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# The Right to (Same-Sex) Divorce

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# THE RIGHT TO (SAME-SEX) DIVORCE

*Judith M. Stinson*<sup>†</sup>

## ABSTRACT

*Divorces are granted every day in every state. In the vast majority of cases, there is no question that the court can and should grant the divorce. But in a growing subset of divorce cases—those involving same-sex couples—courts are refusing to consider requests for divorce on the merits. Six states and the District of Columbia currently permit same-sex couples to marry, yet thirty-eight states have either adopted constitutional amendments or enacted statutes that prevent their courts from recognizing those same-sex marriages validly entered into within another jurisdiction. But what happens when a same-sex couple, legally married in one jurisdiction, seeks to dissolve their marriage in a state that prohibits the recognition of their same-sex union? Most courts have thus far refused to grant a divorce to same-sex couples on the ground that the court lacks subject-matter jurisdiction to hear the matter. Yet the state where the couple was married also lacks jurisdiction because the couple is not domiciled there. This Article argues that denying any individual the ability to divorce is improper. Civilized societies ought to permit divorce for a variety of reasons, and providing access to a forum to adjudicate*

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*genuine disputes, including requests to divorce, avoids the potential of violating the Fourteenth Amendment's Due Process Clause. Denying jurisdiction is unrelated to legitimate state interests because by refusing to grant same-sex divorces, same-sex couples remain married—the exact result about which the state complains in the first instance.*

*“A Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”<sup>1</sup>*

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## INTRODUCTION

Almost 5,000 divorces are granted in the United States each day.<sup>2</sup> In almost all cases, there is no question that the court has subject-matter jurisdiction and no question that the court will ultimately grant the divorce.<sup>3</sup> The vast majority of married couples in the United

<sup>1</sup> *Mireles v. Mireles*, No. 01–08–00499–CV, 2009 WL 884815, at \*2 (Tex. App. Apr. 2, 2009) (setting aside a prior Texas divorce decree and declaring the marriage void because the former husband was born a biological female and hence, the underlying marriage was a void same-sex marriage).

<sup>2</sup> ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, P70–125, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, at 20 tbl.11 (2011), available at <http://www.census.gov/prod/2011pubs/p70-125.pdf> (showing 1,734,000 divorces granted in 2008; divided by seven days per week, about 4,750 divorces are granted each day, and using a five-day work week, the number of divorces granted each day approaches 6,700).

<sup>3</sup> See, e.g., HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 1–2 (1988) (using the example that all states give an adulterer as

States can exit their marriage with relative ease. Yet divorce is often impossible to obtain in a growing number of cases—those where the two parties involved in the divorce are of the same gender.

The problem stems from two sources: (1) inconsistent domicile requirements for marriage and divorce; and (2) statutory or constitutional provisions in most states that prohibit courts from recognizing same-sex marriages. First, most states impose no residency requirement for marriage,<sup>4</sup> but every state requires residency for divorce.<sup>5</sup> Second, twenty-nine states have adopted constitutional amendments that explicitly prohibit recognizing same-sex marriages validly entered into in another jurisdiction,<sup>6</sup> and another nine states have enacted statutes that prohibit recognizing same-sex marriages.<sup>7</sup>

And the problem is likely to grow exponentially in the near future.<sup>8</sup> State-approved, i.e., “civil,”<sup>9</sup> same-sex marriage has been

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much standing to sue as the “innocent” party, stating that “[d]ivorces are usually no longer issued on a basis of marital misbehavior; courts grant them simply when one or both spouses allege that their marriage has been irretrievably broken by irreconcilable differences”).

<sup>4</sup> See, e.g., MASS. GEN. LAWS ch. 207, § 19 (2007) (requiring a three-day waiting period to obtain a marriage license but imposing no requirement that the parties be Massachusetts residents); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 38 (1968) (stating that “[i]n a few states the waiting period is made longer for non-residents than for residents,” which implies that in most states residents and non-residents can marry without a waiting period).

<sup>5</sup> See, e.g., CLARK, *supra* note 4, at 144, 285–86 (indicating that most courts and states have a residency requirement for divorce); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1679 (2011) (explaining that almost every state has residency requirements such that one or more of the parties has to be domiciled in that state for divorce to proceed in that forum). This Article focuses on state law because marriage and divorce are creatures of state, not federal, law. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (stating that domestic law is primarily a state concern).

<sup>6</sup> Those states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. William C. Duncan, *Thirty (30) State Marriage Amendments and Maine Question I: Language, Votes, and Origins*, reprinted in Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 *DRAKE L. REV.* 951, app. 1 (2010). Hawaii is included within the Appendix; Hawaii’s constitutional amendment, however, only states that the “legislature shall have the power to reserve marriage to opposite-sex couples,” which it has done. *Id.* at 966 (emphasis added) (citation omitted).

<sup>7</sup> Those states are Hawaii, Illinois, Maine, Minnesota, New Hampshire, North Carolina, Pennsylvania, Washington, and West Virginia. See Christy M. Glass et al., *Toward a ‘European Model’ of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 *BERKELEY J. INT’L L.* 132, 135 n.9 (2011) (listing all states that have either a constitutional amendment or statute that prohibits recognition of same-sex marriages).

<sup>8</sup> An estimated 80,000 same-sex couples are legally married in the United States, with approximately 50,000 of them marrying in a U.S. state and the other 30,000 marrying in another country, such as Canada; another 85,000 same-sex couples are in civil union-type relationships

permitted in the United States for seven years;<sup>10</sup> it is currently legal in seven states and Washington, D.C.<sup>11</sup> And the number of states that permit same-sex marriage is likely to grow.<sup>12</sup>

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that provide the same benefits as marriage. Press Release, Williams Inst., *Williams Institute Experts Comment on Department of Justice DOMA Decision* (Feb. 24, 2011), available at [http://freemarry.3cdn.net/f373007d99b7cff5f1\\_41m6bnchp.pdf](http://freemarry.3cdn.net/f373007d99b7cff5f1_41m6bnchp.pdf).

Furthermore, a recent study estimates that over eight million American adults identify as lesbian, gay, or bisexual; equal to “3.5% of the adult population.” Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INST., 6 (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

<sup>9</sup> Civil marriage has been described as “a publicly required contract” whereby the state legitimizes the marital relationship. David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 GEO. WASH. L. REV. 1059, 1070 (2000). Religious marriage, on the other hand, whereby a religious institution legitimizes the bond, is now “a purely voluntary matter.” *Id.* This Article is concerned only with civil marriage and divorce.

<sup>10</sup> Massachusetts has permitted same-sex marriage since 2004. Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 27 n.6 (2007).

<sup>11</sup> Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and Washington, as well as Washington, D.C., permit same-sex couples to marry. CONN. GEN. STAT. ANN. § 46b–20(4) (West Supp. 2011) (“‘Marriage’ means the legal union of two persons.”); D.C. CODE § 46–401(a) (LexisNexis Supp. 2011) (“Marriage is the legally recognized union of 2 persons. Any person may enter into a marriage in the District of Columbia with another person, regardless of gender . . . .”); N.H. REV. STAT. ANN. § 457:1–a (Supp. 2011) (“Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender.”); N.Y. DOM. REL. LAW § 10–a (McKinney Supp. 2012) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”); VT. STAT. ANN. tit. 15, § 8 (2010) (“Marriage is the legally recognized union of two people.”); WASH. REV. CODE § 26.04.010 (eff. June 7, 2012) (“Marriage is a civil contract between two persons who have each attained the age of eighteen years, and who are otherwise capable.”); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (holding that Iowa’s statute that prohibited same-sex marriage unconstitutional); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (finding that the Massachusetts law that prohibited same-sex marriage violated the Massachusetts constitution).

<sup>12</sup> For five years, Massachusetts was the sole state that permitted same-sex marriage. *See supra* note 10; *see also* John R. Ellement & Jonathan Saltzman, *R.I. Court Won’t Let Gay Couple Divorce*, BOS. GLOBE, Dec. 8, 2007, at B1 (stating that Massachusetts was the first state to permit same-sex marriage). In the past two years, however, six additional states and Washington D.C. have joined Massachusetts in granting same-sex marriages. *See supra* note 11 (citing the states that permit same-sex marriage). Same-sex marriages will also be valid in Maryland beginning January 1, 2013. MD. CODE ANN. § 2–201 (B) (effective Jan. 1, 2013) (“[o]nly a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State.”) (replacing “[o]nly a marriage between a man and a woman is valid.”); 2–202 (prohibiting marriages between certain blood relatives); MD. H.B. 438 (March 1, 2012). Same-sex marriages were also lawful in California for a period of time after the state supreme court ruled that the restricting marriage to opposite-sex couples violated the state constitution. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008). Following a voter initiative amending the state constitution to prohibit same-sex marriages, a federal district court ruled the voter initiative violated the federal constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). The Ninth Circuit Court of Appeals recently affirmed the district court, finding that Proposition 8 violated the Fourteenth Amendment to the United States Constitution. *Perry v. Brown*, 10–16696, 2012 WL 372713, at \*2 (9th Cir. Feb. 7, 2012).

Furthermore, the increasing availability of same-sex marriage internationally is likely to

Considering that half of all marriages are projected to end in divorce,<sup>13</sup> it stands to reason that some of the same-sex couples who have legally married (or have entered a lawful civil union)<sup>14</sup> have considered or filed for divorce.<sup>15</sup> And most of those couples probably do not live in a state that recognizes their same-sex marriage, whether the couple moved away from the state in which they married or simply travelled there to obtain the marriage in the first place. But what happens when a same-sex couple files for divorce in a state that does not recognize same-sex marriage?<sup>16</sup>

exacerbate this problem. See Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 851–55 (2008) (describing changes in the international landscape, including such actors as Europe, Canada, and South Africa, with respect to same-sex marriage).

<sup>13</sup> Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5, 5 (2002). For a state-by-state comparison of divorce rates, with Massachusetts touting the lowest percentage and Nevada the highest, see *I Don't: Divorce Rates by State*, WALL ST. J. (Aug. 13, 2010), [http://s.wsj.net/public/resources/documents/st\\_DIVORCE\\_20100813.html](http://s.wsj.net/public/resources/documents/st_DIVORCE_20100813.html). Even for those married in the 1950's, one out of every three couples divorced. STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 252 (2005).

Procedurally, one or both parties files a “petition for dissolution” to dissolve the marriage or civil union. See, e.g., Lynn D. Wardle, *Counselors and Gatekeepers: The Professional Responsibilities of Family Lawyers in Divorce Cases*, 79 UMKC L. REV. 417, 421 (2010) (using “petition for dissolution” interchangeably with “divorce”). This Article uses the common term “divorce” to refer to that process.

<sup>14</sup> In addition to marriage, nine states (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington) currently offer same-sex couples equivalent benefits under either civil union or domestic partnership laws. *Marriage Equality and Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf) (last updated July 6, 2011). This Article generally focuses on marriages rather than civil unions or domestic partnerships, although many of the arguments regarding divorce apply in those contexts as well.

<sup>15</sup> See, e.g., John Schwartz, *When Same-Sex Marriages End*, N.Y. TIMES, Jul. 2, 2011, at SR 3 (discussing the problem of same-sex divorce); Associated Press, *First Gay Marriage, Now Gay Divorce*, FOXNEWS.COM (Dec. 10, 2004), <http://www.foxnews.com/story/0,2933,141198,00.html> (discussing the first same-sex divorces in Massachusetts); Jessica Dye, *New York Marriage Bill Paves Way for Same-Sex Divorce*, REUTERS (Jun. 25, 2011, 10:45 AM), <http://www.reuters.com/article/2011/06/25/us-gaymarriage-new-york-divorce-idUSTRE7500GV20110625> (explaining that the New York same-sex marriage law will replace the same-sex divorce law created on an ad hoc basis with standard domestic relations law); *Prominent Same-Sex Marriage Advocates Filing for Divorce*, CBS SAN FRANCISCO (Jun. 7, 2011, 9:50 PM) <http://sanfrancisco.cbslocal.com/2011/06/07/same-sex-marriage-advocates-filing-for-divorce/> (discussing the divorce of two same-sex marriage advocates in California); Rachel Holt, *First Celebrity Gay Split*, ERUDITION (Nov. 2008), <http://www.eruditiononline.co.uk/article.php?id=322> (discussing the divorce of two British celebrities).

<sup>16</sup> The difficulty same-sex couples have obtaining a same-sex divorce has garnered significant media attention. See, e.g., Sue Horton, *The Next Same-Sex Challenge: Divorce*, L.A. TIMES, July 25, 2008, at A1 available at <http://articles.latimes.com/2008/jul/25/local/megaydivorce25> (discussing a case of two women whose unsuccessfully attempted to divorce in Rhode Island); Eve Conant, *The Right to Love—and Loss*, NEWSWEEK (Apr. 13, 2010, 8:00

Generally, courts have refused to grant same-sex divorces on the ground that the court lacks subject-matter jurisdiction because of state statutory or constitutional law.<sup>17</sup> This Article argues that states have an affirmative obligation to grant all divorces, including those of same-sex couples. Furthermore, granting those divorces allows courts to avoid violating the United States Constitution's guarantee of Due Process.

A number of scholars have argued that states have an obligation to grant same-sex marriages, primarily on constitutional grounds.<sup>18</sup> Some scholars have also addressed states' obligation to recognize same-sex marriages validly entered into elsewhere, again primarily on constitutional grounds.<sup>19</sup> And a few have argued that states are

PM), <http://www.newsweek.com/2010/04/13/the-right-to-love-and-loss.html> (describing the difficulties a same-sex couple experienced when ending their out of state marriage); Stephanie Chen, *Serious Legal Hurdles of Gay Divorce*, CNN (May 3, 2010), [http://articles.cnn.com/2010-05-03/living/texas.gay.divorce\\_1\\_gay-marriage-gay-divorce-same-sex-divorce?\\_s=PM:LIVING](http://articles.cnn.com/2010-05-03/living/texas.gay.divorce_1_gay-marriage-gay-divorce-same-sex-divorce?_s=PM:LIVING) (discussing the uncertainty of obtaining a same-sex divorce in states which do not allow same-sex marriage).

<sup>17</sup> See *infra* Part I.B (discussing the reasons for which courts refuse to grant same-sex divorces).

<sup>18</sup> See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1186–87 (2004) (discussing the use of substantive due process arguments to force states to recognize same-sex marriages); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2460 (1994) (stating current bans against same-sex marriages should be rejected based on fundamental principles of freedom of association); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1425 (1993) (noting that the prohibition against same-sex marriage could be considered sexual discrimination and violate the Constitution); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 846–47 (2008) (discussing the constitutional implications of *Perez* and its effects on same-sex marriage, where it constitutes identity-based restrictions); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 692–93 (2010) (characterizing the prohibition against same-sex marriage as a form of sex-based discrimination that should form a suspect classification); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1382 (2010) (rejecting due process and equal protection as arguments supporting marriage for same-sex marriages, but suggesting an equal access framework for rethinking the constitutional status of nontraditional families).

<sup>19</sup> See generally ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); see also Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WISC. L. REV. 1033, 1040 (arguing for using choice-of-law rules to encourage recognition of same-sex marriages out-of-state because it eliminates overbroad state interference into private lives); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 934 (1998) (arguing that there are a number of choice-of-law rules that could be used by same-sex couples); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966–68 (1997) (arguing that the Full Faith and Credit Clause makes DOMA unconstitutional); Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47, 63 (2011) (discussing Kramer's position); Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 934 (2011) (discussing current recognition of out-of-state common-law marriages amongst the

obligated to recognize same-sex divorces entered elsewhere,<sup>20</sup> generally on full faith and credit grounds.<sup>21</sup>

But only a few scholars have addressed, even summarily, states' refusal to grant same-sex divorces.<sup>22</sup> Regardless of whether states permit or even recognize same-sex marriages, this Article addresses states' separate, independent obligation to grant divorces, including for same-sex couples.<sup>23</sup>

states); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2208–09 (2005) (discussing the recognition of extraterritorial marriages amongst sister states); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2217–18 (2005) (discussing interests asserted by courts that refuse to recognize out-of-state same-sex marriages and whether those interests are consistent with Supreme Court precedent).

<sup>20</sup> See, e.g., Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 410 (1998) (arguing that the federal Defense of Marriage Act violates the Full Faith and Credit clause of the Constitution); Mark Strasser, *Life After DOMA*, 17 DUKE J. GENDER L. & POL'Y 399, 404 (2010) (analyzing DOMA's potential effect on same-sex divorce); Kathryn J. Harvey, Note, *The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce*, 78 FORDHAM L. REV. 1379, 1412–18 (2009) (discussing the issues faced by same-sex couples in child custody disputes).

<sup>21</sup> U.S. CONST. art. IV, § 1.

<sup>22</sup> L. Lynn Hogue, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 CAL. W. INT'L L.J. 229, 231 (2010) (arguing that the combination of cases creating a right to divorce and requiring full faith and credit result in a constitutional right to same-sex divorce); Joslin, *supra* note 5, at 1710, 1716–17 (arguing for the abandonment of the domicile rule in divorce cases and suggesting that states “could amend their long-arm statutes” to create personal jurisdiction over parties who marry within the state as well as require parties marrying there “to consent to jurisdiction in the state for purposes of a subsequent divorce of that marriage”); Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KINGS C. L.J. 63, 64, 84–85 (2004) (arguing, from a conflicts of law perspective, for legislation in states that permit same-sex marriage to eliminate residency requirements for same-sex divorce, as well as for recognition of divorce decrees entered in those states under an “incidents of marriage” approach, and positing that constitutional objections “may exist” to courts refusing to provide its citizens with access to the courts, specifically the Privileges and Immunities Clause and the Equal Protection Clause); Colleen McNichols Ramais, Note, *'Til Death Do You Part . . . And This Time We Mean it: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1043 (arguing that *Boddie v. Connecticut* and the right to interstate travel require states to grant same-sex divorces, even for civil unions and domestic partnerships).

<sup>23</sup> A few other commentators have proposed practical solutions to the same-sex divorce issue. See, e.g., F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 592–98 (arguing that courts should recognize the “contractual” elements of same-sex marriages, including divorce, but not more general government benefits); John M. Yarwood, *Breaking Up is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 138796 (2009) (arguing for adoption of the American Law Institute's Principles of Family Dissolution or, in the alternative, treating same-sex divorce petitions like claims for property dissolution by opposite-sex cohabitating partners); Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce is an Incident of Marriage that Should be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 233 (2010) (arguing that courts could, following an “incidents of marriage” approach, grant same-sex divorces without recognizing the marriage for other purposes).



Part I of this Article traces the evolution of divorce law in the United States. Although a divorce was initially impossible or very difficult to obtain, states began permitting couples to divorce under a variety of circumstances early in our nation's history. Divorce laws varied widely from state to state, and pressure to enact more stringent divorce laws arose during the late 1800s and early 1900s. Yet by the 1970s, no-fault divorce became the norm, and until the last decade, courts granted divorces liberally, even *ex parte*. That trend has shifted, however, with states now refusing to grant certain divorces—namely, those of same-sex couples.

Part II argues that granting same-sex couples the right to divorce, including the right to access the courts, is both morally proper and avoids constitutional concerns. Divorce should be permitted, from a normative standpoint, for four main reasons. First, personal autonomy suggests that states should not compel adults to remain married when they no longer desire that relationship. Second, under the view that marriage is, at least in some respects, a contractual relationship, parties ought to be able to decide jointly that they no longer wish to remain bound. Third, a number of legal obligations result from the marriage, and refusing to permit divorce requires the parties to remain liable for each other's debts and torts, as well as to each other for support. Finally, the right to remarry requires parties be able to divorce, lest the state create bigamists or prevent marriages that they would otherwise support.

Furthermore, principles of constitutional avoidance suggest that states ought to respect the liberty interests of their citizens with regard to the most basic familial relationships and permit divorce to avoid conflicts with the Due Process Clause. Due process also requires governments to provide citizens with an opportunity to litigate their legitimate disputes. States do have legitimate interests in regulating marriage, including divorce. But completely denying divorce to a segment of the married population arguably violates the Fourteenth Amendment.

Finally, this Article concludes that because divorce should be permitted generally, and because divorce is fundamentally different from marriage in that it terminates the familial relationship rather than creates one, states ought to grant same-sex divorces despite their interest in refusing to grant or generally recognize same-sex marriages.<sup>24</sup>

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<sup>24</sup> This Article does not address claims based on the Full Faith and Credit Clause, either by requiring states to give full faith and credit to the marriage or by requiring other states to recognize the divorce, as contemplated by *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Similarly, it does not address restrictions on interstate travel, *see, e.g.*, Andrew

## I. THE EVOLUTION OF AMERICAN DIVORCE LAW AND COURTS' REFUSAL TO GRANT DIVORCES

State action is required in order for a couple to lawfully terminate their marriage.<sup>25</sup> Despite the existence of common law marriage,<sup>26</sup> there is no corresponding common law divorce.<sup>27</sup> Early American courts refused to grant divorces on policy grounds. Once divorces became available, the grounds on which they were granted were very limited. Finally, in the late 1960s, no-fault divorce emerged and any interested party could obtain a divorce essentially at will.<sup>28</sup> That ability remained for over forty years, but with the advent of same-sex marriage, courts began to retreat from making divorce readily available, at least in those cases.

### A. From “No Divorce” to “No-Fault” Divorce

In early colonial times, divorce was difficult to obtain.<sup>29</sup> Following independence, state laws varied widely.<sup>30</sup> Some states banned divorces outright, and, of those that granted divorces, the more strict states, such as New York, permitted divorce only in cases of

Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2162 (2005) (discussing the constitutional right to interstate travel and its implications for same-sex marriages), or potential violations of the Privileges and Immunities Clause, *see, e.g.*, Kay, *supra* note 22, at 84–85 (noting that the Privileges and Immunities Clause could require states to extend access to their courts to same-sex couples). Those claims have some merit, but the constitutional concerns raised in this Article are in addition to those other constitutional claims.

Finally, the arguments made here apply to both “migratory” marriages—marriages where the parties lawfully marry in the state where they reside, but later move to a state that would not have permitted the marriage—as well as “evasive” marriages—marriages where the parties explicitly travelled to a state that permits them to be married although their home state does not. For a discussion on the differences between migratory marriages and evasive marriages, see KOPPELMAN, *supra* note 19, at 102–10.

<sup>25</sup> *See, e.g.*, Ryan v. Ryan, 277 So.2d 266, 274 (Fla. 1973) (stating that “the matter of divorce is a legislative prerogative”); Young v. Young, 178 S.W.2d 994, 997 (Ark. 1944) (acknowledging that divorce is a province of states, and specifically of state legislatures).

<sup>26</sup> As of 2009, “fifteen states and the District of Columbia recognize[d] common law marriage under some circumstances.” Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW. 151, 151 (2009).

<sup>27</sup> *See* Peter Nicolas, Essay, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 934 (2011) (noting that there is “no equally informal exit option, such as ‘common law divorce’”).

<sup>28</sup> For a good historical account of divorce in American, see Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 89–100 (2004).

<sup>29</sup> *Id.* at 89. Grossman noted that the colonies “followed England’s ‘divorceless’ tradition.” *Id.* And although “[l]egislative divorce was sometimes available,” that practice was abolished in the latter half of the 1800s. *Id.* at 89 n.11.

<sup>30</sup> *Id.* at 90.

adultery.<sup>31</sup> Other states, such as California, permitted divorce for a number of reasons, including “neglect.”<sup>32</sup>

In the late 1800s and early 1900s, in response to an increase in divorce rates and to what were perceived as “liberal” divorce laws in some jurisdictions, a number of states tightened their standards for obtaining a divorce.<sup>33</sup> Furthermore, a number of federal constitutional amendments were proposed between 1884 and the late 1940s that would have authorized Congress to regulate both marriage and divorce.<sup>34</sup> In the wake of those failed amendments, changing societal attitudes, and continually increasing divorce rates, consensual divorces became more available, despite laws that on their face precluded them.<sup>35</sup>

Finally, in the late 1960s, legal reform caught up to reality. California adopted the first no-fault divorce law,<sup>36</sup> and the once-strict New York amended its laws to permit more divorces.<sup>37</sup> The advent of no-fault divorce, which allowed a party seeking to end his or her marriage to do so without having to prove marital misconduct,<sup>38</sup> was perceived as a “revolution.”<sup>39</sup> Despite this revolution, residency requirements, which required at least one of the parties to reside in the state for a period of time prior to filing a petition for dissolution, minimized migratory divorces.<sup>40</sup> And many states still offered

<sup>31</sup> *Id.* States in the South tended to be more restrictive, and South Carolina prohibited divorces entirely. *Id.* at 89–90.

<sup>32</sup> *Id.* at 90. Some states permitted divorce on vague grounds, such as Connecticut, which allowed divorce for “misconduct”—meaning “any act that permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation.” *Id.* at 91 (citation and quotations omitted). This view was consistent with that of the pragmatists, who believed more lenient divorce laws were “favourable to the virtue and happiness of mankind.” *Id.* at 90 (citation and quotation omitted).

<sup>33</sup> Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 390 (2007).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 395, 404. Even *ex parte* divorces were approved as early as 1942. See Williams v. North Carolina, 317 U.S. 287, 302–04 (1942) (holding that a Nevada divorce was entitled to full faith and credit in North Carolina, even though the divorce would violate North Carolina’s public policy).

<sup>36</sup> Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 83.

<sup>37</sup> Estin, *supra* note 33, at 406. For a comprehensive discussion of grounds of divorce during the 1960s, see CLARK, *supra* note 4, at 327–58.

<sup>38</sup> See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722–23 (outlining the different permutations of no-fault divorce in the United States).

<sup>39</sup> See, e.g., JACOB, *supra* note 3, at 43–79 (describing the origination of no-fault divorce, and noting that while it was revolutionary, revision was accomplished rather peacefully); see also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 188–90* (1989) (describing the variety of original no-fault statutes).

<sup>40</sup> See *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (upholding a one year residency

statutory grounds for divorce, often with ramifications for property division.<sup>41</sup> But within fifteen years every state in the nation had adopted some form of no-fault divorce,<sup>42</sup> and the United States Supreme Court made clear that due process required a “meaningful opportunity to be heard” for those seeking a divorce.<sup>43</sup>

Many viewed this revolution as a transformation from marriage as a “status”<sup>44</sup> to treating the marital relationship like a “contract.”<sup>45</sup> By recognizing more of the contractual elements of marriage, no-fault divorce permitted more personal decision making.<sup>46</sup> And most

requirement as a prerequisite to a court’s jurisdiction over a divorce).

<sup>41</sup> See, e.g., *Copeland v. Copeland*, 616 S.W.2d 773, 774–75 (Ark. Ct. App. 1981) (requiring the complaining spouse to not only prove the alleged statutory ground of “personal indignities” but also requiring, per the statute, that the complaining spouse’s testimony be corroborated by another witness to be considered).

<sup>42</sup> See JACOB, *supra* note 3, at 59, 80 (noting California’s law, the first no-fault divorce regime, became effective in 1970 and by 1985 the last holdout, South Dakota, joined the rest of the states and enacted a no-fault divorce regime); Ellman & Lohr, *supra* note 38, at 722 (discussing the repudiation of classic “full-fault” divorce “in every American state by the late 1970s”); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1154 (1999) (explaining that by 1985 no-fault divorce was available in every state). Challenges to this no-fault regime were generally unsuccessful. See, e.g., *Ryan v. Ryan*, 277 So.2d 266, 274 (Fla. 1973) (rejecting a number of constitutional challenges to Florida’s no-fault divorce law and noting “the matter of divorce is a legislative prerogative”).

<sup>43</sup> *Boddie v. Connecticut*, 401 U.S. 371, 377, 380–81 (1971) (invalidating a filing fee imposed on indigents petitioning for divorce).

<sup>44</sup> See, e.g., Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 3 (2010) (acknowledging that family law scholars tend to see marriage in these terms); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60 U. CHI. L. REV. 67, 107 (1993) (arguing the “status” perspective, which was a “view of marriage as something more than a purely consensual relationship,” provided the “necessary basis for extensive state regulations”).

<sup>45</sup> See Starnes, *supra* note 44, at 107 (noting that the “new emphasis on individual fulfillment” was “at odds with extensive state regulation of marriage, and seemed especially inconsistent with fault-based divorce laws, which often limited individual choice”). In 1973, the Uniform Marriage and Divorce Act adopted the “contract” view when it defined marriage as “a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.” UNIF. MARRIAGE & DIVORCE ACT § 201, 9A U.L.A. 175 (1998). Starnes noted that the Act defines the status of marriage as “arising out of . . . contract” and the drafters’ reference “to a partnership model for divorce” suggested a contract model. Starnes, *supra* note 44, at 108. Some scholars argue marriage inherently is and always was a contract, but its terms were not always enforced and remedies for breach were not always available. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 873–83 (1994) (discussing marriage’s terms and conditions).

Of course, marriage is neither entirely status nor entirely contract; in fact, the legal reality is that marriage bears elements of both, and that they operate on a continuum. The more status-based marriage is, the more state control over the relationship. The more contract-based marriage is, the less state control. See, e.g., Halley, *supra* note 44, at 2 (noting that marriage has elements of both status and contract).

<sup>46</sup> See, e.g., Tracy A. Thomas, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137, 156–57 (2005) (stating that

scholars agreed that this was a welcome shift, especially in light of the gender imbalances present under more traditional marriage structures.<sup>47</sup>

Even though the statutory requirements in no-fault jurisdictions must be proven, such as the “irretrievable breakdown of the marriage,”<sup>48</sup> most states permit unilateral divorces.<sup>49</sup> In the last two decades, some courts have granted divorces in cases where they would not have permitted the marriage in the first place, including common-law marriages<sup>50</sup> and marriages of first cousins.<sup>51</sup> Divorces have been permitted, primarily on equitable estoppel grounds, even

“the construct of marriage as a contract is clearly evidenced by the uniform acceptance of no-fault divorce, prenuptial contracts, and separation agreements” and arguing that this “significant legal evolution” restricts “the government’s ability to continue to control the marriage relation and its attendant privileges,” with the state being “divested of its power to restrict the individual freedoms and privileges of the partners choosing the marital relation”).

<sup>47</sup> See, e.g., Halley, *supra* note 44, at 15 (noting that “the onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal”). Similarly, from the mid-1800s through the early 1900s, women in England were indicted for bigamy at a substantially higher rate than men, suggesting gender bias. Patricia Cohen, *As the Gavels Fell: 240 Years at Old Bailey*, N.Y. TIMES, Aug. 18, 2011, at C6.

Some scholars, though, claim that this “triumph of contract over status” was a mistake, and that eliminating gender roles from the status rules would have been a better option. See, e.g., Ira Mark Ellman, “Contract Thinking” was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (arguing that “contract is a poor model for intimate relations”); see also Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163, 255 (2007) (arguing that “no-fault divorce makes the consequences of the ‘status’ legacy come to life” and these consequences are demonstrated in “the very real impact on women and children”). Critics of no-fault divorce, however, “have identified the move from status to contract as the underlying source of the problems with modern no-fault divorce law.” Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 201, 201 (F.H. Buckley ed., 1999).

<sup>48</sup> See, e.g., *In re Marriage of Franks*, 542 P.2d 845, 852 (Colo. 1975) (noting that “although the dissolution of marriage statute was intended as a ‘no-fault’ divorce act, the actual granting of the decree is not automatic or perfunctory under all circumstances” and requiring the court to “weigh all the evidence and make its own independent determination” of irretrievable breakdown). The *Franks* court went on to state that although Colorado’s no-fault divorce statute “did eliminate all the former defenses to divorce in this state, it did not eliminate the necessity of proving an irretrievable breakdown where that basic allegation is denied in the pleadings.” *Id.*

<sup>49</sup> See Ellman & Lohr, *supra* note 38, at 722–23 (and noting that in the few states that do not permit unilateral divorce, “spouses can divorce without any showing of fault if both of them consent”).

<sup>50</sup> See, e.g., *Norman v. Ault*, 695 S.E.2d 633, 635–36 (Ga. 2010) (granting a divorce from a common-law marriage entered into in Alabama despite the fact that Georgia does not allow common law marriages); *Anderson v. Anderson*, 577 So.2d 658, 660 (Fla. Dist. Ct. App. 1991) (granting a divorce to a common-law marriage entered into in another jurisdiction). As of 2009, sixteen jurisdictions recognized common-law marriages. Thomas, *supra* note 26, at 151.

<sup>51</sup> See, e.g., *Ghassemi v. Ghassemi*, 998 So.2d 731, 742 (La. Ct. App. 2008) (recognizing a marriage between first cousins entered validly entered into in a foreign country in order to permit the parties to legally divorce); *Cook v. Cook*, 104 P.3d 857, 866 (Ariz. Ct. App. 2005) (recognizing a marriage between first cousins validly entered into in another state); *Mason v. Mason*, 775 N.E.2d 706, 709–10 (Ind. Ct. App. 2002) (same).

when the state's strong public policy prohibits the underlying marriage, as in the case of bigamous marriages.<sup>52</sup>

*B. From "No-Fault" Divorce Back to "No Divorce": The Case of Same-Sex Divorce Petitions*

Many scholars argue that American society is moving away from seeing marriage as a contract and back to seeing marriage as a status<sup>53</sup> that is "fundamental to the social order, a permanent commitment of the utmost importance, permeated by unshirkable obligation and public normativity."<sup>54</sup> The recent reintroduction of covenant marriages, essentially what existed at common law prior to no-fault divorce, is one attempt to return marriage to a more privileged status position.<sup>55</sup> A movement to repeal no-fault divorce more generally is also gaining momentum.<sup>56</sup>

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<sup>52</sup> See, e.g., *Heuer v. Heuer*, 704 A.2d 913, 920 (N.J. 1998) (invoking quasi-estoppel to prevent a spouse from calling a bigamous marriage invalid in order to benefit financially); *Poor v. Poor*, 409 N.E.2d 758, 761–62 (Mass. 1980) (finding that a husband was estopped from challenging the validity of this wife's prior divorce); *McIntyre v. McIntyre*, 191 S.E. 507, 507 (N.C. 1937) (holding that one may not assert bigamy as a defense in divorce proceedings when the bigamy is due to the party's failure to remedy an invalid divorce decree); *Lowenschuss v. Lowenschuss*, 579 A.2d 377, 386 (Pa. Super. Ct. 1990) (holding that husband is estopped from asserting the marriage to be void due to wife's divorce to a prior husband being procedurally invalid as a defense in divorce proceedings based on equitable principles); *Mayer v. Mayer*, 311 S.E.2d 659, 669 (N.C. Ct. App. 1984) (same). Courts have granted a divorce even while acknowledging the bigamous nature of the marriage and the policies against marriage by estoppel. See, e.g., *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (granting a divorce to a wife, despite the marriage being "technically bigamous" and despite Tennessee's policies against recognizing bigamist marriages or marriage by estoppel).

Following similar principles in an estate case, a California court awarded half of the estate of an immigrant from India to each of his two wives, despite California law generally treating only the first wife as lawfully married and hence, the only person entitled to the estate. *In re Estate of Singh Bir*, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

<sup>53</sup> See *supra* note 44 (citing sources that discuss marriage as a status).

<sup>54</sup> Halley, *supra* note 44, at 3 ("Marriage as status is conservative not only in the sense that it commits legal thought to using the institution to preserve tradition, but also in the sense that it provides an inlet into contemporary legal thought about marriage for classical legal ideas."). Halley argues for an entirely new perspective, a "legal realist understanding of the marriage system," because the "very idea that marriage is anything—anything at all—is symptomatically classical." *Id.*

<sup>55</sup> See, e.g., Katherine Shaw Spaht, *Mulieris Dignitatem: The Vocation of a Wife and Mother in a Legal Covenant Marriage*, 8 AVE MARIA L. REV. 365, 366 (2010) (noting that in Louisiana, Arizona, and Arkansas, "a couple who chooses to marry may choose a covenant marriage, which consists of a legally enforceable agreement between the spouses to adopt a more binding form of marriage than available under typical 'no-fault' divorce statutes"); see also Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted it, and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 13 (2011) (explaining that "[u]nlike a marriage based on ordinary contract law, a covenant marriage, at least under traditional common law, was supposed to be more permanent").

<sup>56</sup> See, e.g., Ellman & Lohr, *supra* note 38, at 721 (discussing the movement to reinstitute fault divorce).

Yet even under a “fault” divorce scheme, parties can still obtain a divorce.<sup>57</sup> They simply must claim one of the enumerated grounds.<sup>58</sup> Similarly, covenant marriages can be dissolved;<sup>59</sup> the available grounds are fewer than under the current default provisions in most states,<sup>60</sup> but the parties agree to those restrictions prior to entering into the marriage.<sup>61</sup>

But a new class of cases has developed where courts simply refuse to consider petitions for divorce. Those cases involve petitions for divorce by same-sex couples lawfully married in another jurisdiction.<sup>62</sup> The problem arises because of residency requirements. States do not impose residency requirements to be married.<sup>63</sup> But all states impose residency requirements on a party seeking a divorce,<sup>64</sup> and moving to a state simply to obtain residency and file for divorce can also preclude jurisdiction.<sup>65</sup> If the state where the parties reside

<sup>57</sup> *Id.* at 722; see also Grossman, *supra* note 28, at 90 (noting that after the Revolutionary War, “[a]ll states required that an ‘innocent’ spouse file for divorce on one of the legislatively enumerated grounds”).

<sup>58</sup> Those grounds varied widely by jurisdiction. See *supra* notes 31–32 and accompanying text (discussing the previous fault schemes that existed in the states before the no-fault revolution).

<sup>59</sup> See, e.g., Scott & Scott, *supra* note 47, at 201 (noting that even in covenant marriages, spouses can terminate the marriage).

<sup>60</sup> See, e.g., Spaht, *supra* note 55, at 366 (citations omitted) (identifying the three “distinguishing features” of a covenant marriage as: “(1) mandatory premarital counseling by a member of the clergy or a professional marriage counselor; (2) an agreement to take reasonable steps to preserve the marriage if marital difficulties arise; and (3) limited grounds for divorce, ordinarily consisting of proof of a spouse’s fault or lengthened time periods of. [sic] living separate and apart”).

<sup>61</sup> See Stephen L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169, 171 (2003) (noting that to enter into a covenant marriage, the parties must “participate in premarital counseling with a state-recognized secular or religious counselor” that explicitly covers “the restricted grounds for divorce”). Furthermore, the parties must present a Declaration of Intent to the clerk of the court “affirming that marriage is for life, that each partner has disclosed everything that could adversely affect the decision to marry, that premarital counseling was received, and the agreement to take all reasonable efforts to preserve the marriage, including marital counseling.” *Id.*

<sup>62</sup> In one of the first same-sex divorce cases filed, on March 3, 2003 a Texas judge “ordered a straightforward no-fault divorce decree and civil union dissolution.” Molly McDonough, *Court Ok's Divorce Without Recognizing ‘Marriage’: Gay Couple's Civil Union, Created in Vermont, Is Dissolved in Texas*, Mar. 21, 2003, 2 No. 11 A.B.A. J. E.-REPORT 2 (Westlaw) (noting that Texas district court judge Tom Mulvaney “made headlines” when he granted the same-sex divorce). The Texas Attorney General responded by requesting the judge set aside the decree, and although the judge agreed to rehear the case, the petition was ultimately withdrawn by the petitioners’ for financial reasons. Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, Apr. 6, 2003, at ST2.

<sup>63</sup> See *supra* notes 4–5 and accompanying text.

<sup>64</sup> CLARK, *supra* note 4, at 285–86.

<sup>65</sup> See, e.g., MASS. GEN. LAWS ch. 208, § 5 (West 2007) (emphasis added) (providing that “a divorce may be adjudged” as long as “the plaintiff has lived in this commonwealth for one year last preceding the commencement of the action if the cause occurred without the commonwealth, or if the plaintiff is domiciled within the commonwealth at the time of the commencement of the action and the cause occurred within the commonwealth,” “unless it

refuses to grant a divorce, the result is that no forum is in fact available and the parties must remain married.

In these cases, the courts conclude that lack of subject-matter jurisdiction prevents them from considering the merits of the case.<sup>66</sup> These decisions rely on statutory construction: divorce statutes permit courts to dissolve “marriages.” And most courts conclude that same-sex unions, even if denoted “marriages” in the state where celebrated, are not “marriages” for purposes of their states’ divorce laws.

In states with constitutional or statutory bans on same-sex marriage, the analysis is relatively straightforward. For example, a Texas Court of Appeals ruled that the trial court could not entertain a petition for same-sex divorce<sup>67</sup> because Texas’s Constitution and statutes provided that marriage consisted “only of the union of one man and one woman.”<sup>68</sup> Thus, the state was statutorily and constitutionally prohibited from giving effect to a same-sex marriage entered into elsewhere.<sup>69</sup> Although the court was a court of general jurisdiction and could hear cases in law and equity,<sup>70</sup> the “contrary showing” limiting the definition of marriage deprived the court of subject-matter jurisdiction to hear the petition.<sup>71</sup> The court relied on language from a prior case asserting that “[a] Texas court has no more

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appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce”).

<sup>66</sup> See *infra* notes 68–79 and accompanying text (discussing the reasoning behind courts’ refusal to grant same-sex divorces). Of course, if a court did accept jurisdiction, the judge could still deny the divorce on the merits. But because of no-fault divorce statutes, it would be very difficult, if not impossible, for a court to justify refusing to grant a divorce when the statutory basis of irreconcilable differences was present.

<sup>67</sup> *In re J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010) (dismissing a divorce petition by a same-sex couple married in Massachusetts for lack of jurisdiction and finding the Texas law mandating this result to be constitutional); *but see* *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App. 2011) (holding the state lacked standing to appeal the grant of a divorce to a same-sex couple married in Massachusetts), *appeal filed* No. 03–10–00237–CV (Tex. App. Apr. 23, 2011).

<sup>68</sup> *In re J.B. & H.B.*, 326 S.W.3d at 663.

<sup>69</sup> *Id.* at 663. Similarly, a Pennsylvania trial court held that the court was “without subject matter jurisdiction to grant a divorce” to a lesbian couple married in Massachusetts. *Kern v. Taney*, 11 Pa. D. & C. 558, 576 (Pa. Com. Pl. Mar. 15, 2010) (holding the court lacked jurisdiction over the case and refusing to find the Pennsylvania marriage law, which precluded their divorce, was unconstitutional). A Pennsylvania statute defined marriage as the union of one man and one woman, and another statute declared same-sex marriages entered into elsewhere were void. *Id.* at 562–63. “Without a legally recognizable marriage,” the court held, “relief under the Divorce Code is simply not available.” *Id.* at 563. The court recognized that the ruling meant the marriage remained valid in some jurisdictions. *Id.* at 576. The court further noted that although the plaintiff had no remedy under Pennsylvania’s divorce statutes, she could petition to have the marriage declared void. *Id.* It is questionable, however, whether that declaration would be binding in Massachusetts or any state that recognized same-sex marriages.

<sup>70</sup> *In re J.B. & H.B.*, 326 S.W.3d at 664.

<sup>71</sup> *Id.*



power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person.”<sup>72</sup>

Even when the state constitution and statutes are silent in defining marriage, general principles of statutory construction can lead a court to conclude that divorce is not available to a same-sex couple.<sup>73</sup> In the first appellate case in the country on this issue, the Supreme Court of Rhode Island ruled that the family court had no subject-matter jurisdiction to hear a petition for divorce filed by a party to a Massachusetts same-sex marriage.<sup>74</sup> The family court was a court of limited jurisdiction,<sup>75</sup> able to grant a divorce only if there was a valid marriage.<sup>76</sup> The court held that, based on both the plain meaning of the word “marriage” and the legislative intent in 1961, when the divorce statutes were passed, only unions between opposite-sex couples were marriages.<sup>77</sup>

Statutory language also led a New York trial court to dismiss a same-sex couple’s divorce petition for lack of subject matter jurisdiction in 2006 where the couple married in Massachusetts.<sup>78</sup>

<sup>72</sup> *Id.* at 666 (quoting *Mireles v. Mireles*, No. 01–08–00499–CV, 2009 WL 884815, at \*2 (Tex. App. Apr. 2, 2009) (setting aside a prior Texas divorce decree and declaring the marriage void because the former husband was born a biological female and hence, the underlying marriage was a void same-sex marriage)) (internal quotation marks omitted).

<sup>73</sup> *See* *Chambers v. Ormiston*, 935 A.2d 956, 966 (R.I. 2007) (acknowledging the decision created a hardship by leaving the parties without a remedy, but declaring that the court was not a “policy-making branch” and any solution was up to the legislature).

<sup>74</sup> *Id.* at 967. The issue had been certified to the Rhode Island Supreme Court from the family court.

<sup>75</sup> *Id.* at 958.

<sup>76</sup> *Id.* at 959 n.6.

<sup>77</sup> *Id.* at 961–65. The same logic has been applied to civil unions. For instance, the Appellate Court of Connecticut refused to dissolve a Vermont same-sex civil union for lack of subject-matter jurisdiction. *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002). The court concluded that “the text itself, the rules of court, the legislative history, the strong legislative policy against permitting same sex marriages and the relationship between other statutes, legislative enactments of state policy and the common law” were consistent with finding a same-sex civil union was not a “marriage” for purposes of the divorce statutes. *Id.* at 178.

<sup>78</sup> *Gonzalez v. Green*, 831 N.Y.S.2d 856, 861 (Sup. Ct. 2006) (declaring the marriage void and therefore dismissing the action for divorce, but permitting a claim based on a separation agreement to proceed). The court held that the same-sex marriage was void both under New York law as decided in *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005), and a 1913 Massachusetts law that provided marriages by non-residents were void if they would be void in the state of residency. *Gonzalez*, 831 N.Y.S.2d at 858–59 (citation omitted). The court refused to invalidate the parties’ separation agreement, however, even though it expressly resolved their “property rights, and other rights and obligations growing out of the marriage relation.” *Gonzalez*, 831 N.Y.S.2d at 857, 859.

In 2009, a New York court also ruled it had no power to grant a divorce to a same-sex couple who had entered a lawful civil union, despite prior New York courts granting same-sex divorces. *B.S. v. F.B.*, 883 N.Y.S.2d 458, 463, 465–67 (N.Y. Sup. Ct. 2009). The court recognized the same-sex Vermont civil union as “validly and properly contracted,” but refused to grant a divorce because the civil union did not constitute a “marriage.” *Id.* The court noted that the parties were New York residents and hence, were not able to pursue petition to dissolve

Similarly, an Oklahoma trial court, having entered a decree of dissolution and later learning that the parties to the Canadian marriage were both women, vacated its judgment.<sup>79</sup> News reports of unreported decisions also suggest most courts are unwilling to grant same-sex couples a divorce when the state in which they live refuses to grant same-sex marriages.<sup>80</sup>

A few courts, however, have considered petitions for same-sex divorce on the merits. For example, despite the state not permitting same-sex marriage at the time, some New York courts have recognized a same-sex marriage validly entered into in another jurisdiction for purposes of divorce.<sup>81</sup> One New York court found that recognizing same-sex marriage was “consistent” with New York’s public policy.<sup>82</sup> And in June 2011, the Wyoming Supreme Court ruled that Wyoming law permitted the state to grant a same-sex divorce.<sup>83</sup>

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their civil union in Vermont, but the plaintiff “must be afforded a legal avenue to accomplish the fair and equitable dissolution of her fractured relationship with defendant.” *Id.* at 467. The court suggested she “may have a properly pleaded complaint for dissolution of the civil union heard by the New York State Supreme Court which possesses the general jurisdiction to hear and decide all equitable civil actions including actions which may also be heard by the Family Courts.” *Id.*

<sup>79</sup> See *O’Darling v. O’Darling*, 188 P.3d 137, 140 (Okla. 2008) (affirming in part the trial court’s order vacating the divorce decree). The Oklahoma Supreme Court held that the trial court properly vacated its order because the petitioner failed to disclose that the parties were both women and failed to disclose “controlling legal authority regarding same-sex marriage in Oklahoma.” *Id.* at 139. The court also held that the court could not dismiss the divorce petition without notice to the petitioner, and that the trial court on remand should “conduct a hearing, after notice is given to the parties and the Oklahoma Attorney General’s office, allowing Petitioner to argue if there exists facts that would entitle her to relief.” *Id.* at 140. In light of the court’s holding that the order vacating the decree was proper, it is not clear what facts, other than the parties not actually both being women, would preclude dismissal of the petition.

<sup>80</sup> See, e.g., Associated Press, *Neb. Judge Denies Divorce for Lesbian Couple*, NEW ENG. CABLE NEWS (Feb. 6, 2011, 12:37 PM), [http://www.necn.com/02/06/11/Neb-judge-denies-divorce-for-lesbian-cou/landing\\_politics.html?&blockID=3&apID=6184baa939174deba253933567a3e93e](http://www.necn.com/02/06/11/Neb-judge-denies-divorce-for-lesbian-cou/landing_politics.html?&blockID=3&apID=6184baa939174deba253933567a3e93e) (stating District Judge Randall Rehmeier refused to grant a lesbian couple a divorce from a Vermont marriage, but did approve a custody agreement).

<sup>81</sup> *C.M. v. C.C.*, 867 N.Y.S.2d 884, 889 (Sup. Ct. 2008) (holding the New York court had jurisdiction to grant a divorce to a same-sex couple married in Massachusetts); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008) (holding the court had jurisdiction to hear a divorce petition for a same-sex couple married in Canada); see also *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing, for benefits purposes, a same-sex Canadian marriage).

<sup>82</sup> *C.M.*, 867 N.Y.S.2d at 887.

<sup>83</sup> *Christiansen v. Christiansen*, 253 P.3d 153, 157 (Wyo. 2011) (reversing a district court’s dismissal of a divorce petition resulting from a Canadian same-sex marriage and holding the Wyoming court had subject-matter jurisdiction over the case). The court reconciled the Wyoming statute that prohibited same-sex marriage with another Wyoming statute that provided “[a]ll marriage contracts which are valid by the laws of the country in which contracted are valid in this state.” *Id.* at 155–56 (alteration in original) (quotation omitted).

In a bench ruling with no written opinion, a New Jersey trial court also granted a divorce on principles of comity to a lesbian couple married in Canada. Arthur S. Leonard, *More on N.J.*

The Wyoming court recognized that district courts have “broad subject-matter jurisdiction”<sup>84</sup> and asserted that the policy exception precluding recognition of certain foreign marriages “is necessarily narrow.”<sup>85</sup> It then concluded that:

[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.<sup>86</sup>

By petitioning for divorce to dissolve their marriage, which was legally entered into in Canada, the parties were “not seeking to live in Wyoming as a married couple,” and thus were “not seeking to enforce any right incident to the status of being married.”<sup>87</sup> Respecting Canadian law for the “limited purpose of accepting the existence of a condition precedent to granting a divorce” was not, the court found, “tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated.”<sup>88</sup>

This approach acknowledges what Texas courts, which have stated that a “Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person,”<sup>89</sup> have ignored. No court could find a living person dead,

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*Marriage Recognition Ruling*, LEONARD LINK (Feb. 25, 2009), <http://newyorklawschool.typepad.com/leonardlink/2009/02/more-on-nj-marriage-recognition-ruling.html>.

<sup>84</sup> *Christiansen*, 253 P.3d at 155.

<sup>85</sup> *Id.* at 156.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 156–57. In response to this ruling, the president of an anti-same-sex marriage organization stated that she “will continue to encourage the Legislature to ‘correct’ the statutes and allow people to vote on the so-called ‘defense of marriage’ constitutional amendment.” Ashby Jones, *Wyoming High Court Grants Divorce to Same-Sex Couple*, WALL ST. J. L. BLOG (Jun. 7, 2011, 1:27 PM), <http://blogs.wsj.com/law/2011/06/07/wyoming-high-court-grants-divorce-to-same-sex-couple/>. The Wyoming Supreme Court earlier denied a petition to intervene in the case filed by thirteen state legislators. Joan Barron, *Wyoming Supreme Court Reverses Same-Sex Divorce Ruling*, CASPER STAR-TRIBUNE (Jun. 7, 2011, 7:00 AM), [http://trib.com/news/state-and-regional/article\\_56d136c9-ea3c-54c6-b5db-39bf9fb28a48.html](http://trib.com/news/state-and-regional/article_56d136c9-ea3c-54c6-b5db-39bf9fb28a48.html).

<sup>89</sup> *Mireles v. Mireles*, No. 01–08–00499–CV, 2009 WL 884815, at \*2 (Tex. App. Apr. 2,

making administration of a living person's estate both completely impossible as well as unnecessary. But a court could find—and some have found—a same-sex couple married, making their divorce both possible and, when sought, necessary.

## II. THE RIGHT TO DIVORCE AND TO ACCESS THE COURTS

The ability to divorce is important, and restricting individuals' ability to divorce is morally problematic for a number of reasons. First, when a government forces a person to remain married to an individual who is no longer of his or her choosing, that person's personal autonomy is significantly reduced. Second, the perspective that marriage is, at least in some sense, a contract rather than simply a status suggests that divorce cannot be prohibited. Third, married persons are often legally liable for their spouse's actions, even absent consent, and courts should not shackle a person with unwanted and unintended liability. Finally, individuals cannot remarry if they remain legally married to another person.

Furthermore, substantive due process suggests that individuals possess a protectable right to divorce. Despite state restrictions on the formation of a marriage, once a party is married, the state should be obligated to acquiesce in the *dissolution* of that marriage if and when the parties no longer desire to be married.

### A. Personal Autonomy and Dignity

Whether or not marriage is viewed as a completely egalitarian relationship,<sup>90</sup> the basic principles of individual autonomy<sup>91</sup> dictate

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2009), *quoted in In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 666 (Tex. App. 2010).

<sup>90</sup> See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77 (2004) (arguing for a vision of marriage, as an "egalitarian liberal community," which combines the benefits of community with equality and individual autonomy, protected through the right of free exit).

<sup>91</sup> "[R]espect for individual autonomy is a central principle of much of our ethical and political theory . . ." Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 765 n.90 (1991); see also Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 426 (1992) (describing "individual human dignity" as a "cardinal" belief in our "political culture" that "people have the moral right—and the moral responsibility—to confront for themselves, answering to their own conscience and conviction, the most fundamental questions touching the meaning and value of their own lives"); see generally IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 69 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785) (connecting freedom with autonomy and autonomy with morality); JOHN STUART MILL, *ON LIBERTY* 119–20, 127, 149–52 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859) (arguing that the freedom to act on one's opinions is an essential part of well-being).

that adults are entitled to make decisions about their most important relationships. Marriage is among the most important human relationships<sup>92</sup>—to decide with whom to live, maintain a household, and be intimate. When adults<sup>93</sup> no longer desire to maintain the marital relationship, the law should not require them to remain legally entangled.<sup>94</sup> Very little is required to marry; only a simple application and certification from the state is necessary.<sup>95</sup> But judicial intervention is required to divorce,<sup>96</sup> and the state should not eliminate access to that judicial process.<sup>97</sup>

Marriage is a voluntary relationship.<sup>98</sup> People cannot be forced into a marriage;<sup>99</sup> similarly, they should not be compelled to remain married regardless of how deeply they desire to end it.<sup>100</sup>

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<sup>92</sup> See, e.g., Anne C. Dailey, *Liberalism's Ambivalence*, 28 QUINNIAC L. REV. 617, 617 (2010) (noting that “in the realms of intimate relationships and spirituality,” we observe “the flowering of romantic ideas about individual freedom, self-expression, free love, spiritual transcendence, and the whole structure of ideas surrounding privacy and autonomy in modern liberal legal thought”); Mae Kuykendall, *Emerson Family Values: Claims to Duration and Renewal in American Narratives of Divorce, Love and Marriage*, 18 HASTINGS WOMEN'S L.J. 69, 72 (2007) (describing marriage as “paradoxically both deeply private and important to the constitution of citizenship”); See also E. Christian Brugger, Book Review, 55 AM. J. JURIS. 225, 231 (2010) (reviewing *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* (Scott FitzGibbon, Lynn D. Wardle & A. Scott Loveless eds., 2010)) (describing marriage, for Kant, as “a vehicle for personal autonomy—an expression of adult choice”).

<sup>93</sup> These same principles do not apply with respect to adults' relationships with children or incapacitated individuals; in those instances, adults have a moral obligation to maintain the relationship for the benefit of those who need to be protected. In the marital context, however, the “disabilities” formerly placed upon women that would suggest an ongoing obligation to remain married no longer exist. See, e.g., CLARK, *supra* note 4, at 219, 222 (describing the limits the law historically placed on married women to do certain things without their husbands and those limits elimination).

<sup>94</sup> See, e.g., Dworkin, *supra* note 91, at 426 (arguing that human dignity requires the right to decided issues of value for themselves); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 177 (1982) (describing the “turn from liberty to autonomy” as reflecting “a shift from higher law views that justified the liberal state as the means of achieving a specific substantive goal, securing certain natural rights, to more relativistic stances that defend the state because it allows for the pursuit of self-chosen ends, now held to be the only ends that are legitimate”).

<sup>95</sup> See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 117–18 (2001) (discussing the minimal formalities required to form a marriage).

<sup>96</sup> See *id.* at 119–120 (discussing marital dissolutions and comparing them to administrative corporate dissolutions).

<sup>97</sup> Some scholars criticize autonomy as a governing legal principle. See, e.g., Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 437, 437 (2009) (attributing the unequal treatment of women to our valuing “autonomy over equality,” thus sacrificing “substantive equality in the name of greater independence, ignoring the realities of our shared states of episodic dependency and constant vulnerability”). But few question its prominence. See, e.g., Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 163 (2010) (noting the “ascendancy of the liberal commitment to autonomy and individual rights”).

<sup>98</sup> See, e.g., *Garrison v. Garrison*, 460 A.2d 945, 947 (Conn. 1983) (upholding the validity of a marriage in a dissolution proceeding because even though the parties did not intend to file

### B. Marriage as a Contract

The view that marriage is a contract also justifies the right to divorce.<sup>101</sup> Just as parties can mutually decide to enter into an enforceable contract,<sup>102</sup> parties to an existing contract can mutually decide to exit that contract and the law will support those agreements of rescission<sup>103</sup> and release.<sup>104</sup> Applying the contract theory to marriage,<sup>105</sup> people have a right to decide the terms of their marriage, including when to end it.<sup>106</sup>

the marriage certificate, they did “intend to marry”); *Tice v. Tice*, 672 P.2d 1168, 1170–71 (Okla. 1983) (“Marriage is a personal relation which arises from a civil contract, and which requires the voluntary consent of parties who have the legal capacity to contract.”); *Aetna Life Ins. Co. v. Boober*, 784 P.2d 186, 188–89 (Wash. Ct. App. 1990) (finding that a decedent’s wife was entitled to his life insurance proceeds despite their separation). The court in *Boober* acknowledged the general proposition that marriage “is based on mutual consent” and that “[e]ither party may withdraw consent by dissolving the marriage.” *Boober*, 784 P.2d at 188. “Plainly, spouses can best judge the viability of their marriage.” *Id.*

<sup>99</sup> Forced marriage is also banned by various international human rights conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Jennifer Gong-Gershowitz, *Forced Marriage: A “New” Crime Against Humanity?*, 8 NW J. INT’L HUM. RTS. 53, 66 (2009) (discussing the CEDAW’s proscription of forced marriages).

<sup>100</sup> Some argue that divorce is impossible because there is no “real marriage” in the first instance. *See, e.g.*, Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 246 (2011) (arguing for the “conjugal” view of marriage: “the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together”). The authors claim that only opposite-sex marriage is “real marriage” because only heterosexual intercourse involves “organic bodily union.” *Id.* at 252–53.

<sup>101</sup> Interestingly, a contract that impairs the right to marry might be unenforceable as against public policy. RESTATEMENT (SECOND) OF CONTRACTS § 189 (1981) (“A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of marriage.”).

Furthermore, a contract theory of marriage is consistent with personal autonomy. *See, e.g.*, Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 642 (2010) (explaining that contract law is not designed to enforce “societal standards or norms” and that contract law does not “force parties into contracts to which they have not agreed, even if those contracts would be socially beneficial”). Kim also noted that “[o]ne of the main objectives of contract law . . . is furthering personal autonomy—the ‘freedom to contract.’” *Id.*

<sup>102</sup> RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (providing that unless certain narrow incapacitating conditions are present, “[a] natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby”).

<sup>103</sup> *Id.* § 283 (providing that an “agreement of rescission is an agreement under which each party agrees to discharge all of the other party’s remaining duties of performance under an existing contract”; furthermore, an “agreement of rescission discharges all remaining duties of performance of both parties”).

<sup>104</sup> *Id.* § 284 (providing “[a] release is a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition” and that the release “takes effect on delivery”).

<sup>105</sup> As noted earlier, marriage in America is not truly a purely contractual matter; it has elements of both status and contract. *See supra* notes 44–47 and accompanying text. And the view of marriage as both a status and a contract has persisted since at least 1932. K.N. Lewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1282 (1932) (noting that the

Although courts and commentators have recognized marriage as a contract for over a hundred years,<sup>107</sup> treating marriage like a contract, albeit a state-approved and regulated contract, began during the rise of no-fault divorce.<sup>108</sup> Removing the vestiges of coverture<sup>109</sup> and attempts to liberate women from the gender-rigid roles present in traditional marriages<sup>110</sup> resulted in a shift toward allowing married couples to create their own terms and conditions regarding at least some aspects of the marital relationship.<sup>111</sup>

By analogy, partnerships are also mutual agreements that establish a legally enforceable relationship,<sup>112</sup> and formation brings particular

“law-books tell us of marriage as a ‘contract’ . . . and marriage as a ‘status’”). But to the extent those contractual elements have grown over the past 200 years, they inform this argument. And “the contractual nature of the modern law of marriage is indisputable” because of the “freedom of parties to opt out of the state-provided legal rules.” Scott & Scott, *supra* note 47, at 236.

<sup>106</sup> Although marriage is a social contract as well as a personal contract between the parties, the rise of the contract theory of marriage corresponded with the rise in respecting individual rights. See Estin, *supra* note 33, at 383 (discussing the intersection between the rise in individual rights and the revolution in divorce law).

Henry Sumner Maine posited in the 1800s that law was moving to a contract theory, proclaiming that “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.” HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Ashley Montagu ed., Univ. Ariz. Press 1986) (1864).

If marriage is treated like a contract, the ban on specific enforcement of personal services contracts is arguably relevant. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) (“A promise to render personal service will not be specifically enforced.”). Under that provision, the courts could not force an unwilling party to remain married; “damages” may be proper, but the party would be entitled to exit the marriage.

<sup>107</sup> See, e.g., Ponder *ex rel.* Graham v. Graham, 4 Fla. 23, 44 (1851) (declaring unconstitutional a legislative act declaring a particular marriage dissolved because it impaired “the obligation of a contract”); Franklin G. Fessenden, *Nullity of Marriage*, 13 HARV. L. REV. 110, 110 (1899) (acknowledging that whether “marriage is looked upon as a contract or as an institution or as a status, it is perhaps the most important of all conditions in civilized communities” and arguing the parties to a marriage have no power to dissolve the marriage contract).

<sup>108</sup> See *supra* notes 44–47 and accompanying text (discussing the shift from thinking about marriage as a status to marriage as a contract).

<sup>109</sup> “Coverture is the legal system that vested virtually all property rights to a couple’s assets in the husband.” Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2230 n.5 (1994). Williams argued that the current post-divorce impoverishment of women and children results from treating men’s income as “entitlements” under property law, allocating the “family wealth to husbands,” and treating women’s claims to income under family law as a “discretionary redistribution.” *Id.* at 2229.

<sup>110</sup> See, e.g., Thomas, *supra* note 46, at 156 (discussing how recognition of women’s individual liberties helped form the current terms of legal marriage).

<sup>111</sup> See, e.g., Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1833 (1987) (noting that although the “status model views marriage as defining and modifying . . . the identities of the marriage partners,” the “contract model . . . conceptualizes marriage in terms of a series of rights and duties undertaken by consent”).

<sup>112</sup> See Calvin G. C. Pang, *Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai‘i and Beyond*, 20 U. HAW. L. REV. 1, 5

legal and social consequences. Yet when business partners no longer desire to remain entangled, the state does not object to the dissolution of their partnership.<sup>113</sup> True, the dissolution cannot be for the purpose of evading creditors or for other fraudulent reasons.<sup>114</sup> But the legitimate desire to end the business relationship is sufficient for the law to permit that dissolution.<sup>115</sup>

The rise in judicial enforcement of prenuptial and postnuptial agreements is consistent with viewing marriage from this perspective.<sup>116</sup> Although American courts previously refused to enforce such agreements<sup>117</sup>—either for lack of capacity<sup>118</sup> or as against public policy<sup>119</sup>—courts now generally recognize married

(1998) (“Analogizing marriage to a partnership, more specifically a commercial partnership, was a legal construct largely necessitated by a nationwide turn toward no-fault divorces.”); Cynthia M. Davis, Comment, “*The Great Divorce*” of Government and Marriage: *Changing the Nature of the Gay Marriage Debate*, 89 MARQ. L. REV. 795, 803 (2006) (internal citation omitted) (analogizing marriage to a closely-held corporation, “especially concerning formation,” which “requires application to and certification from the state”); see also Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIMONIAL LAW. 335, 336 n.3 (2003) (“The theory of marriage as partnership completely suffuses divorce law.”).

<sup>113</sup> With a true “partnership,” no judicial approval is even necessary, making it more similar to cohabitation than marriage. Davis, *supra* note 112, at 804. But for corporations seeking to dissolve, they must file formal “articles of dissolution.” *Id.* at 803. They can dissolve voluntarily, which Davis analogizes to no-fault divorce, or administratively. *Id.*; see also Ertman, *supra* note 95, at 118–19 (analogizing corporate dissolutions to divorce).

<sup>114</sup> See, e.g., Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors Duties to Creditors*, 20 DEL. J. CORP. L. 1, 11, n.32 (1995) (discussing the dissolution incentive created when corporations can evade creditors through dissolution).

<sup>115</sup> See, e.g., Robert B. Thompson, *Corporate Dissolution and Share Holders’ Reasonable Expectations*, 66 WASH. U. L.Q. 193, 199 (1988) (stating that corporations statutes permit “voluntary dissolution” as well as providing methods for involuntary dissolution, such as “dissolution on deadlock; dissolution for misconduct by those in control of the corporation; and dissolution on broader grounds not necessarily related to misconduct”).

<sup>116</sup> See, e.g., Scott & Scott, *supra* note 47, at 203–04 (noting that the “contractual paradigm is most evident in marital dissolution proceedings,” where the parties’ “separation and premarital agreements” are routinely enforced by courts).

<sup>117</sup> See, e.g., Sarah Ann Smith, *The Unique Agreements: Premarital and Marital Agreements, Their Impact Upon Estate Planning, and Proposed Solutions to Problems Arising at Death*, 28 IDAHO L. REV. 833, 840 (1991–1992) (noting early American courts’ refusal to accept pre- and post-marital agreements). Some early courts, however, enforced prenuptial agreements in equity, even though they were void under law. See, e.g., *Tisdale v. Jones*, 38 Barb. 523, 525 (N.Y. Sup. Ct. 1860) (“It cannot be doubted at this day that a contract entered into between husband and wife before marriage, although void at law, will be recognized and enforced in equity.”).

<sup>118</sup> See, e.g., Smith, *supra* note 117, at 840 (noting that until the mid-nineteenth century, a woman’s legal identity merged with that of her husband).

<sup>119</sup> Many courts refused to enforce support obligations in prenuptial agreements under the view that those agreements were “destabilizing to the marital relationship and might promote or encourage marital breakup.” *Edwardson v. Edwardson*, 798 S.W.2d 941, 943 (Ky. 1990); see also Smith, *supra* note 117, at 840–41 (discussing courts’ policy rationale behind voiding certain prenuptial agreements).



couples' right to control the parameters of their marital relationship with these types of agreements.<sup>120</sup> Similarly, divorce law itself supports the contractual nature of marriage; consensual settlement agreements are "particularly favored" in divorce cases.<sup>121</sup>

By "allowing spouses to enter into stronger commitments than the state's default contract provides for,"<sup>122</sup> the view that marriage is a contract is consistent with communitarian goals.<sup>123</sup> Similarly, the return to offering covenant marriage options in some states,<sup>124</sup> despite being an attempt to return marriage to a privileged status,<sup>125</sup> has been described as a "milestone" in the "evolution of marriage from a relationship based on status to one that is regulated by contractual norms."<sup>126</sup> Allowing the parties entering into a marriage to jointly determine the standards by which they can divorce preserves their right to contract, while at the same time allowing them to "voluntarily undertake a greater marital commitment" than no-fault divorce requires.<sup>127</sup>

### C. Legal Liability

The law imposes legal liability for one's spouse.<sup>128</sup> For example, married parties are obligated to each other for support.<sup>129</sup> And despite

<sup>120</sup> See, e.g., *Williams v. Williams*, 801 P.2d 495, 497, 499 (Ariz. Ct. App. 1990) (overruling a 1926 case that held prenuptial agreements could not waive spousal maintenance); *Edwardson*, 798 S.W.2d at 945 (overruling a 1916 case that declared prenuptial agreements void); see also Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 142 (1979) (explaining that antenuptial contracts are valid and enforceable if they comply with contract law); Smith, *supra* note 117, at 840–43 (tracing the history of prenuptial agreements).

Courts have also been willing to find and enforce oral agreements of property division and support, even in the absence of a lawful marriage, unless the sole basis for the agreement is illicit sexual services. *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976).

<sup>121</sup> See *Weishaus v. Weishaus*, 849 A.2d 171, 178 (N.J. 2004) (citation omitted) (noting that "while settlement is an encouraged mode of resolving cases generally, 'the use of consensual agreements to resolve marital controversies' is particularly favored in divorce matters"); accord *Dougan v. Dougan*, 21 A.3d 791, 796 (Conn. 2011) (citation and quotations omitted) (noting that a stipulated judgment in a dissolution "may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction").

<sup>122</sup> Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 878.

<sup>123</sup> See, e.g., *id.* (arguing that, "[f]ar from undermining communitarian values, the language of contract . . . is consistent with the language of commitment and obligation"); Scott & Scott, *supra* note 47, at 208 (arguing that "contract can serve very well as a basis for an enduring, committed relationship"); see also Clark, *supra* note 120, at 142 (emphasis added) (stating that "if certain requirements of form and substance are met, the typical antenuptial contract is valid and enforceable and in fact is favored by the law as tending to promote marital harmony").

<sup>124</sup> Under a covenant marriage, divorce can be granted only for fault, or, absent marital fault, after a long waiting period. Nock et al., *supra* note 61, at 172.

<sup>125</sup> See *supra* note 55 and accompanying text.

<sup>126</sup> Scott & Scott, *supra* note 47, at 201.

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., Ertman, *supra* note 95, at 117 (observing that spouses are often liable for

not jointly entering into a commercial contract, spouses can be liable for each other's debts, at least for "necessaries"<sup>130</sup> and under "family expense" statutes.<sup>131</sup> In community property states, this problem is exacerbated.<sup>132</sup> Spouses can also be liable in tort under the family purpose doctrine.<sup>133</sup> Insurance laws remove some of these concerns,<sup>134</sup> but for uninsured parties and torts not covered by mandatory liability insurance, the innocent spouse remains subject to tort liability.<sup>135</sup>

As long as spouses remain legally married, they could be subject to liability for each other's actions<sup>136</sup>—even though they may desperately desire to be freed from that legal obligation. Parties who no longer share a committed emotional bond are less likely to be

debts incurred by their partner); Marie T. Reilly, *In Good Times and In Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 399 (2008) (noting that "[e]ven though divorce law reconstructs marriage as a contract at the will of the parties, marital status—the fact that two people are married—triggers shared financial responsibility to third parties without regard to the parties' private agreement").

<sup>129</sup> See, e.g., Beth R. v. Donna M., 853 N.Y.S.2d 501, 509 (Sup. Ct. 2008) (noting that because the two women were married, "Plaintiff may be constrained to provide support for Defendant and Defendant would be a recipient of a portion of Plaintiff's estate"); Pang, *supra* note 112, at 39–40 (recounting one state's statutory "transform[ation]" of the "duty for the husband to support his wife . . . into a duty by both spouses to support each other and their family"); Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian Adoptions*, 3 AVE MARIA L. REV. 561, 591 (2005) (observing that marriage and adoption create legal and familial ties that previously did not exist).

<sup>130</sup> Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 838 (2004) ("[A]t least thirty-three states recognize some form of the doctrine of necessities. Under this doctrine, spouses are prohibited from suing each other directly for support, but are obligated to pay each other's debts, if the debts are for necessary expenses."); see also James L. Musselman, *Once Upon a Time in Bankruptcy Court: Sorting Out Liability of Marital Property for Marital Debt is No Fairy Tale*, 41 FAM. L.Q. 249, 251 (2007) (explaining that a spouse is liable for debts incurred by their partner for items purchased for family use). Furthermore, a creditor's rights relating to existing debts are not affected by a divorce decree; however, post-divorce, the spouses are no longer legally liable for each other's debts. *Id.* at 259–60.

<sup>131</sup> Reilly, *supra* note 128, at 399–400, 400 n.116 (describing statutes which establish a list of goods for which the non-contracting spouse is liable if the contracting spouse fails to pay).

<sup>132</sup> See William Houston Brown, 1 THE LAW OF DEBTORS AND CREDITORS § 6:85 (2011) (explaining that in some states, creditors may pursue community property for separate debts, and at times creditors may pursue separate property to satisfy community debts); Reilly, *supra* note 128, at 400–01 (explaining that in some community property states creditors may collect debts from either spouse if the spouse has the right to control).

<sup>133</sup> See, e.g., Reilly, *supra* note 128, at 400 (describing "the 'family purpose doctrine' by which courts imposed one family member's tort liability on other solvent family members based on family activities as joint enterprise").

<sup>134</sup> See *id.* (noting that the presence of mandatory automobile insurance laws addresses the problem of driver insolvency).

<sup>135</sup> See 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 714 (2007) (noting that while the mere familial relationship generally is not enough to establish liability, when a husband and wife are engaged in a "joint enterprise," liability of the driver may be imputed to the third party).

<sup>136</sup> See *supra* notes 128–35 and accompanying text.

concerned for each other's financial well-being,<sup>137</sup> creating an incentive for abuse. Divorce law intends to resolve this problem by severing these legal bonds: "The primary effect to be accomplished by a divorce or dissolution is the separation of the parties in a manner that enables each to continue his or her life as free as possible from entanglement with the other."<sup>138</sup> The absence of any forum for same-sex couples to obtain a divorce prevents divorce law from fulfilling this goal.

Although it is true that some states may not impose liability upon the "spouses" they refuse to divorce—because they do not view them as married in the first place<sup>139</sup>—creditors with access to marriage records may claim detrimental reliance or make a similar equitable argument.<sup>140</sup> In addition, if one spouse moves to a state that *does* recognize the marriage, whether to establish residency in order to obtain a divorce or for other purposes, that spouse is very likely subject to liability for the other spouse's actions.

#### *D. The Right to Remarry*

The right to marry includes the right to remarry, and that right depends on the ability to divorce. Every state prohibits bigamous marriages,<sup>141</sup> yet without the ability to dissolve an existing marriage, the parties cannot exercise their right to remarry<sup>142</sup> without

<sup>137</sup> See Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, 74 LAW & CONTEMP. PROBS. 133, 161 (2011) (noting that one characteristic of involvement is concern for a spouses financial well-being).

<sup>138</sup> *Ward v. Ward*, 599 P.2d 1150, 1153 (Or. Ct. App. 1979) (terminating an alimony award because the former wife had gained employment and acknowledging the husband was "not a life-long guarantor of a higher standard of living").

<sup>139</sup> Ostensibly, just as a court could refuse to grant a divorce, a court could also reject a creditor's claim of spousal liability. The rationale would not likely be lack of jurisdiction, *see supra* Part I.B, but would be simply lack of liability for want of a valid marriage.

<sup>140</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Creditors arguably have a right to rely on valid marriage records. Furthermore, it would be difficult for spouses to argue that when they entered into the marriage relationship they did not intend to hold themselves out as married or accepted the benefits and responsibilities that came with marriage.

<sup>141</sup> *See, e.g.*, Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 35 (2010) (noting that "[b]igamy is currently illegal in every state" and is prohibited "by the state constitutions of five states").

<sup>142</sup> For purposes of this Article, we can presume the party seeking a same-sex divorce wishes to remarry an opposite-sex partner, eliminating any debate about whether the right to the subsequent marriage is a fundamental right.

Some scholars have argued that all state-sponsored marriage could cease to exist, obviating the need for divorce. *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228 (1995) (arguing society should not consider marriage to be a "legal category"); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 166–191 (2003) (reviewing arguments against continued state recognition of marriage); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 28 (1996) (analyzing the potential legal and social

committing bigamy.<sup>143</sup> And because marriage is a fundamental right,<sup>144</sup> denying the ability to divorce is, in essence, denying the ability to exercise this fundamental right.<sup>145</sup>

States are free to impose some restrictions on divorce. For example, compulsory mediation,<sup>146</sup> aimed to reduce the overall divorce rates and aid the societal goal in having couples remain married, may be proper. Similarly, residency requirements demanding a plaintiff reside in the state for a set period of time prior to commencing a divorce action are a reasonable means to avoid migratory divorces.<sup>147</sup> But states must provide *some* ability for their residents to obtain a divorce.<sup>148</sup>

consequences of the abolition of state recognition of marriage); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 283 (1997) (arguing for the abolition of marriage). Because marriage is firmly entrenched as a fundamental right, it is questionable whether eliminating state recognition would survive constitutional scrutiny. *See infra* note 144.

<sup>143</sup> A recent symposium on family law posed this very hypothetical in the context of a California same-sex couple who lawfully married there. Jennifer Ann Drobac, *Jazzing up Family Law: The First Annual Midwest Family Law Conference*, 42 IND. L. REV. 533, 563 (2009). After a period of time, one spouse moved to Indiana. Indiana would not grant a divorce because it refused to recognize the California marriage; thinking that the same-sex marriage was void, the spouse in Indiana then married an opposite-sex partner. *Id.* The remarried spouse is now "possibly a bigamist under California law and faces possible prosecution if she moves back." *Id.* at 564.

<sup>144</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking a ban on interracial marriage as violating due process because the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *see also* *Turner v. Safley*, 482 U.S. 78, 99–100 (1987) (holding that prisoners have a constitutional right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978) (upholding the right to marry even for people behind on child support payments from prior marriage because "the right to marry is of fundamental importance" and part of the Due Process Clause's fundamental liberty).

<sup>145</sup> By analogy, imagine the husband in *Loving* also married a Caucasian woman in Virginia, which he could do because his previous marriage to an African-American was considered illegal and not recognized. If he then moved to a northern state that permitted interracial marriage, he could be arrested for bigamy because both marriages would be recognized as valid.

<sup>146</sup> Mandatory mediation is often used in child custody disputes. *See* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 297 n.256 (2009) (noting that "mandatory mediation could take place before, not after, a family is severed"); Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 272 (2007) (noting that "mandatory mediation" is "prevalent in child custody cases").

<sup>147</sup> *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (upholding a one year residency requirement as a prerequisite to a court's jurisdiction over a divorce).

<sup>148</sup> This rationale appeared persuasive to at least one trial court judge who granted a same-sex divorce. *See* Leonard, *supra* note 83 (reporting the bench ruling in the case). The judge is reported as saying:

I'm also concerned here that if the plaintiff wants to remarry in Canada that the way her union with Kinyati Hammond is ended has impact outside the State of New Jersey. She says in her certification, and I accept it as true, it's undisputed that she plans to return to Canada to be remarried. And if she goes with a document that says

### E. Avoiding Constitutional Conflicts

In addition to the normative arguments that support granting divorces, there is an arguable constitutional problem created by states refusing to grant same-sex divorces. Autonomy<sup>149</sup> also has constitutional dimensions;<sup>150</sup> substantive due process protects decisions about marriage and family.<sup>151</sup> More generally, liberty

dissolution of a civil union and what she had was a valid marriage in Canada, I think she has a valid concern that there could be issues raised in Canada.

*Id.*

<sup>149</sup> See *supra* Part II.A (discussing the intrusion into personal autonomy that stems from states' refusal to grant certain persons divorces).

<sup>150</sup> See, e.g., Dworkin, *supra* note 91, at 426 (describing "individual human dignity" as a "[c]ardinal" belief in our Constitution and "political culture more generally," defined as "people have the moral right—and the moral responsibility—to confront for themselves, answering to their own conscience and conviction, the most fundamental questions touching the meaning and value of their own lives"); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 81 (2011) (arguing that personal autonomy—the "power to make choices"—is central to protecting the "ability to participate effectively in the democratic process" and "underlies all the individual rights protected by the Constitution"); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 291 (2005) (addressing the Court's "positive emphasis on personal autonomy" in *Lawrence v. Texas* and noting that if "the Constitution protects people's prerogatives to live their lives as they see fit, then government interference with an individual's decisions about matters central to personal autonomy can only be just if necessary to protect some other person's concrete interest"); Smith, *supra* note 94, at 177 (describing the "turn from liberty to autonomy" as reflecting "a shift from higher law views that justified the liberal state as the means of achieving a specific substantive goal, securing certain natural rights, to more relativistic stances that defend the state because it allows for the pursuit of self-chosen ends, now held to be the only ends that are legitimate"). Furthermore, those protected rights "provide spheres of freedom from government intrusion on individual choice." Hessick & Hessick, *supra* note 150, at 81.

<sup>151</sup> The Supreme Court held this right existed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). In *Casey*, the Court noted that "[o]ur precedents 'have respected the private realm of family life which the state cannot enter.'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). The Court concluded:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* See also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (citations omitted) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

Not all "all important, intimate, and personal decisions" are constitutionally protected. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (finding that Washington's prohibition of assisted suicide was constitutional). But marriage is protected, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights

cannot be deprived without “due process of law.”<sup>152</sup> Divorce arguably lies within the “domain of liberty”<sup>153</sup> protected by due process. And denying same-sex couples the ability to divorce may “violate those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”<sup>154</sup> Granting divorces to same-sex couples avoids these constitutional problems.<sup>155</sup>

Furthermore, the Supreme Court is wary of limitations placed on the availability of a forum.<sup>156</sup> Specifically in the context of divorce,

essential to the orderly pursuit of happiness by free men.”), as are “family living arrangements,” *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

<sup>152</sup> U.S. CONST. amend. XIV, § 1 (prohibition on states); U.S. CONST. amend. V (prohibition on federal government).

<sup>153</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

<sup>154</sup> *Id.* at 328 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

<sup>155</sup> Equality concerns are also present. Equal protection arguments, however, are at least arguably less likely to be successful than due process arguments. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011) (arguing that “equality” claims sound more like pleas for “special rights” and are, therefore, less persuasive than “liberty” claims, which sound more like “human rights” assertions). The reluctance of courts to hear divorce petitions affects, as described above in Part I.B, primarily same-sex couples. Hence, courts are arguably treating validly-married same-sex couples differently from validly-married opposite-sex couples in violation of equal protection. U.S. CONST. amend. XIV, § 1.

Over the past few decades the Supreme Court has declined to extend—and has even curtailed—application of the equal protection doctrine. Yoshino, *supra* note 155, at 755–76. But it has, at the same time, expanded the reach of the due process doctrine to fill that void. *Id.* at 776–87. Yoshino argues this result has occurred because our nation’s “pluralism anxiety” requires that the Court resist expanding protected groups. *Id.* at 758. Instead, the Court identifies common liberties that we all should possess. *Id.* at 776. Yoshino calls this the “liberty-based” or ‘equality-based’ dignity claim.” *Id.* at 749; see also Shannon Price Minter, *The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence*, 19 S. CAL. REV. L. & SOC. JUST. 89, 107 (2010) (citation and quotations omitted) (arguing that it “would be a mistake” to “distinguish equal protection and due process too categorically” and, relying on the majority opinion in *Lawrence v. Texas*, pointing out that “[b]oth equal protection and due process include a powerful equality norm, and their interdependence is a key feature of American constitutional structure”); Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902 (2004) (arguing that the Court, in *Lawrence*, blended “equal protection and substantive due process themes”).

Yoshino asserts that this “liberty-based dignity claim” provides a means for the Supreme Court “to ‘do’ equality in an era of increasing pluralism anxiety.” Yoshino, *supra* note 155, at 750. Other scholars note the power of this “dignity” claim, commenting that plaintiffs, in their briefs in same-sex marriage cases, often state they are “dignity-deprived.” Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CAL. L. REV. 235, 237 (2011).

<sup>156</sup> *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (holding literal access to the courts is required by the Due Process Clause and stating “[t]he Due Process Clause also requires the States to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings”); *M. L. B. v. S. L. J.*, 519 U.S. 102, 113 (1996) (recognizing termination of parental rights as a civil case “in which the State must provide access to its judicial processes without regard to a party’s ability to pay court fees”); *Mayer v. Chicago*, 404 U.S. 189, 197–98 (1971) (requiring the City of Chicago permit an appeal for conviction of a city ordinance despite the defendant’s inability to pay for transcripts, even though the defendant was not sentenced to

the Court has held that barriers to access which preclude petitioners from obtaining a divorce, such as fees imposed on the indigent, violate due process.<sup>157</sup>

In *Boddie v. Connecticut*,<sup>158</sup> the Court specifically required a “meaningful opportunity to be heard” for parties seeking a divorce.<sup>159</sup> The Court refused to declare that “access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause . . . .”<sup>160</sup> But the Court singled out the nature of a divorce action: “this right is the exclusive precondition to the adjustment of a fundamental human relationship.”<sup>161</sup> The *Boddie* Court relied heavily on the fact that court action was essential for a party to end a marriage lawfully,<sup>162</sup> concluding that:

[G]iven the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process . . . prohibit[s] a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>163</sup>

jail and fined only a total of \$500); *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956) (plurality opinion) (requiring access to an appeal for indigent criminal defendants).

When the Court does condone lack of a judicial remedy, some other avenue to resolve the claim exists. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (denying a federal employee the ability to sue his employer for defamation and retaliatory demotion because other substantive and procedural provisions provided an opportunity for relief). As the Court noted, the issue was “not what remedy the court should provide for a wrong that would otherwise go unredressed.” *Id.* at 388. Instead, the question was “whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.” *Id.*

<sup>157</sup> *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971). Ann Estin argues that beginning in the 1940s, with *Williams v. North Carolina*, the Supreme Court began seeing divorce as an individual right, whereby individuals were entitled to greater control over their marital status. Estin, *supra* note 33, at 425. Estin argues this shift connected the Court’s divorce cases with due process cases, although not articulated that clearly. *Id.* at 426.

<sup>158</sup> 401 U.S. 371 (1971).

<sup>159</sup> *Id.* (“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”).

<sup>160</sup> *Id.* at 382.

<sup>161</sup> *Id.* at 383.

<sup>162</sup> *Id.* (stating that in seeking a divorce, “resort to the judicial process is entirely a state-created matter”).

<sup>163</sup> *Id.* at 374. Estin asserts that “*Boddie* did not declare a constitutional right to divorce, but it linked divorce to other familial rights protected by the Constitution.” Estin, *supra* note 33, at 427.

The Court described marriage as involving “interests of basic importance in our society”<sup>164</sup>—interests that the state properly oversees.<sup>165</sup> The Court could not identify any instance “where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and, more fundamentally, the prohibition against remarriage, without invoking the State’s judicial machinery.”<sup>166</sup> Because of the state’s monopoly, the Court treated the plaintiffs seeking access to divorce similarly to criminal defendants:

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants’ plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one.<sup>167</sup>

Despite the *Boddie* Court’s strong language, states may impose some limitations. For example, a one-year residency requirement prior to filing for divorce does not violate due process.<sup>168</sup> The state has an interest in “requiring that those who seek a divorce from its courts be genuinely attached to the State.”<sup>169</sup> But a residency requirement “is not total deprivation, as in *Boddie*, but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut. No similar total deprivation is present”<sup>170</sup> when the only bar to filing for divorce is a residency requirement.<sup>171</sup>

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<sup>164</sup> *Boddie*, 401 U.S. at 376.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The Court distinguished marriage and divorce from commercial contracts, which may be entered and rescinded freely; citizens may not “covenant for or dissolve marriages without state approval.” *Id.*

<sup>167</sup> *Id.* at 376–77.

<sup>168</sup> *Sosna v. Iowa*, 419 U.S. 393, 410 (1975).

<sup>169</sup> *Id.* at 409. The Court also found the one-year residency requirement proper because the proceeding was *ex parte* and the state’s finding of domicile was therefore not necessarily binding on another state; to prevent collateral attack, the one-year requirement was reasonable. *Id.* at 407–08.

<sup>170</sup> *Id.* at 410.

<sup>171</sup> Nevada retained the shortest residency requirement in the country for decades: six weeks. See Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 441 tbl.2 (1992). Many argue that the lenient laws of Nevada, as well as a few other states, created the opportunity for “migratory divorce.” Grossman, *supra* note 28, at 91.



Access to the courts is not required in all civil cases, though.<sup>172</sup> The Court has distinguished *Boddie* from those circumstances where denying access does not violate due process. For example, in finding no constitutional right to file a bankruptcy petition, the Court distinguished *Boddie* on several grounds, including the “state monopolization of the means for legally dissolving marriage”;<sup>173</sup> the fact that the “denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship,” which is of “fundamental importance”;<sup>174</sup> and the government’s “control over the marriage relationship,” as opposed to the “establishment, enforcement, or dissolution of debts.”<sup>175</sup>

Against that backdrop, the question is whether a state can justify its refusal to grant some divorces. Without much doubt, states have a legitimate interest in regulating marriage.<sup>176</sup> And states have some legitimate concerns about granting divorces to same-sex couples to

<sup>172</sup> See, e.g., *United States v. Kras*, 409 U.S. 434, 446 (1973) (holding there is no constitutional right to discharge debts in bankruptcy and hence refusing access based on inability to pay the filing fee does not violate due process or equal protection).

<sup>173</sup> *Id.* at 441.

<sup>174</sup> *Id.* at 444.

<sup>175</sup> *Id.* at 445.

<sup>176</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (noting that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed”); see also *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring) (stating that “Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage”); Mark Strasser, *Same-Sex Marriage and the Right to Privacy*, 13 J.L. & FAM. STUD. 117, 144–45 (2011) (acknowledging that “[p]romoting marriage is considered a legitimate state interest”).

The state interests asserted for regulating the *right to marry* differ from those that can be asserted for or against recognizing marriages or granting divorces to same-sex couples validly married in another jurisdiction. The state interest asserted most frequently in the right to marry context is preserving the traditional institution of marriage. See *Kern v. Taney*, 11 Pa. D. & C. 558, 575–76, No. 09–10739, I.D. #2, 2010 WL 2510988 (Pa. Com. Pl. Mar. 15, 2010) (discussing and accepting Pennsylvania’s asserted interest in the institution of marriage when refusing to grant a same-sex couple a divorce); see also *Lawrence*, 539 U.S. at 585 (O’Connor, J. concurring) (disagreeing with Texas’s interest in preserving traditional marriage to support its criminal sodomy laws).

In at least one same-sex divorce case, the court conflated these two issues. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 674 (Tex. App. 2010). In that case, the appellate characterized “the rights in question as the ‘freedom to marry a person of one’s own choosing’ and the concomitant right to end such a marriage with a divorce.” *Id.* The court therefore framed the right at issue as the “right to marry a person of the same sex.” *Id.* at 675. The “legitimate [state] interest” in prohibiting same-sex marriage was “promoting the raising of children in households headed by opposite-sex couples.” *Id.* at 677.

Although this state interest is arguably valid in the marriage context, it is irrelevant in the divorce context. If anything, this state interest provides a rationale for prohibiting *opposite-sex* couples from divorcing; it does not provide a reason to prohibit same-sex couples from divorcing. And at most it involves *recognizing* same-sex marriages, not granting them. Similarly, Sherif Girgis, Robert George, and Ryan Anderson assert that permitting same-sex marriage: (1) weakens real marriage; (2) obscures “the value of opposite-sex parenting as an ideal”; and (3) threatens “moral and religious freedom.” Girgis et al., *supra* note 100, at 260, 262–63. These state interests, however, are also unrelated to divorce.

the extent that it requires them to recognize the underlying marriage, which might suggest approval<sup>177</sup> of same-sex marriages.<sup>178</sup> Moreover, granting some divorces could require on-going state intervention for purposes of support or child custody and that state involvement could also legitimize the underlying relationship.<sup>179</sup>

But *Boddie* arguably requires heightened scrutiny<sup>180</sup> when denying access to a court—at least in the context of divorce. Although it did not expressly delineate the right to divorce as a “fundamental right,” the Court described access to the legal system as fundamental: “Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.”<sup>181</sup>

The Court suggested some form of heightened scrutiny was appropriate when it stated that “due process requires, at a minimum, that absent a *countervailing state interest of overriding significance*, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”<sup>182</sup> Because Connecticut refused to “admit these appellants to

<sup>177</sup> This justification is similar to the “expressive or communicative” justification for punishment, where punishment is conceptualized “as a form of communication that expresses society’s moral condemnation of criminal wrongdoing.” Sigler, *supra* note 97, at 165.

<sup>178</sup> See Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT’L L.J. 105, 124 n.64 (2010) (citing sources that discuss the policy rational for refusing to recognize same-sex marriages). Tobias Wolff has articulated three rationales for states’ refusal to recognize same-sex marriages entered elsewhere: (1) regulate sexual activity; (2) express moral disapproval; and (3) dissuade migration to the state. Wolff, *supra* note 19, at 2218–37. Wolff rejected the first interest because states can no longer regulate consensual sexual activity by virtue of *Lawrence v. Texas*, 539 U.S. 558 (2003). And states are no longer entitled, according to Wolff, to express their moral disapproval of a particular group under *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring), and *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (striking Colorado’s Amendment 2 as irrational because “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”). Wolff, *supra* note 19, at 2231–33. Finally, Wolff argued that states may not discourage migration to the state under *Saenz v. Roe*, 526 U.S. 489, 506 (1999) (stating that “a purpose to deter welfare applicants from migrating to California” would be “unequivocally impermissible”). Wolff, *supra* note 19, at 2236–37.

<sup>179</sup> See, e.g., *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 666 (noting the “appellee seeks to ‘give effect’ to his marriage under Texas law by seeking a division of the parties’ community property in the event they are unable to agree on a property division”).

<sup>180</sup> See Hogue, *supra* note 22, at 240 (referring to a “stricter standard of review because of the fundamental character of the interest involved”). Even without heightened scrutiny, the state cannot be motivated by animus. See, e.g., *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring) (noting that such motivation “runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review”).

<sup>181</sup> *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

<sup>182</sup> *Id.* at 377 (emphasis added). Furthermore, in 1996 the Court described the

its courts, the sole means in Connecticut for obtaining a divorce,” unless Connecticut could demonstrate “a *sufficient countervailing justification*,” the state impermissibly denied them due process.<sup>183</sup> The Court also discussed “other alternatives” available to the state,<sup>184</sup> which suggests it was applying more than a mere rational basis analysis.

The *Boddie* Court ultimately held that “a State may not, consistent with the . . . Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.”<sup>185</sup> To reach this result, the Court relied on the fact that the right to access the courts for a divorce “is the exclusive precondition to the adjustment of a fundamental human relationship” and noted that “resort to the judicial process is entirely a state-created matter.”<sup>186</sup>

Even if a state’s interest in denying its residents access to a forum to pursue a divorce is legitimate, this interest arguably does not rise to the level of “overriding significance.”<sup>187</sup> First, states can grant divorces without recognizing same-sex marriages for purposes of *marriage*. Divorce is arguably “a ‘benefit’ of state residency, rather than a ‘legal protection, benefit, or responsibility’ resulting from marriage.”<sup>188</sup> Courts can grant divorces to same-sex couples lawfully

“fundamental interest at stake” in *Boddie* as “[c]rucial to our decision.” *M. L. B. v. S. L. J.*, 519 U.S. 102, 113 (1996). The Court also acknowledged the “fundamental importance” of “the associational interests that surround the establishment and dissolution of th[e] [marital] relationship.” *Id.* at 114 (citation and quotations omitted).

<sup>183</sup> *Boddie*, 401 U.S. at 380–81 (emphasis added). The Court rejected the state’s interests in preventing frivolous lawsuits, allocation of scarce resources, and balancing defendants’ rights to notice with plaintiffs’ rights to access the courts. *Id.* at 381. The Court concluded that “none of these considerations is sufficient to override the interest . . . in having access to the only avenue open for dissolving their allegedly untenable marriages.” *Id.* The state interest involved here—avoiding implicit approval of same-sex marriage—is stronger than the financial interests asserted in many of the cases involving access to the courts. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 533 (2004) (noting that “ordinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts”). But even the interest of avoiding implicit approval does not appear to rise to the level required by the Court. *See infra* notes 188–92 and accompanying text.

<sup>184</sup> *Boddie*, 401 U.S. at 381.

<sup>185</sup> *Id.* at 383.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 377.

<sup>188</sup> *State v. Naylor*, 330 S.W.3d 434, 441 (Tex. App. 2011). The court also acknowledged that the state statute at issue in *Naylor*, which resembled most states, could be interpreted the statute’s “plain language” as precluding only “actions that create, recognize, or give effect to same-sex marriages on a ‘going-forward’ basis, so that the granting of a divorce would be permissible.” *Id.* The appellate court expressed “no opinion on the merit of these arguments,” but concluded that “the fact remains that there are interpretations of [the Texas divorce statute] that would allow the trial court to grant the divorce without finding the statute unconstitutional.” *Id.* at 442.

married in another jurisdiction and yet refuse, on traditional “marriage” grounds, to provide benefits of marriage, such as tax benefits, spousal immunity, and other rights, to those couples that remain married in the state.<sup>189</sup>

Second, the asserted state interests are not furthered by denying *divorce*. Although those interests create an argument for denying the right to marry, divorce is fundamentally different from marriage. Contrary to marriage, which creates a new familial bond subject to state control, divorce ends the familial relationship.<sup>190</sup> State interests in divorce are not as profound as those relating to marriage. This explains why states generally grant divorces even when they object to the underlying marriage.<sup>191</sup>

Because states generally have an obligation to permit divorces, and because denying same-sex couples the right to divorce raises significant constitutional concerns, states ought to grant divorces in all cases, including those involving same-sex couples.

#### CONCLUSION

Divorce is commonplace in America. Yet for same-sex couples, most of the courts that have considered their divorce petitions have refused to address the merits, holding instead that they lack subject-matter jurisdiction. These courts rely on state constitutional or statutory provisions that prohibit recognizing same-sex marriages entered into elsewhere, or simply on generic principles of statutory construction, to find that there is no valid “marriage” to dissolve.

The problem is created in large part by residency requirements. Same-sex couples often cannot get divorced in the state where they

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<sup>189</sup> See *supra* note 23 (citing commentators that argue under an “incidents of marriage” approach, states can grant divorces without otherwise accepting the validity of an out-of-state same-sex marriage).

<sup>190</sup> See, e.g., *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011) (noting that recognizing a same-sex marriage for purposes of ending the marriage did not lessen the state’s interest in preventing same-sex marriages); Wardle, *supra* note 129, at 590–91 (distinguishing a judicial adoption decree, which begins a family relationship, from a divorce, which “terminates an ongoing relationship” and requires no “further supervision of the spousal relationship”).

<sup>191</sup> See *supra* notes 50–52 and accompanying text (discussing states’ granting of divorces to first cousins and bigamous marriages). Also, the Supreme Court requires that states recognize divorce decrees of other states, *Williams v. North Carolina*, 317 U.S. 287, 302–304 (1942), even when inconsistent with a state’s public policy. See, e.g., Rena M. Lindevaldsen, *Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 WM. & MARY J. WOMEN & L. 29, 65 (2009) (distinguishing a decision “whether to nationalize a parentage standard through the full faith and credit obligation” as raising “unique concerns that are not implicated to the same degree in the Supreme Court precedent requiring a state to give full faith and credit to a divorce decree rendered in another state even if the divorce decree violates the public policy of the receiving state”).

were married because they are not (or are no longer) residents there. But the state where they reside refuses to hear the case.

States have an interest in regulating marriage.<sup>192</sup> But they also have an obligation—both morally and arguably constitutionally—to permit parties to voluntarily terminate their marital relationship. This is especially true when denying subject-matter jurisdiction results in the complete absence of any forum to hear the dispute, creating a “palpable hardship” to the married couple.<sup>193</sup> And because divorce terminates the marital relationship, states do not have the same interests in refusing to grant a same-sex divorce that they would in either prohibiting a same-sex marriage or in recognizing an ongoing same-sex marital relationship<sup>194</sup> within their jurisdiction.<sup>195</sup> Denying the right to divorce means the same-sex couple remains married—precisely the result the state objects to in the first instance.

At least five potential solutions emerge. First, courts can construe their statutes (and constitutions, if applicable) to preclude *furthering* a same-sex marriage but not *dissolving* it. This would permit courts to assert subject-matter jurisdiction and grant same-sex divorces. Second, courts of general jurisdiction can exercise their equity powers to confer subject-matter jurisdiction, in order to avoid “palpable hardship,” and grant same-sex divorces. Third, courts can construe their statutes (and constitutions, if applicable) as violating the Fourteenth Amendment’s Due Process requirement and, accordingly, find that the court has subject-matter jurisdiction and grant same-sex divorces. Fourth, legislatures can repeal state statutes that prohibit recognizing same-sex marriages. Fifth, legislatures can amend their divorce laws to make it clear that even if state statutes generally

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<sup>192</sup> See *supra* note 176 and accompanying text.

<sup>193</sup> *Chambers v. Ormiston*, 935 A.2d 956, 966–67 (R.I. 2007) (asserting that the “court has no power to grant relief in the absence of jurisdiction” and suggesting the legislature ought to solve the problem, but acknowledging that “this observation may be cold comfort to the parties before us”); see also *supra* note 148 (reporting another judge’s acknowledgement of the hardship a same-sex couple would face if the court refused to grant the divorce).

<sup>194</sup> The Wyoming Supreme Court recognized this in *Christiansen*. See *supra* notes 86–88 and accompanying text (discussing the Wyoming Supreme Court’s rationale for allowing a same-sex couple to divorce in Wyoming); see also LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 228 (1981) (“Clearly, a less uniform and less rigid legal system is needed in a pluralistic society as diverse and heterogeneous as ours”).

<sup>195</sup> With regard to on-going court involvement, many states address these issues absent marriage. *Gonzalez v. Green*, 831 N.Y.S.2d 856, 857, 861 (Sup. Ct. 2006) (enforcing the parties’ million dollar separation agreement despite finding no valid Massachusetts same-sex marriage), especially when they involve children, *Jones v. Jones*, 884 A.2d 915, 919 (Pa. Super. Ct. 2005) (granting custody of a minor child to the biological mother’s former same-sex partner). See generally William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135 (2007) (discussing custody disputes between legally unmarried and same-sex couples).

prevent recognizing same-sex marriages for purpose of *marriage*, courts are empowered to grant same-sex *divorces*.

Finally, and perhaps the most appropriate, states that permit same-sex marriage should provide a forum, without residency restrictions, for same-sex divorce.<sup>196</sup> Residency requirements are at the crux of this dilemma. States that helped create this conflict—those that grant same-sex marriages—ought to help solve it.

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<sup>196</sup> After this Article was written, the District of Columbia passed a bill doing just that. D.C. CODE § 16–902(b)(1) (effective April 19, 2012). That statute states:

An action for divorce by persons of the same gender, even if one of or neither party to the marriage is a bona fide resident of the District of Columbia at the time the action is commenced, shall be maintainable if the following apply:

(A) The marriage was performed in the District of Columbia; and

(B) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce; provided that it shall be a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.