever in the way of an abortion.<sup>144</sup> Similarly, the proposed legislation only enlarges the array of choices and puts no obstacle before a woman wishing to avoid notification or damages: one need simply *not* check the opt-in box. Further, one may unilaterally opt-out later.

In *Maier* and *Harris*, the Court consistently held that the state and federal government could make value judgments in the options offered to individuals.<sup>145</sup> It drew a distinction between undue burdens<sup>146</sup> imposed by the force of law and legitimate encouragement of alternative activity.<sup>147</sup> By putting the opt-in on the marriage license application, the legislature merely attempts to encourage voluntary agreement to notify and does not use the force of mandatory law. Moreover, any influence brought to bear on parties to check an opt-in box pales in comparison to constitutionally-permissible regulations requiring those contemplating abortions to know the “philosophic and social” objections against exercise of their constitutional right.<sup>148</sup>

Opponents of the proposed legislation might further argue that

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<sup>143</sup> *Harris*, 448 U.S. at 316; *Maier*, 432 U.S. at 469-70.

<sup>144</sup> *Harris*, 448 U.S. at 314 (quoting *Maier*, 432 U.S. at 474).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 473-74.

<sup>147</sup> *Harris*, 448 U.S. at 314-15 (quoting *Maier*, 432 U.S. at 474-76).

<sup>148</sup> *Casey*, 505 U.S. at 872.

[T]he State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

*Id.*

the promise to notify or pay damages constitutes an undue burden on abortion for those women who have opted-in. However, the Court has repeatedly ruled that state regulations imposing substantial monetary costs do not impose undue burdens.<sup>149</sup> For example, the *Casey* Court upheld a twenty-four-hour waiting period between initial consultation and abortion, requiring two trips to an abortion clinic.<sup>150</sup> No spousal consent could waive this waiting period. Given the costs of transportation, lost wages, and extra medical fees, this can impose a substantial burden in many cases.<sup>151</sup> Similarly, the Court in *Maher* and *Harris* freely accepted that indigence could effectively bar abortion by putting its price out of reach if a legislature did not provide funding.<sup>152</sup>

The twenty-four-hour waiting period and the denial of public funding for abortion share one notable feature: they impose a burden *prior* to the constitutionally protected act of aborting. Not having the money to buy gas for the second trip to a clinic or lacking funds for the procedure prevents an abortion as surely as an injunction. By contrast, the damages in the proposed clause would always come *after* an abortion, even then *only if* the couple divorces. Although the Court has never applied its “prior restraint” framework<sup>153</sup> to the abortion right, it serves to highlight the difference between the proposed notification clause and acceptable regulations. Damages in divorce impose a burden

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<sup>149</sup> See *Harris*, 448 U.S. at 316; *Maher*, 432 U.S. at 469.

<sup>150</sup> *Casey*, 505 U.S. at 885-87.

<sup>151</sup> Cf. Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249-50 (1993).

<sup>152</sup> See *Harris*, 448 U.S. at 325; *Maher*, 432 U.S. at 474-75.

<sup>153</sup> See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). The Court, per curiam, invalidated an injunction based on national security concerns that prevented publication of classified documents. *Id.*

long after the constitutionally protected act, and only if the couple divorces.<sup>154</sup>

### C. Default with Opt-Out

This Section considers the constitutionality of including the abortion notification clause as a default in the marriage contract, with the option to opt-out by checking a box or by unilaterally opting out any time prior to pregnancy. The distinction made in *Harris* and *Maher* between undue burdens and legitimate encouragement of alternatives remains applicable to this legislation. Although avoiding the choice between notification and damages now requires the spouse to check a box, doing so is far less burdensome than paying for an abortion despite indigence. Indeed, one cannot even easily pinpoint what characteristics of an individual would lead them not to check the box, whereas one can quite easily identify the characteristic making an abortion unaffordable: poverty. The proposed legislation retains the availability of unilaterally opting out at any time prior to pregnancy. The damages remain small and payable after the abortion, in contrast to the immediate expenses resulting from permissible mandatory rules such the twenty-four-hour period in *Casey*.<sup>155</sup>

Supreme Court precedent has long recognized that core constitu-

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<sup>154</sup> The fact that the opt-in would occur on a marriage license, which is a type of form contract, should have no impact. Notably, although the Supreme Court has jealously guarded against “prior restraints” on free speech, it has permitted prior restraints when assented to in a form employment contract. *Snepp v. United States*, 444 U.S. 507, 510 (1980) (upholding injunction requiring that former CIA agent submit all future books to censorship for national security purposes in accord with the terms of his employment agreement).

<sup>155</sup> *Casey*, 505 U.S. at 44.

tional rights can be permanently waived by simple inaction.<sup>156</sup> In *Peretz v. United States*,<sup>157</sup> Justice Stevens listed a number of fundamental criminal rights which precedent clearly holds inaction may *permanently* waive: protection against double jeopardy; the right against self-incrimination; the right against unlawful search and seizure; the right to be present at all stages of criminal trial; the right to a public trial; and, the right against unlawful post-arrest delay.<sup>158</sup> To this list, Justice Stevens might have added the right to trial in the same venue as the crime,<sup>159</sup> the right not to be tried in prison clothes,<sup>160</sup> and the right to a speedy trial.<sup>161</sup> The standard for waiving a protection merely incident to the right to abort, subject only to civil damages and with the availability of subsequent unilateral opt-out, should not exceed that for permanent waivers of basic constitutional protections for a criminal defendant's liberty.

With regard to civil protections, Judge Easterbrook in *Hill v. Gateway 2000, Inc.*<sup>162</sup> held that consumers could waive their Seventh Amendment rights to jury trial by failing to return a computer.<sup>163</sup> The burden of checking a box is considerably less than the expense and aggravation of returning bulky merchandise. Moreover, the plurality in

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<sup>156</sup> See *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

<sup>157</sup> 501 U.S. 923 (1991).

<sup>158</sup> *Id.* at 936-37.

<sup>159</sup> *United States v. Carreon-Palacio*, 267 F.3d 381, 390-91 (5th Cir. 2001).

<sup>160</sup> *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976).

<sup>161</sup> *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

<sup>162</sup> 105 F.3d 1147 (7th Cir. 1997).

<sup>163</sup> *Id.* at 1148, 1151. The court found that, because the buyer did not return the computer within the thirty-day return policy, the buyer was bound by the arbitration clause included in the terms sent with the box. *Id.*

*Casey* explicitly recognized that a state could lawfully interpret inaction as consent to state intervention on behalf of a developing fetus.<sup>164</sup> Given the fact that avoiding spousal notice is not a fundamental right, these cases suggest that the legislation in question would likely pass constitutional scrutiny.

Despite the favorable precedent, encouraging couples to include a term in the marriage contract via a default may still seem like coercion or an undue burden to some observers. The claims of coercion separate into three possible categories: transaction costs, status quo bias, and irrational optimism.

### 1. *Transaction Costs*

One can argue that forcing parties who do not want the default term to opt-out imposes burdens, best understood as non-pecuniary transaction costs. These include the time and effort required to understand the need to opt-out to achieve the desired term, as well as the possible impact to marital goodwill from negotiating whether to opt-out. In the hectic run-up to a wedding, both time and goodwill certainly may be particularly scarce commodities. This means that marrying parties with a preference for opting out might bear a substantial burden to educate themselves of the existence and meaning of the default and to negotiate between themselves to agree whether to check the opt-out box.

The proposed legislation significantly reduces the burden of education by ensuring that the marriage license application prominently displays the clause, along with plain-language explanatory documenta-

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<sup>164</sup> *Casey*, 505 U.S. at 870 (“In some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”).

tion. The legislation further diminishes these burdens by allowing for unilateral opt-out after marriage, at a point where the costs of opting out in time, effort and goodwill have declined. These light burdens for opting out of a default abortion notification term pale in comparison to the substantial transaction costs required to opt-out of the myriad default rules currently inserted into the marriage contract.<sup>165</sup> Doing so requires hiring an attorney to draft a private premarital agreement, with substantial costs in terms of time, expense, and most especially, goodwill.<sup>166</sup>

## 2. *Status Quo Bias*

The second possible category of perceived coercion from the proposed default comes from the so-called status quo bias. Empirical studies have shown that even in situations free of transaction costs, well-informed contracting parties still show a bias towards adhering to the status quo provided by the default term.<sup>167</sup> This implies that, even with every possible measure in place to reduce transaction costs, laws may still influence parties' behavior with the choice of defaults.<sup>168</sup> As a

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<sup>165</sup> See Baker & Emery, *supra* note 55.

<sup>166</sup> In some cases legal aid lawyers may be available to draft premarital agreements. See, e.g., LA. DEP'T OF JUSTICE, *supra* note 57, at 6.

<sup>167</sup> See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 632-33 (1998) (demonstrating empirically that parties tend to prefer default rules in their contracts). See generally Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (providing extensive background material on the status quo bias and numerous other challenges to assumption of rationality).

<sup>168</sup> The closely related idea of endowment effects might give rise to a similar critique. See Kahneman, Knetsch & Thaler, *supra* note 167, at 1345. People tend to view loss of an entitlement as having a greater magnitude than gaining the same entitlement. *Id.* Applied to the default context, if a party that is not childbearing values the entitlement to notification or compensatory damages more as a result of the switched default (or a childbearing party values the entitlement less), the result may be an increased likelihood of accepting the default. This influence is acceptable under constitutional jurisprudence for the same reasons that the status quo bias provides an acceptable influence. The option of unilateral opt-out remains if a childbearing



result, the proposed legislation would seem to coerce a choice in favor of notification.

A number of Supreme Court cases, including *Maier* and *Harris*, have held that a state may take a number of steps to influence the decision whether to exercise the *core* constitutional right to abort.<sup>169</sup> *Casey* allows a state to require physicians to provide information about the alternatives to the abortion right and facts about the fetus such as probable gestational age, even mandating that the patient take at least twenty-four hours to contemplate the decision.<sup>170</sup> “Undue burden” jurisprudence allows states to exercise influence against constitutional rights much more forcefully and directly than employing the status quo bias.

### 3. *Irrational Optimism*

Third, some might argue that the proposed legislation coerces parties to include the term by playing on irrational optimism marrying couples show about the likelihood of the marriage’s long-term survival.<sup>171</sup> Two individuals who think they will never part may happily accept a default potentially imposing compensatory damages upon divorce, thinking the issue immaterial. One might expect, however, for this irrational optimism to move to realism with time.

In contrast, couples optimistically submit to the myriad of other marriage contract defaults without a chance to opt-out either on the mar-

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party later decides upon a higher value for not agreeing to notify or pay compensatory damages.

<sup>169</sup> See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 (1989) (quoting *Maier*, 432 U.S. at 474).

<sup>170</sup> *Casey*, 505 U.S. at 881, 882, 884-85, 887.

<sup>171</sup> See *Baker & Emery*, *supra* note 55, at 443. In a survey of 135 couples who had recently applied for marriage licenses, the median expected likelihood of divorce was zero percent. *Id.*

riage license application or unilaterally later on.<sup>172</sup> These other defaults, of course, can and do result in significant reallocations of money at divorce, without parties even knowing of their existence at the time of marriage.<sup>173</sup> By allowing unilateral opt-out prior to pregnancy, the proposed legislation provides a quite generous exit compared to contracts in general, which rarely ever permit unilateral opt-out without damages.<sup>174</sup> Indeed, if parties never exhibited irrational optimism and circumstances never changed, there would be no need for either contract law or divorce law.

#### **D. Affirmative Choice**

The same arguments made above regarding the constitutionality of providing the clause as an opt-in or opt-out apply here. Forcing the marrying couple to make an affirmative choice is simply a hybrid of opt-in and default with opt-out.<sup>175</sup> However, having the legislature require an affirmative choice on whether to include the term has four benefits.

First, mandating affirmative choices allows legislatures to avoid making any judgments on defaults, leaving the choice completely in the hands of individuals. Second, it equalizes the transaction costs of opting in and opting out and eliminates any influence from the status quo bias.<sup>176</sup> As a result, affirmative choice maximizes individual autonomy. Third, when couples cannot avoid making an affirmative choice, the

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<sup>172</sup> See *id.* at 441.

<sup>173</sup> See *id.*

<sup>174</sup> Voidable contracts are the largest category of contracts which permit independent withdrawal. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

<sup>175</sup> See *supra* sections II.B-C.

<sup>176</sup> See Korobkin, *supra* note 167, at 673-74.

chances of information disclosure and discussion increase.

Fourth, mandating affirmative choices provides a fallback should default-with-opt-out be found unconstitutional. Consider two states, one of which offers term *T* as an affirmative choice, the other of which makes *T* the default with the ability to opt-out. Suppose the Supreme Court then held it unconstitutional to make *T* the default with an opt-out. In that case, the state that used affirmative choice will still have a basis for continuing to respect the choices of those couples who opted in to *T*.

#### IV. CONCLUSION

The move towards greater individual autonomy and freedom in family relations has greatly enhanced the law's emphasis on matrimony as a contract. Commentators and policymakers have long recognized the value of optional terms and well-crafted defaults in other contractual regimes such as partnerships and employment. Yet, they have barely begun to explore the possibilities of using defaults in the marriage contract beyond asset disposition in divorce. This Comment has suggested three possible ways legislatures could present such terms on the marriage license application: opt-ins, defaults with opt-outs, and affirmative choices. Through judicious use of these three mechanisms with carefully crafted terms, lawmakers could encourage parties to reveal and discuss preferences, bolster individual autonomy, and achieve policy goals that might otherwise narrowly fail constitutional scrutiny. Moreover, by making certain terms prerequisites for others, legislators can combine terms in sophisticated ways.

Courts throughout history have repeatedly expressed the central-

ity of matrimony to society, with one opinion calling it a “social institution of the highest importance.”<sup>177</sup> A majority of Americans enter a marriage contract during their lives,<sup>178</sup> making it the perfect vehicle for inserting terms to avoid constitutional jurisprudence, especially given the key role that marriage plays in daily life and property ownership. Divorce, sadly, marks the end of approximately half of all marriages,<sup>179</sup> indicating that measures resulting in greater discussion and information revelation prior to matrimony may contribute significantly to social welfare. This Comment aims to lead more commentators and legislators to recognize the possibility of using this policy lever to achieve such goals.

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<sup>177</sup> *Goodridge*, 798 N.E.2d at 954 (citing *French v. McAnamey*, 195 N.E. 714 (Mass. 1935)).

<sup>178</sup> U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 48 tbl.51 (2001) (showing sixty-nine percent of males and over seventy-one percent of females between thirty-five and forty-four are married).

<sup>179</sup> R. Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States after 1980*, 8 DEMOGRAPHIC RES. 245, 245 (2003), <http://www.demographic-research.org>.