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Cover Page Footnote

Ms. Lowrey is a third-year law student at Campbell University Law School. She holds a B.S. in International Law and Comparative Legal Studies from the United States Military Academy at West Point. Prior to starting law school, Ms. Lowrey was a commissioned Aviation Officer in the United States Army. A special thank you to Eugene Volokh, Gary T. Schwartz, Professor of Law at UCLA School of Law, for his feedback on this comment. Additionally, thank you to Associate Professor Anthony Ghiotto and Professor Lisa Lukasik at Campbell University School of Law for their assistance with brainstorming, researching, and editing this piece.

Hopefully Enduring: How North Carolina's Divorce Laws Violate the First Amendment

Maren H. Lowrey[*]

ABSTRACT

The phrase "til death do us part" is both poetic and aspirational. It is the ubiquitous vow Americans make to one another when they marry[1] and embark on what is "hopefully enduring."[2] But life does not always meet the aspirational marks we set and that is most true in the context of marriage and divorce. Each state enjoys nearly exclusive control over this intimate relationship, which results in different regulatory schemes across the United States.[3] Changes in Supreme Court jurisprudence over

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[1] Caralynn Lippo, *Why We Say "Until Death Do Us Part" In Wedding Vows*, REDBOOK (Apr. 24, 2017), https://www.redbookmag.com/love-sex/relationships/a49934/until-death-do-us-part-wedding-vows-origin/#:~:text=The%20oldest%20standard%20wedding%20vows,to%20love%2C%20cherish%2C%20and%20to.

[2] Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, *hopefully enduring,* and intimate to the degree of being sacred.") (emphasis added).

[3] Boddie v. Connecticut, 401 U.S. 371, 385 (1971) (Douglas, J., concurring) ("The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions."); Sosna v. Iowa, 419 U.S. 393, 404 (1975) ("The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic

time ensured state regulation of marriage did not run afoul of the Constitution.[4] These decisions found marriage to be a fundamental right under the Fourteenth Amendment.[5] The Court addressed the issue of divorce in the same context.[6] But the Court has yet to squarely address the issue of marriage and divorce under the First Amendment. Divorce might very well be a fundamental right under a similar substantive due process analysis, but that is not the only potential source of its constitutional protection.[7] This comment provides the framework to argue that North Carolina's year-long separation requirement is unconstitutional under the First Amendment because it violates an individual's right to freedom of expressive association, freedom of intimate association, and freedom from compelled speech.

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relations, an area that has long been regarded as a virtually exclusive province of the States.").

[4] *See* Zablocki v. Redhail, 434 U.S. 374, 375 (1971); *see also Sosna*, 419 U.S. at 404; *see also* Loving v. Virginia, 388 U.S. 1, 2 (1967); *see also* Obergefell v. Hodges, 576 U.S. 644, 645 (2015).

[5] *Loving*, 388 U.S. at 12.

[6] *Boddie*, 401 U.S. at 374 (holding a Connecticut divorce law unconstitutional per the due process clause of the Fourteenth Amendment because the law denied access to the courts based on an inability to pay fees).

[7] *See* Cathy J. Jones, *The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 WASH. U. L. REV. 577, 579-588 (1985); *see also* Elizabeth Horowitz, *The "Holey" Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws*, 8 U. PA. J. CONST. L. 877, 879 (2006).

INTRODUCTION

Marriage continues to be a cornerstone of our social order. Its value is illustrated not just by the recent fight for marriage equality for

homosexual citizens[8] but in the myriad of ways that marriage stabilizes society.[9] The Supreme Court's jurisprudence around this historic union highlights that marriage is a fundamental right guaranteed by our Constitution. But the Court also recognizes that divorce laws are subject to judicial scrutiny; the power of the State to regulate the termination of a marriage is not absolute.[10]

North Carolina's no-fault divorce scheme previously required parties seeking a divorce to either live separate and apart for two years[11] or pursue a divorce through one of the at-fault options.[12] In 1966, the legislature reduced the required time period to one year.[13] That same year, the State provided that an at-fault ruling amounts to "nothing more than a judicial separation."[14] In effect, this required that *every* party seeking divorce comply with the year-long separation period before being awarded an absolute divorce. North Carolina, as a matter of policy, views marriage as a fundamental keystone of civilization.[15] This is not an unfounded policy as marriage helps promote better childhood outcomes, economic stability, and social stability.[16] The State certainly has a compelling interest in regulating marital relationships, both at their inception and dissolution.

The year-long separation period, however, is a blanket policy that applies to every couple no matter the reason the party is seeking a divorce.[17] This policy and accompanying regulatory scheme raise several questions. Is *any* marriage better than *no* marriage? Is the State's compelling interest and current regulation sufficient to outweigh the individual liberties protected by the Constitution as it relates to decision-making in familial relationships? If the State cannot regulate a couple's decision-making *within* the marital union, then to what extent can the State regulate decision-making on whether to remain within a marital

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[8] *See Obergefell*, 576 U.S. at 645 (where the Supreme Court recognized marriage equality under the Fourteenth Amendment).
[9] *See Zablocki*, 434 U.S. at 384; *see also Loving*, 388 U.S. at 12; *see also Obergefell,* 576 U.S. at. 657
[10] *Boddie*, 401 U.S. at 374.
[11] N.C. GEN. STAT. § 50-6 (1950).
[12] N.C. GEN. STAT. § 50-7 (1950).
[13] N.C. GEN. STAT. § 50-6 (1966).
[14] N.C. GEN. STAT. § 50-7 (1966).
[15] McLean v. McLean, 237 N.C. 122, 126 (1953) (Barnhill, J., concurring).
[16] Ron Haskins, *Marriage, Parenthood, and Public Policy*, 21 NAT'L AFFAIRS 55, 55, 65 (2014).
[17] N.C. GEN. STAT. § 50-6 (2021).

union at all? Does a year-long separation period actually promote reconciliation, or are there less intrusive ways for the State to discourage divorce for those couples who might be able to reconcile?

The Supreme Court has addressed constitutional issues related to divorce before, but on the merits has never squarely considered how divorce (or marriage) might be protected by the First Amendment alone (instead addressing divorce law under the Fourteenth Amendment).[18] This comment presents the argument that North Carolina's current no-fault requirements to obtain a divorce violates an individual's First Amendment rights in three ways: (1) freedom of expressive association, (2) freedom of intimate association, and (3) freedom from compelled speech. The first section is an overview of North Carolina's divorce law and the Supreme Court's current jurisprudence on marriage and divorce. The following three sections analogize Supreme Court jurisprudence on each freedom to the issue of divorce. These sections will show that divorce is not just the inverse of the fundamental right to marriage (under a substantive due process argument), but it is also its own separate right protected by the First Amendment. The fifth section addresses the appropriate burden to apply to state divorce law and why North Carolina's laws fail to meet that burden. Finally, the sixth section proposes different regulatory schemes that will better protect an individual's First Amendment rights better achieve the State's policy of protecting the sanctity of marriage.

NORTH CAROLINA DIVORCE LAW AND THE SUPREME COURT'S CURRENT JURISPRUDENCE ON MARRIAGE AND DIVORCE

The starting point for this discussion is the current state of the law. This section highlights North Carolina's current scheme of divorce law, the State's justification for requiring a year-long separation period, and

[18] The cases generally approach the topics of marriage and divorce from a Fourteenth Amendment perspective, either under equal protection, due process, or substantive due process. *See generally* Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding Virginia's miscegenation statute unconstitutional under the equal protection clause); *Boddie*, 401 U.S. at 374 (holding a Connecticut law unconstitutional per the due process clause of the Fourteenth Amendment because the law denied access to the courts based on an inability to pay fees); *Zablocki*, 434 U.S. at 375–77 (holding a Wisconsin statute that required individuals seeking marriage to show they are current on child support payments and the child is not likely to become a public charge before being granted permission to marry unconstitutional under the equal protection clause).

the Supreme Court's jurisprudence on divorce (and the marital relationship, more generally).

A. North Carolina's Current Statutory Scheme of Divorce Laws

It is important to start by recognizing that North Carolina's divorce laws are neither the most restrictive in the country, nor the least. Prior to adopting a no-fault divorce scheme, North Carolina required a party to prove one of six fault-based grounds: (1) abandonment, (2) maliciously turning the other out, (3) cruel or barbarous treatment, (4) intolerable life conditions, (5) excessive alcohol or drug use, or (6) adultery.[19] North Carolina later adopted a no-fault only scheme for obtaining an absolute divorce.[20] This scheme allows parties to obtain a judgement of absolute divorce from state courts by meeting two requirements: (1) six-month residency and (2) a continuous, year-long separation.[21] This comment will focus solely on the separation period and will assume residency is not at issue.

Fault-based divorce laws still exist in North Carolina,[22] but even after a party proves one of the fault-based conditions, the State still requires a one-year separation period before it will grant an absolute divorce.[23] A judgment under the fault-based statute is merely a judicial separation; it is not an absolute divorce.[24] Moreover, the separation period is just the first hurdle. A party may not even file for divorce until they can show the separation period requirement is met.[25] From there, a contested divorce can prolong the proceedings.

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[19] N.C. GEN. STAT. § 50-7 (2019).
[20] N.C. GEN. STAT. § 50-7 (1966) (providing that "a divorce from bed and board is nothing more than a judicial separation).
[21] § 50-6.
[22] § 50-7 (2019).
[23] *Id*.; Schlagel v. Schlagel, 253 N.C. 787, 790 (1961) ("A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond.").
[24] *Schlagel*, 253 N.C. at 790. Parties can also obtain an absolute divorce by showing incurable insanity; but this requires a three-year separation period. N.C. GEN. STAT. § 50-5.1 (2019). Because this timeframe is longer than that of the one-year separation requirement, this comment will focus on the more widely applicable and shorter separation period.
[25] § 50-6 (2019).

B. The Separation Justification

As a general matter, the Supreme Court upheld a state's right to regulate marriage and divorce.[26] The Court announced that states have a compelling interest in maintaining the sanctity of these relationships because of the societal values associated with marriage.[27]

North Carolina, specifically, has a strong policy of favoring marriage over non-marriage.[28] This is evidenced not just by the scheme of divorce laws adopted, but by the State's continued adherence to heart balm torts which provide a civil cause of action against those who negatively affect marital relations.[29]

The State's policy preference can be justified by the various positive outcomes related to marriage. The most impactful positive outcome relates to childhood development. Children raised in a two-parent household where the parents are married outperform their peers raised in non-marriage households in nearly every performance metric available.[30] Marriage also promotes social and economic stability in communities.[31] But these statistics have some limitations. The question of whether these outcomes are true, no matter the stability of the marriage, is difficult to answer.[32]

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[26] *Boddie*, 401 U.S. at 385 (Douglas, J., concurring) ("The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions."); *Sosna*, 419 U.S. at 404 ("The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States.").

[27] Griswold, 381 U.S. at 496–98 (Goldberg, J., concurring).

[28] Jessica T. Burgess, *Avoiding Wonderland: Clarifying Marriage Requirements in North Carolina*, 35 CAMPBELL L. REV. 227, 235 (2013) (compiling cases in which courts upheld marriages as valid despite failure to comply with statutory requirements).

[29] Malecek v. Williams, 804 S.E.2d 592, 594 (N.C. Ct. App. 2017).

[30] W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFFAIRS 81, 84 (2009).

[31] HASKINS, *supra* note 17, at 55.

[32] Meaning, are children raised in a home with married parents that abuse one another still going to experience better outcomes than if they are raised in a household with divorced parents?

C. The Supreme Court's Jurisprudence on Marriage and Divorce

The Supreme Court has addressed marriage on several occasions—most recently in *Obergefell v. Hodges*.[33] Relying on precedent laid out in *Loving v. Virginia*, the Court extended the fundamental right to marry to same sex couples.[34] Both landmark cases addressed marriage under the Fourteenth Amendment. Thus, the Court resolved these issues as products of equal protection arguments.[35]

The Court also considered the issue of divorce before, but again in light of challenges to State regulation under the Fourteenth Amendment. In *Boddie v. Connecticut*, the Court struck down a state law that denied access to the courts to seek a divorce because the parties could not afford to pay the applicable court fees.[36] The Court found the State's bar to access for inability to pay court fees violated the Fourteenth Amendment for two reasons.[37] First, the Due Process Clause requires that individuals have an *opportunity* to be heard, and the financial bar to access amounted to the State denying the parties' constitutionally protected opportunity.[38] Second, the State applied the regulation in an unconstitutional manner because although court fees are valid, they cannot act as an absolute bar to court access.[39]

Recent scholarship on the constitutional questions about divorce tends to make the argument that divorce, like marriage, is a substantive due process right.[40] This analysis brings about the same conclusion presented in this comment: state regulation of divorce is subject to more rigorous constitutional scrutiny than rational basis review.

Although a substantive due process analysis is fitting for the issue of divorce, the Court also has a line of jurisprudence related to First Amendment issues of freedom of expressive association, freedom of intimate association, and freedom from compelled speech. Rather than substantive due process, these cases raise a different question: to what extent do marriage and divorce implicate these associational freedoms recognized by the court; and, how might a state-imposed continuation of

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[33] *Obergefell*, 576 U.S. at 655.
[34] *Id.* at 728.
[35] *Id*. at 655; *Loving*, 388 U.S. at 2.
[36] *Boddie*, 401 U.S. at 374.
[37] *Id*.
[38] *Id*. at 378–79.
[39] *Id*. at 380.
[40] *See* HOROWITZ, *supra* note 8, at 883; *see also* Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 CLEV. ST. L. REV. 89, 90 (2020).

this legal relationship amount to compelled speech? This comment addresses those questions and answers in the affirmative: divorce falls within the spectrum of protected associations and speech, such that, North Carolina's regulation of it must comport with the appropriate constitutional standard of review.

FREEDOM OF EXPRESSIVE ASSOCIATION

The First Amendment protects more than an individual's right to speak freely.[41] It also protects an individual's freedom to associate with others.[42] This associational right is derived from the right to free speech.[43] There are some associations the Supreme Court has recognized that enjoy constitutional protections because they are integral to an individual's ability to exercise their First Amendment rights fully.[44]

This section explores what expressive association is, how the Court analyzes expressive associations cases, how divorce falls within this jurisprudential framework, how North Carolina divorce law violates this right, and potential limitations to expressive associations.

A. Freedom of Expressive Association Defined

The First Amendment protects the right of individuals to associate in order to engage in expression—the freedom of expressive association.[45] It is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[46] This right, of course, is not without its limitations. The group must engage in "some form of expression, whether it be public or private,"[47] but the group need not associate solely for the purpose of "disseminating a certain message" to enjoy First Amendment protections.[48]

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[41] Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); NAACP v. Ala. *ex rel*. Patterson, 357 U.S. 449, 462 (1958).
[42] *Dale*, 530 U.S. at 650.
[43] *Id.*
[44] *NAACP*, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." (citations omitted)).
[45] *Dale,* 530 U.S. at 648.
[46] *Roberts*, 468 U.S. at 622.
[47] *Dale,* 530 U.S. at 648.
[48] *Id.* at 655.

There is a spectrum of associational relations.[49] Some associations are impersonal and transactional; others are intimate and private. This spectrum requires "careful assessment" of any given association in order to determine how much protection it might be afforded.[50] The Court views private associations as the most protected, while transactional associations are the least protected.[51] The kinds of associations that are *not* protected under the umbrella of expressive associations are generally recreational in nature, with a loose connection built merely by proximity in time, place, or activity.[52] The kinds of expressive associations that *are* protected under the umbrella of expressive associations include civic organizations, clubs for childhood development, and parades.[53] The Fourth Circuit even recognized an expressive association among members of a university fraternity.[54]

Most important to the analysis of this right, in the context of divorce, is that the freedom to associate "plainly presupposes a freedom to not associate."[55] The Court upheld the right to exclude members from expressive associations in *Dale*.[56] Because the marital relationship falls within the confines of protected expressive associations, it may be inferred this freedom to not associate includes the freedom to not associate with a spouse.

B. Freedom of Expressive Association Applied

The Court's jurisprudence on expressive association—specifically the right to exclude certain people from an expressive association—is best exemplified in *Boy Scouts of America v. Dale*[57] and *Roberts v.*

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[49] *Roberts*, 468 U.S. at 620.
[50] *Id.* ("Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").
[51] *Id.* ("Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").
[52] Dallas v. Stanglin, 490 U.S. 19, 24-25(1989).
[53] *Dale*, 530 U.S. at 650; *Roberts*, 468 U.S. at 622; *NAACP*, 357 U.S. at 462.
[54] Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson, 566 F.3d 138, 146–47 (4th Cir. 2009).
[55] *Roberts*, 468 U.S. at 623.
[56] *Dale*, 530 U.S. at 645.
[57] *Id.* at 644.

United State Jaycees.[58] In both cases, the Court considered the issue of whether an organization could exclude certain classes of people in light of state anti-discrimination statutes.[59] While the outcomes in both cases were different, the Court applied the same framework. First, is the organization an expressive association such that it is protected by the First Amendment?[60] Second, by forcing the association to accept members the group would otherwise exclude, did the State law "impermissibly burden" or "significantly affect" the group's expression?[61]

In *Boy Scouts of America v. Dale*, the Court upheld the exclusionary right of the Boy Scouts of America.[62] At issue in *Dale* was New Jersey's public accommodations law which prohibited discrimination on the basis of sexual orientation.[63] Dale, an Eagle Scout and Assistant Scoutmaster, publicly declared himself as homosexual and became a gay rights activist in the 1990s.[64] As a result of his sexual orientation, the Boy Scouts revoked his membership and title because the organization did not condone homosexuality.[65] After filing suit against the Boy Scouts under the State's public accommodations law, the New Jersey Supreme Court held that the Boy Scouts must comply with the law, forbidding the group from excluding Dale because of his sexual orientation.[66] In short, the New Jersey Supreme Court found that the organization did not fall within the ambit of protection as an expressive association and therefore did not enjoy exclusionary rights.[67]

The Supreme Court's analysis started with the recognition that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of *expressive association* if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[68] But, to enjoy this protection, the organization must

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[58] *Roberts*, 468 U.S. at 609.
[59] *Roberts*, 468 U.S. at 612; *Dale*, 530 U.S. at 643.
[60] *Roberts*, 468 U.S. at 621; *Dale*, 530 U.S. at 648.
[61] *Roberts*, 468 U.S. at 621–22; *Dale*, 530 U.S. at 650.
[62] *Dale*, 530 U.S. at 642.
[63] *Id*. at 645.
[64] *Id.* at 644–45.
[65] *Id.* at 645.
[66] *Id.* at 646.
[67] *Id*.
[68] *Dale*, 530 U.S. at 648 (citing N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 13 (1988)) (emphasis added).

be sufficiently "expressive."[69] The Court did not define exactly what a group must do in order to be sufficiently expressive, but it did highlight that the group need not be associated for the purpose of advocating a particular viewpoint or agenda.[70] Instead, the "group must engage in *some form of expression*, whether it be public or private."[71]

The Court determined the Boy Scouts fell within this definition based on the following:

> It is a private, nonprofit organization;
>
> It has a mission statement and oath;
>
> Adult leaders spend time with youth members in order to instill the mentioned values;
>
> Adult leaders instruct youth members on various outdoor activities;
>
> Adult leaders inculcate Boy Scouts with the group's values ("expressly and by example").[72]

The Court provided no analysis on how exactly these facts amounted to expression. The majority opinion instead simply stated, "[t]he Boy Scouts engage[] in expressive activity . . . ."[73]

The Court then considered whether the "forced inclusion" of *Dale* would "significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[74] This required the Court to consider what the Boy Scouts believed about homosexuality. In addition to a handful of internal communications between executive members, the Scout oath and law commanded young boys to remain "morally straight" and "clean."[75] The Court adopted the representations proffered by the Boy Scouts that these words meant young men were not meant to engage in homosexual activity. The Court stated it had no role in evaluating the consistency—or inconsistency—with these words and the group's internal operations.[76]

The Court considered exactly what kind of burden Dale's inclusion would place on the Boy Scouts, determining that at a minimum his

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[69] *Id.*
[70] *Id*.
[71] *Id.* (emphasis added).
[72] *Id.* at 649–50.
[73] *Id.* at 650.
[74] *Dale*, 530 U.S. at 650.
[75] *Id.* at 649.
[76] *Id.* at 651.

presence would require the organization to send an implicit message condoning homosexual conduct.[77] It did not matter to the Court that the Boy Scouts were not associating to petition against homosexuality overtly.[78] Instead, the Court applied a rather deferential standard: "An association must merely engage in expressive activity that *could* be impaired in order to be entitled to protection."[79] The Court rejected the argument that because heterosexual members could be gay allies the Scout message was inconsistent.[80] According to the Court, expressive associations must not consist of individuals with homogenous views about every issue.[81] But in Dale's case, the public nature of his sexuality coupled with the Boy Scout's official policy were too incongruous to mandate inclusion, even under a state public accommodation law.[82] The Court determined there was a distinct difference between a heterosexual person who supported gay rights wearing a Scout uniform and a homosexual person wearing a Scout uniform: the latter sent a "distinctly different message."[83]

Dale highlights two key points. First, expressive association rights are not limited to certain types of groups pursuing more traditional forms of free speech.[84] While expressive association protections might be heightened for religious or political associations, the Court here extended the protection to a non-political, non-religious organization.[85] The Court provided clear guidance. First, there must simply be some form of expression from the association in order to enjoy the right of exclusion.[86] Second, the Court is deferential to an association's representations on

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[77] *Id.* at 654 (Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that Boy Scouts accepts homosexual conduct as a legitimate form of behavior.).
[78] *Id.* at 655.
[79] *Id.* (emphasis added).
[80] *Dale*, 530 U.S. at 655.
[81] *Id.*
[82] *Id.* at 655–56.
[83] *Id.* ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.").
[84] *Id*. at 655 ("First, associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment.").
[85] *Dale*, 530 U.S. at 650.
[86] *Id.*at 648.

what exactly their expression is.[87] Although Dale made strong, logical arguments about the contrary nature of the Boy Scout's official position on homosexuality, the Court refused to look behind the curtain and instead adopted the association's official position on its face.[88] In the context of divorce, this is important because *Dale* left the door open to include the marital relationship within the umbrella of expressive association *and* upheld a right of exclusion.

Conversely, in *Roberts v. United States Jaycees*, the Court denied exclusionary rights protection to the Jaycees.[89] The Minnesota chapters of the United States Jaycees admitted women as regular members for approximately ten years before the national organization threatened to revoke their charters.[90] Minnesota courts determined that the exclusion of women violated the Minnesota Human Rights Act, which forbade discriminatory practices in places of public accommodation on the basis of sex.[91] Eventually, the national organization sued Minnesota claiming the anti-discrimination statute violated the organization's "constitutional rights of free speech and association" because requiring women be admitted to a traditionally all-male organization would substantially and directly interfere with their policies.[92] The Court of Appeals determined that Minnesota's statute violated the Jaycee's right to "select its members [as] protected by the *freedom of association* guaranteed by the First Amendment."[93]

The Supreme Court's analysis began by affirming that the freedom of association is protected "as a fundamental element of personal liberty."[94] The protection of associational freedoms is a derivate right, necessary to ensuring those rights central to the First Amendment—

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[87] *Id*. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").
[88] *Id*. at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.").
[89] *Roberts*, 468 U.S. at 612.
[90] *Id.* at 614.
[91] *Id.* at 614–17.
[92] *Id.* at 615.
[93] *Id.* at 616–17 (quoting U.S. Jaycees v. McClure, 709 F.2d 1560, 1570 (8th Cir. 1983)) (emphasis added).
[94] *Id.* at 618.

"speech, assembly, petition for redress of grievances, and the exercise of religion"—are protected from government infringement.[95]

The Court then considered whether the Jaycees, as an organization, was protected by the guarantee of expressive association rights.[96] The Court determined this case implicated expressive association rights because "of the various protected activities in which the Jaycees engage[d]. . . ."[97] While the majority did not provide analysis on what exactly made the Jaycees organization subject to expressive association protections, the Court did discuss the following:

> The Jaycees is a non-profit organization;[98]
>
> The group pursued "educational and charitable purposes" as a civic organization;[99]
>
> There were bylaws establishing membership requirements (allowing only men to become full members);[100]
>
> Members had to pay dues and fees;[101]
>
> The national offices made available "*to members* . . . travel accessories, casual wear, pins, awards, and other gifts."[102]

The Court then analyzed to what extent the Minnesota anti-discrimination statute infringed on the Jaycee's expressive association rights. The Court acknowledged that there are many ways in which a state may infringe on these rights, such as imposing penalties, withholding government benefits, requiring disclosure of membership, or interfering with the internal organization of the group.[103] However, the Court categorized forced inclusion as the clearest example of intrusion into an association's internal structure, stating plainly: "Freedom of

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[95] *Roberts*, 468 U.S. at 618, 622 ("The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.") ("We have long understood as implicit in the right to engage in activities protected by the First Amendment, a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").
[96] *Id.* at 622.
[97] *Id.*
[98] *Id.* at 612.
[99] *Id.*
[100] *Id.* at 613.
[101] *Roberts*, 468 U.S. at 613.
[102] *Id.* at 614 (emphasis added).
[103] *Id.* at 622–23.

association . . . plainly presupposes a freedom *not* to associate."[104] Recognizing that there are limitations to these freedoms, the Court also provided potential justifications for when a state might legitimately involve itself in an association's activities: government intrusion "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[105]

Ultimately, the Court was not convinced that forced inclusion of women in the Jaycees impermissibly burdened the group's expressive rights.[106] In part, because the Jaycees failed to show that the mere presence of women as full voting members would "impede[] the organization's ability to engage in . . . protected activities or to disseminate its preferred views."[107] Inclusion of women, in short, would not affect the civic pursuits of the organization.[108] Moreover, the organization had a long history of allowing women to participate in all of its activities, just without the membership designation.[109]

A third case, *Dallas v. Stanglin*, provides a limit, so to speak, on how far the Court is willing to extend expressive associational protections. In *Dallas*, the Court did not extend expressive associational protections to patrons of a dance hall.[110] The dance hall owner challenged a Dallas city ordinance that restricted access to certain dance halls based

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[104] *Id.* at 623 (emphasis added).
[105] *Id*.
[106] *Id.* at 627.
[107] *Roberts*, 468 U.S. at 627.
[108] *Id.* ("The [anti-discrimination statute] requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of existing members.").
[109] *Id.* ("Moreover, the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.").
[110] Dallas v. Stanglin, 490 U.S. 19, 24 (1989) ("These opportunities might be described as 'associational' in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee.").

on age and time of day.[111] The owner claimed the ordinance violated (among other things) the First Amendment rights of minors to associate.[112] The Texas Court of Appeals determined the ordinance violated a minor's First Amendment associational rights (as to the age restriction) based on a "fundamental right of '*social* association.'"[113] The court argued that rational basis scrutiny was inappropriate, and the ordinance failed to satisfy the higher burden of strict scrutiny.[114]

The Supreme Court began by identifying the right at issue; it disagreed with the Texas Court of Appeals in finding an associational right implicated. Citing to *Roberts*, the Court found that the minors who frequented the dance hall were not in any kind of associational relationship—expressive or otherwise.[115] Integral to this finding was the sheer number of teenagers involved on any given night, the fact that many of them were strangers to one another, and the strongest connection among them was that they were patrons of the same business.[116] Moreover, the dance hall had only two requirements: (1) fall within the ordinance's age requirements and (2) pay the admission fee.[117]

After finding error in the analysis of the First Amendment right of association in relation to these facts, the Court went on to evaluate the appropriate standard of scrutiny.[118] Because there was no First Amendment right at issue, the Court determined rational basis scrutiny was appropriate (as an age-based category under the Equal Protection clause) and upheld the ordinance.[119]

Combining these three precedential cases, it is clear the first question is whether the association is sufficiently expressive in order to enjoy First Amendment protections. If the association is expressive, the

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[111] *Id.*at 22.
[112] *Id.*
[113] *Id.* at 23 (emphasis added).
[114] *Id.* at 22–23.
[115] *Id.* at 24.
[116] *Dallas*, 490 U.S. at 24–25 ("These opportunities might be described as 'associational' in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of an organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee.").
[117] *Id.* at 24–25.
[118] *Id.* at 25.
[119] *Id.* at 25–26, 28.

next question is whether the forced inclusion of certain members would impermissibly affect the expression. Although *Roberts* yielded a different result than *Dale*, the key difference is in the question of *how* forced inclusion would affect the association's expression. The Court based their rejection of the Jaycees' argument that forced inclusion of women would affect the association's expression on the fact that the Jaycees knowingly allowed women to participate in all of their functions, just without official membership.[120] The Boy Scouts, however, had (ostensibly) not let openly homosexual people join their organization.[121]

In the context of divorce, this analysis is crucial. If the marital relationship falls within the ambit of protection for expressive association, then how does the forced inclusion of parties to that association affect their desired message? The next section addresses both issues and presents the argument that the marital relationship falls within the Court's parameters of an expressive association, and like *Dale*, forced inclusion would violate the associational rights protected by the First Amendment.

C. Freedom of Expressive Association and Divorce

Of course, the first question is whether the divorce is sufficiently expressive to bring it within the umbrella of First Amendment protections. The analysis must recognize that divorce is predicated upon the existence of a marital relationship. If the act of getting married, or the marital relationship, are at all expressive, then their inverse—getting a divorce and being divorced—are as well.

First, marriage is a form of expressive association because it encompasses many of the types of activities and aims the Supreme Court, Fourth Circuit, and North Carolina courts have considered sufficiently expressive in the past.

In *Dale*, the Court noted that the Boy Scouts are a private organization that established their own rules, oaths, and membership requirements.[122] Similarly, the Fourth Circuit made note of the same characteristic when evaluating the expressive rights of a college fraternity.[123] Conversely, the Court ruled that mere attendance at a public dance hall did not create expressive associational rights between

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[120] *Roberts*, 468 U.S. at 627.
[121] *Dale*, 530 U.S. at 644, 675.
[122] *Id.* at 649–50.
[123] Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson*,* 566 F.3d 138, 146–47 (2009).

patrons.[124] Marital relationships are perhaps the most private human relationship of all. The Court's consideration of private versus public organization weighs in favor of finding expressive associational rights for the marital union.

The Court in *Dale* also considered the Boy Scout oath in its evaluation of the group's right to expressive association.[125] While the Court did not explain exactly how the oath weighed in favor of declaring the Boy Scouts an expressive association, several inferences can be drawn. First, an oath is an actual expression in and of itself. Individuals within the association tend to take the same oath adopted by the association. Second, these oaths serve as the standards for conduct while participating as a member. Likewise, married couples make vows to one another during a marriage ceremony. These vows also tend to serve as a framework for what each partner promises to the other during the marriage: loyalty, support, fidelity, or encouragement. The presence of an oath—one that unites the individual members to the identity of the association—is powerful evidence that the association is expressive. It signals that the individual members of the body ascribe to the vision of the whole. Marital vows signal the same adoption of a unified body between the members.

Outward expression of membership was also part of the Court's analysis in *Roberts* and *Dale*.[126] In *Roberts*, the Court identified that members of the Jaycees wore lapel pins and other accouterment that were only available to full-fledged members.[127] In *Dale*, the Court placed significant weight on the idea that the mere presence of Dale wearing a Boy Scout *uniform* would affect the group's expression.[128] These points highlight that the outward representation of membership in an association helps further the expression of the association. For example, boys wear Boy Scout uniforms but girls do not.[129] This helps further the

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[124] *Stanglin,* 490 U.S. at 24–25.
[125] *Dale,* 530 U.S. at 650.
[126] *Dale,* 530 U.S. at 656; *Roberts*, 468 U.S. at 614.
[127] *Roberts*, 468 U.S. at 614.
[128] *Dale,* 530 U.S. at 656.
[129] *See generally, SCOUTS Youth 11-17 years old: Ready to Join?*, BOY SCOUTS OF AM., https://www.scouting.org/scoutsbsa/ (last visited Apr., 9, 2022) (At least at the time *Dale* was decided this was true; since that Court opinion, the Boy Scouts of America have allowed female Scouts to join. The website provides that "[f]or the first time in its 100+ year history, the iconic program of the Boy Scouts of American is open to young women as well as young men, all of whom will have the change to earn Scouting's highest rank, Eagle Scout."

association's expression that it existed to develop boys, not girls. In most cultures, people outwardly represent their marital status by wearing (or not wearing) marital accessories. In in the United States, the tradition takes the form of wearing a wedding band on the left-hand ring finger. This outward representation expresses, without the need for any spoken words, the following: I am married and am not romantically available.

There are other expressions somewhat unique to the marital relationship. The first is that culturally, the married couple may start collectively representing themselves in public as "The Smith's" or "The Wellington Family." In heterosexual couples, it is still culturally common for wives to adopt their husband's last name. This is also true for women who use the title "Missus" instead of "Miss." Each of these changes colloquially or officially signal that not only does the marital relationship exist, but that the person is a member of it. This signal carries certain societal expectations, private expectations, and legal benefits and obligations.

Interestingly, the courts above did not explicitly consider the pursuits of the various associations. The Court in *Dale* even explicitly denied that a group must be of a particular pursuit to enjoy expressive association protections.[130] Regardless, in analyzing whether a group is sufficiently expressive to bring it within these protections, the group's end goal is seemingly less relevant than the aforementioned considerations.

These considerations (privacy, vows / oaths, and outward expression of membership) that brought the Boy Scouts and the Jaycee's within the protections of expressive association are equally applicable to the marital relationship. The expression is this: *I am part of a marital union and am no longer romantically available. I uphold the marital vows I took to my spouse.*

Divorce is the inverse of this expressive association. In seeking a divorce, a party expresses their desire to no longer be bound by the vows once expressed. They stop wearing marital accouterment, change names, and send a different message: *I am no longer part of a union and may be romantically available.* A divorce is more than a resumption of being single, and it requires more than simply removing oneself from a committed partner. It requires the dissolution of a legally binding relationship. The sheer number of substantial changes that take effect

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But prior to this change, because girls could not become members of the Boy Scouts, they could not wear Scout uniforms. Now they can.).

[130] *Dale,* 530 U.S. at 648.

upon a divorce (in terms of default legal rules and societal expectations) make it more than a simple break-up. It is the dismantling of a union.

D. North Carolina's Divorce Law Infringes on the Freedom of Expressive Association Because it Impermissibly Forces Inclusion

E. What are the Potential Limits to Expressive Association Rights?

FREEDOM OF INTIMATE ASSOCIATION

In addition to protecting the freedom of expressive association, the First Amendment also protects an individual's freedom of intimate association.[139] This section explores what intimate association is, how the Court has approached intimate association issues, how divorce falls within this jurisprudential framework, and how North Carolina's laws violate this right.

A. Freedom of Intimate Association Defined

The source of the right to intimate association is not perfectly clear, but scholars argue it stems from the Court's jurisprudence in *Griswold v. Connecticut* and *Lawrence v. Texas*.[140] More importantly, the Court has since expressly provided that the right of association takes two forms: expressive and intimate.[141]

In *Griswold*, the Court created a "penumbra" of privacy rights that gave legal scholars ample fodder to craft decades worth of law review articles.[142] On the narrow issue of intimate association as a protection provided by the First Amendment though, the Court provided some clearer guidance. The Court first acknowledged that associational freedoms are rights peripheral to the First Amendment.[143] This means that while the First Amendment may not explicitly use the word "associate," an association between individuals is often necessary to ensure citizens enjoy the full exercise of their First Amendment rights.

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[139] *Roberts*, 468 U.S. at 617–18.
[140] *See* Kenneth L. Karst, *THE FREEDOM OF INTIMATE ASSOCIATION,* 89 YALE L. J. 624, 624-25 (1980); *See also* Nancy Catherine Marcus, *THE FREEDOM OF INTIMATE ASSOCIATION IN THE TWENTY FIRST CENTURY*, 16 GEO. MASON U. CIV. RTS. L. J. 269, 270 (2006).
[141] *Roberts*, 468 U.S. at 617-18; *See also* Willis v. Town of Marshall, N.C., 426 F.3d 251, 258 (4th Cir. 2005).
[142] *Griswold*, 381 U.S. at 485–86.
[143] *Griswold*, 381 U.S. at 483 (citing *NAACP*, 357 U.S. at 462).

For example, individuals who want to assemble or petition the government must be able to communicate among one another in order to assemble and organize a petition. At times, intimate associations are also necessary to allow citizens to enjoy the full exercise of their First Amendment rights in areas like religion.[144]

But as for the marital relationship, the Court has been quick to acknowledge it falls in a category of its own because of its history, tradition, and importance to society at large.[145] The language of the Court in *Griswold* is almost poetic: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. *Marriage is . . . intimate* to the degree of being sacred. It is an association that promotes a way of life, not causes."[146]

The source of intimate association rights under the First Amendment in *Lawrence* is more difficult to draw because the Court considered Texas's anti-sodomy law in light of a challenge to the Fourteenth Amendment.[147] In fact, the opinion never mentions the First Amendment by name. However, the Court rightly discusses the sexual relationship at issue as one of "intimate conduct."[148] Even though the merits of the case did not address First Amendment challenges to intimate association, the Court recognized where consensual sexual conduct is at stake, the issue is clearly one of *intimacy*.[149] This is especially important because the parties in *Lawrence* were not married.[150] They simply engaged in consensual, sexual conduct.[151] Marriage is an association that encompasses more than just sexual conduct. If sex alone is sufficient to bring a relationship within the ambit of intimate association protections, then marriage exceeds that threshold.

The Court in *Roberts* expressly recognized the existence of the right to intimate association for the first time.[152] In doing so, it provided

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[144] *Roberts*, 468 U.S. at 618.
[145] *Obergefell*, 576 U.S. at 656 ("From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage."); *Griswold*, 381 U.S. at 486.
[146] *Griswold*, 381 U.S. at 486 (emphasis added).
[147] Lawrence v. Texas, 539 U.S. 558, 563–64 (2003).
[148] *Id.* at 564.
[149] *Id.*
[150] Although the Court did not itemize this point, at the time marriage was not available to same-sex couples. Therefore, the men involved in this case were not married to one another.
[151] *Lawrence,* 539 U.S. *at* 578.
[152] *Roberts*, 468 U.S. at 617–18.

attributes lower courts should consider when determining whether an association is sufficiently intimate to secure it "against undue intrusion by the State."[153] The attributes of an intimate association are: "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[154] Justice Brennan all but conclusively placed familial relationships and marriage within the realm of intimate association.[155] "The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—*marriage*."[156] Although the Court did not consider intimate association in *Roberts*, the framework above is still instructive.

More recently, the North Carolina Court of Appeals considered a challenge to the State's adherence to heart balm torts as a violation of First Amendment intimate associational rights. Although the court did not provide a clear definition of intimate association, it did find that "facing liability for engaging in intimate sexual relations . . . *can* implicate the First . . . Amendment right[] to . . . expression."[157]

To be sure, the Court's jurisprudence on intimate associational rights is not abundantly clear. There is no definition or elemental test to apply to determine whether an association is intimate such that it enjoys constitutional protections. It is sufficient to say, for the purposes of this comment, that marriage does fall within whatever definition the Court may apply because of *Griswold*, *Lawrence,* and *Roberts*. The next section considers how the Court approached issues of intimate association in the past.

B. Freedom of Intimate Association Applied

There are few cases that interpret the right of intimate association, and even fewer that do so under a challenge to the First Amendment. However, an overview of the cases provides a similar framework: where there is an intimate association, it is afforded constitutional protections.

In *Griswold v. Connecticut*, the Court considered legislation passed in Connecticut that made it illegal for citizens to use contraceptives and

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[153] *Id.*
[154] *Id.* at 620.
[155] *Id.* at 619–20(emphasis added).
[156] *Id.* at 619 (emphasis added).
[157] *Malecek*, 804 S.E.2d at 597.

for individuals to aid in the use of contraceptives.[158] Defendants in the case were medical professionals who provided contraceptive care to married couples.[159] They appealed their convictions, arguing the law violated the Fourteenth Amendment.[160] The Connecticut Supreme Court of Errors affirmed the judgments below, upholding the defendants' convictions.[161]

Admittedly, the problem with this case as an illustration for intimate association rights under the First Amendment is that the Supreme Court did not clearly define which constitutional amendment provided the firm basis for its decision. It rejected a Lochner-type Fourteenth Amendment argument,[162] instead adopting a "penumbra" approach related to "zone[s] of privacy created by several fundamental constitutional guarantees."[163] The Court then determined the law swept "unnecessarily broadly"[164] considering the State's claim that the law was meant to curtail extramarital affairs.[165]

At the state level, in *Malececk v. Williams* the North Carolina Court of Appeals considered constitutional challenges to the heart balm torts.[166] *Malececk* involved a husband who sued his wife's lover under North Carolina tort law "for alienation of affection and criminal conversation."[167] The defendant-lover argued that the torts were facially unconstitutional because they violated his First Amendment "rights to engage in intimate sexual activity, speech, and expression with other

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[158] *Griswold*, 381 U.S. at 480 (citations omitted).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 481–82.
[163] *Id.* at 485.
[164] *Griswold*, 381 U.S. at 485–86 ("Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").
[165] *Id.* at 498.
[166] *Malecek*, 804 S.E.2d at 594.
[167] *Id.*

consenting adults."[168] The trial court heard the defendant's argument at the motion to dismiss stage and granted the defendant's motion.[169]

On appeal, the State appellate court agreed that liability for intimate sexual relations can implicate the First Amendment.[170] However, the court found the defendant's argument regarding his association claim unpersuasive.[171] Instead, the court determined there were "countless ways" for two consenting adults to associate without incurring liability under the heart balm torts.[172] Ultimately, the court viewed these torts as acceptable, conduct-related regulations because their aim is to provide a remedy for a wronged spouse, not restrict free expression.[173]

C. Freedom of Intimate Association and Divorce in North Carolina

Justice Brennan argued in *Roberts* that familial relationships are inherently intimate associations: "Family relationships by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[174] Marriage is at the heart of the intimacy and privacy issues the Court considered in *Griswold*.[175] There, the Court placed marriage at the furthest end of the spectrum—it is the most protected kind of association.[176] This is mainly because, in many cases, marriage brings with it the expectation that the spouses will forgo sexual relations with other parties ("open marriages" notwithstanding).[177]

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[168] *Id.*
[169] *Id.*
[170] *Id.* at 597.
[171] *Id.*at 598.
[172] *Malecek*, 804 S.E.2d at 598 ("But these torts do not prohibit all conceivable forms of association between a spouse and someone outside the marriage. There are countless ways for one to associate with a married person, form meaningful relationships, and even share feelings and intimacy without incurring liability for alienation of affection or criminal conversation.").
[173] *Id.* at 597–98 ("Put another way, these torts may restrict certain forms of intimate speech or expression, but they do so for reasons unrelated to the content of that speech or expression. Courts review laws that only incidentally burden protected expression under the test established in *United States v. O'Brien*.").
[174] *Roberts*, 468 U.S. at 619–20.
[175] *Griswold*, 381 U.S. at 485–86.
[176] *Id.* at 486.
[177] Although this same framework might provide for the Constitutional argument that polygamous marriages are also Constitutionally protected, this Comment focuses solely on the American "traditional" form of marriage between only two

The problem with North Carolina divorce law in this aspect is that divorce fundamentally changes the nature of the intimate relationship in a way that mere separation does not. When parties divorce, they are free to enter into new intimate relationships (sexual or otherwise) that are not regulated by the State (i.e. North Carolina's criminal statute for adultery and heart balm tort causes of action), nor regulated by private expectations. The decisional aspects of intimate associations as outlined in *Griswold* create a conundrum: a state cannot regulate the decisions made within the relationship, but it can regulate the decision on whether to remain in the relationship at all.

There is also a significant difference regarding the State's deference towards heart balm torts. The heart balm tort cases usually involve a *third party* defending against a married party's claim by asserting the tort interferes with their First Amendment right to an adulterous affair. This is a significant difference because a party filing for divorce is a party to the marriage, not an outsider. Moreover, the defendant in a heart balm tort is not engaged in a legally binding relationship. Their ability to express the creation of the relationship or termination thereof is not dependent on state interference—a marital relationship is. While the rights asserted may sound the same (the right to intimate association), they are different in creation. In the context of marriage, the State is effectively preventing the creation of a new intimate association or termination of the marital intimate association. But the State is not preventing intimate association creation or termination in the context of a heart balm tort. Instead, the State is enforcing the rights of a married partner who asserts a civil law claim.

Although the freedom of intimate association is not clearly defined in a broad sense, the Court's language in *Roberts* and *Griswold* is essentially conclusive: marriage is an intimate association.[178] This freedom protects individuals from state intrusion into the decision-making aspects of the relationship (whether to use birth control or whether to engage in sodomy). North Carolina divorce law violates this right because it prevents individuals from exercising their decisional rights to dissolve their marriage. The next section considers how the one-year separation period amounts to compelled speech.

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persons. It is not likely at this current juncture the Court would consider Constitutional protections for three (or more) person marriages because that fundamentally alters the "intimacy" of the relationship considered in the above cases.

[178] *Id.*; *Roberts*, 468 U.S. at 617-18.

FREEDOM FROM COMPELLED SPEECH

In addition to protecting associational freedoms, the First Amendment also protects an individual from a state's attempt to compel speech.[179] Much like the freedom of association includes a freedom to exclude, the freedom to speak includes the freedom to not speak at all.[180]

This section explores what compelled speech is, how the Court has approached compelled speech contexts similar to divorce, how divorce falls within this jurisprudential framework, and how North Carolina's one-year separation period requirement amounts to compelled speech.

A. Freedom from Compelled Speech Defined

The First Amendment's protection for freedom of speech includes within its gilded armor the freedom from *compelled* speech.[181] These protections mean more than simply the right to open one's mouth and speak or not; they intend to protect the speaker's right to craft his or her own message.[182] This includes the choice to speak on particular issues or not speak on those issues.[183]

In the context of divorce, this begs the question of whether the State's one-year separation period forces individuals to speak on a matter they would rather not, or whether it denies individuals the right to craft their own message. Considering the Court's jurisprudence on what state

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[179] Wooley v. Maynard*,* 430 U.S. 705, 714 (1977).

[180] *Id.*

[181] *Id.* ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.").

[182] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573–74 (1995) ("But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation." (citations omitted)).

[183] *Id.* at 574–75 ("[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. . . . But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

action amounts to a compulsion to speak, the one-year separation period likely violates this right.

B. Freedom from Compelled Speech Applied

There are many cases that discuss the freedom from compelled speech. Those cases discussed below most closely fit with the analysis of divorce as a First Amendment issue because they represent situations in which the state forced parties to speak on matters antithetical to their core beliefs.

In *West Virginia Board of Education v. Barnette*, the Court considered one such case.[184] The West Virginia State Board of Education made it mandatory that students participate in saluting the American flag each morning and reciting the Pledge of Allegiance.[185] A student's refusal to do so subjected them to disciplinary action, to include expulsion.[186] Parents of children in the school system objected to the requirement; the salute and pledge violated tenants of their faith as Jehovah's Witnesses.[187] Their children were subsequently expelled and officials threatened to send them to reform schools for juvenile offenders.[188] The lower court restrained enforcement of the school board's requirement on children of the Jehovah's Witness faith, which the State appealed.[189]

The Supreme Court defined the conflict in this case as "a compulsion of students to declare a belief."[190] Inherent to the analysis is recognition of what exactly made this regulation fall within the ambit of "speech." The Court noted that the symbolism of the flag, saluting, and spoken pledges all constituted speech protected by the First Amendment.[191] The compulsory activity would allow state authorities to

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[184] W. Va. State Bd. Of Educ. v. Barnette*,* 319 U.S. 624, 626 (1943).
[185] *Id.* at 625.
[186] *Id.* at 629.
[187] *Id*.
[188] *Id.* at 630.
[189] *Id.*
[190] *Barnette,* 319 U.S. at 631.
[191] *Id.* at 632–33 ("Symbolism is a primitive but effective way of communicating ideas. . . . Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. . . . It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.").

"compel [a person] to utter what is not in his mind."[192] Before inquiring about the appropriateness of an exception, the Court first considered whether the State even had the power to compel this kind of patriotic, but religiously offensive, speech from students of the Jehovah's Witness faith.[193] The Court held the State did not have such power.[194] The Court's opinion ends there; because the State did not have the power to compel this kind of speech, there was no need for further analysis. The Court overturned a previously decided case that ruled to the contrary.[195]

In *Wooley v. Maynard*, the Court considered a First Amendment challenge to New Hampshire's license plate laws.[196] The State's passenger vehicle license plates included the motto "Live Free or Die."[197] The State also punished citizens who knowingly obscured "figures or letters on any number plate," which the State Supreme Court interpreted to include the motto.[198] The State issued three citations to Mr. Maynard for violating the State law because he continued to cover up the State motto claiming it offended his religious beliefs as a Jehovah's Witness.[199]

Mr. Maynard sought injunctive and declaratory relief against the State's enforcement of his sentencing related to the three offenses.[200] The district court issued an order preventing the State from arresting or prosecuting Mr. Maynard for violation of the license plate statute.[201]

On appeal, the Supreme Court began by reiterating that inherent in the First Amendment's protection of speech is "the right to speak freely

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[192] *Id.* at 634.
[193] *Id.* at 635–36 ("The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.").
[194] *Id.* at 642 ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").
[195] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), overruled by *Barnette*, 319 U.S. 624.
[196] *Wooley,* 430 U.S. at 706, 711.
[197] *Id.* at 706.
[198] *Id.* at 707.
[199] *Id.* at 707–08.
[200] *Id.* at 708.
[201] *Id.* at 709, 711.

and the right to refrain from speaking at all."[202] The Court defined this case as one in which the State forced an individual "as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[203] Important to the analysis was the recognition that driving a car is nearly a necessity for most Americans, the State exclusively controls the message on state-issued license plates, and the message is displayed to the public.[204] This relationship between the need to drive and the license plate being required to do so caused the Court to conclude that New Hampshire, in effect, used private vehicles as "mobile billboard[s]" to promote ideological messages.[205]

After finding the State license plates implicated the First Amendment right to be free from compelled speech, the Court evaluated whether the license plate regulation survived strict scrutiny.[206] The State offered two interests supporting the regulation: (1) the need to identify passenger vehicles for effective law enforcement and (2) the desire to promote history, individualism, and state pride.[207] The Court refused to clearly state whether these interests were sufficiently compelling, instead finding that the compelled display of the State motto was not narrowly tailored.[208]

A third case, *Hurley v. Irish-American Gay*, implicates both expressive association issues and compelled speech issues.[209] For the purposes of this comment, it highlights important aspects of how an association imputes speech between members. In this case, members of the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) sought inclusion in the annual St. Patrick's Day-Evacuation Day Parade.[210] The council responsible for managing applications denied the group a spot in the festivities.[211] GLIB filed suit under the State's public

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[202] *Wooley*, 430 U.S. at 714 ("A system which secures the fight to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").
[203] *Id.* at 715.
[204] *Id.*
[205] *Id.*
[206] *Id.* at 716.
[207] *Id.* at 716–17.
[208] *Wooley*, 430 U.S. at 716–17.
[209] *Hurley*, 515 U.S. at 563, 573–74.
[210] *Id.* at 561.
[211] *Id.*

accommodation law which forbade discrimination based on sexual orientation.[212]

The lower court rejected the council's First Amendment claims, instead finding the choice to exclude GLIB violated the public accommodation law.[213] In rejecting their claims to freedom of expressive association, the lower court determined the council and parade did not enjoy First Amendment protections as a "recreational event," and even if they did, the forced inclusion of GLIB only incidentally affected their rights in light of a legitimate state purpose.[214] The Supreme Judicial Court of Massachusetts upheld the lower court ruling.[215]

The Supreme Court first corrected the State courts' determination that the parade did not fall within an "expressive association" sufficient to bring its activity within the First Amendment.[216] Instead, the Court noted that a parade includes "marchers who are making some sort of collective point" as opposed to a group of people merely walking to get to a particular destination.[217] The coordination of people marching in a parade together was enough to qualify as an expression; no "particularized message" was necessary to afford the organizers First Amendment protections.[218] However, each individual unit of the parade did have a particularized message, and in the case of GLIB it was that of support for openly gay members of the Irish community.[219] As overall organizers of the parade, the Court determined that forced inclusion of GLIB would require an "alter[ation] [to] the expressive content of the parade."[220] Because each individual unit made up a broader message of the whole, the organizers enjoyed the freedom to *not* include GLIB.[221] Forced inclusion would *compel* them to speak on a matter they otherwise chose not to.[222]

Each of these cases highlight important factors related to compelled speech issues. In *Barnette* and *Wooley*, part of the Court's analysis

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[212] *Id.*
[213] *Id.* at 563.
[214] *Id.*
[215] *Hurley*, 515 U.S. at 563.
[216] *Id.* at 568.
[217] *Id.*
[218] *Id.* at 569.
[219] *Id.* at 570.
[220] *Id.* at 572-73.
[221] *Hurley*, 515 U.S. at 577.
[222] *Id.* at 575.

focused on the ideological nature of the messages being compelled.[223] Moreover, the issue of punishment for failure to comply with the compulsion was severe in *Barnette* (expulsion)[224] and a consideration in *Wooley* (tickets, fines, and imprisonment).[225] As it relates to divorce, these cases raise the question of whether there is some ideological message conveyed in the marriage or divorce. The other question raised is whether the one-year separation period amounts to some kind of punishment like the expulsion or fines in *Barnette* and *Wooley*. These questions are addressed in the following section.

C. Compelled Speech and Divorce in North Carolina

There are several ways in which North Carolina compels speech from couples during the one-year separation period similar to the situations presented in the aforementioned cases. But first it is necessary to recognize that there is an ideological nature to the marital relationship.

Marriage is in some ways a contract, but courts are hesitant to leave the nature of the relationship purely within contractual law frameworks.[226] Although marriage is not a standalone religion, it is just as central to a person's identity because it permeates every facet of life—even more so than religion.[227] While even the most fervent churchgoers may attend a daily service, rarely do members of a religious practice live with their "church family." But spouses tend to cohabitate on a daily basis. Most religions call congregants to offer a small percentage of funds as a way to support the organization's activities (10% for Christians and 2.5% for Muslims).[228] But in marriage, most couples combine income, assets, and property by far more than a small percentage.[229] These points highlight that the marital relationship brings

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[223] *Wooley,* 430 U.S. at 715; *Barnette,* 319 U.S. at 637.
[224] *Barnette,* 319 U.S. at 629.
[225] *Wooley,* 430 U.S. at 708.
[226]McLean v. McLean, 237 N.C. 122, 126 (1953) (Barnhill, J. concurring) ("Of course, theologically, marriage is a sacrament, but under the law it is a contract. . . . It is so basic that the contract of marriage is set apart and treated as one entirely different from other contracts.").
[227] *Griswold*, 381 U.S. at 486 (referring to marriage as a "way of life.").
[228] Garcia Rhys Lindmark, *How Different Religions Sustain Themselves Through Self-Taxing*, MEDIUM (Mar. 20, 2020), https://medium.com/@RhysLindmark/how-religions-sustain-themselves-through-self-taxing-37fc6ab64de1.
[229] Casey Bond, *6 Women Share Why They and Their Spouses Keep Separate Finances*, HUFFPOST (Jul. 2, 2018, 5:45 AM),

with it the same kinds of ideological concerns the Court considered in *Barnette* and *Wooley*.[230] If religious considerations raise heightened concerns about compelled speech, then marriage should too.

While divorce doesn't bring about the same kind of punishment considered in *Barnette* and *Wooley*, there are ramifications to not being able to obtain a divorce. This includes an individual's inability to enter into a new romantic relationship for fear of being exposed to a claim of adultery[231] or opening their new partner to civil liability via a heart balm tort.[232] The delay in being able to obtain a divorce can also limit an individual's decisions with regards to financial or real property for fear of adverse judicial rulings in an equitable distribution claim.

1. Changing Names

This issue affects women more than men, as it is culturally more common for a woman to adopt the surname of her husband (if the couple is heterosexual). But with the increase in same-sex marriages, some couples choose to adopt a surname new to both, choose the surname that sounds the best, or adopt a hyphenated surname that includes both party's names.[233]

Regardless, a separated spouse is not allowed to obtain new identification until they have a divorce decree.[234] The practical effect is a separated spouse is required by the State to represent themselves in certain capacities by a surname they no longer identify with. Obviously, a person is free to "go by" another name colloquially. But when it comes to a driver license, vehicle registration, taxes, voter registration, and certain employment forms, the person must continue to use the surname from a marriage they have separated from.

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https://www.huffpost.com/entry/women-keep-finances-separate-spouses_n_5b35117ee4b0cb56052084b4.

[230] *Wooley,* 430 U.S. at 71-15; *Barnette,* 319 U.S. at 632.

[231] Adams v. Adams, 374 S.E.2d 450, 452-54 (N.C. Ct. App. 1988).

[232] *Malecek*, 804 S.E.2d at 595.

[233] Patricia Garcia, *In a Same-Sex Marriage, Who Gets to Keep Their Name*?, VOGUE (July 30, 2015), https://www.vogue.com/article/same-sex-marriage-name-change; *An LGBTQ+ Couple's Guide to Name Changes After Marriage*, THE KNOT (May 21, 2020), https://www.theknot.com/content/same-sex-marriage-name-change.

[234] *Name Changes: Driver Licenses & IDs*, N.C. THE OFF. N.C. DMV WEBSITE, https://www.ncdot.gov/dmv/help/moving/Pages/name-changes.aspx (last updated Jan. 4, 2022); *Corrected Card for a U.S. Born Adult*, SOC. SEC., https://www.ssa.gov/ssnumber/ss5doc.htm (last visited Apr. 9, 2022).

Like *Wooley*, these identification documents are necessary for daily life in America. One must have a valid driver's license or state identification to drive, board a plane, or purchase alcohol. Admittedly, the public nature of these documents does not amount to a "public billboard," but the content of the message is even more central to a person's beliefs than religious disagreement with a state motto. Although Shakespeare might argue otherwise, names carry great weight in the realm of personal identity—it is why some change their surname upon marriage in the first place. The shared name signals a change in *identity* to that of a spouse. The return to a maiden or pre-marital name is just as significant.[235]

2. New Romantic Relationships or Marriages

There is also a question of compelled speech issues with regards to dating while separated. First, while a couple may be separated, they are still legally married. Therefore, a partner who enters into a romantic relationship with a third party during this period may still be liable for adultery.[236] This is true regardless of whether the adulterous relationship began within one month of separation or eleven months. If the spouse who did not engage in a romantic relationship can prove adultery, that may substantially change a court's determinations for separation of assets, custody, and alimony.[237]

Moreover, because North Carolina courts uphold the application of heart balm torts,[238] a party is likely dissuaded from pursuing a new intimate association for fear that their partner may be sued for one of these torts. The North Carolina Court of Appeals acknowledged that intimate relationships are in some part protected by the First Amendment.[239] But the punishment for engaging in a new romantic relationship while separated—but not divorced—is the exact kind of

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[235] North Carolina does provide for a citizen to legally change their name once absent marriage or divorce. This process requires an application, showing of cause, and a posting period at the courthouse before the change may take effect. *See* N.C. GEN. STAT. ANN. § 101-1 (West 2022).

[236] *Adams*, 374 S.E.2d at 452-53(upholding lower court's decision to award wife alimony because her husband entered into a romantic relationship with a third party after separation) ("[V]oluntary sexual intercourse by a spouse with a third party during the period of separation [required by statute] is adultery as contemplated by [the statute], and is a ground for alimony.").

[237] *Id.*

[238] *Malecek*, 804 S.E.2d at 598-99.

[239] *Id.* at 594.

"chilling effect" the Court found unconstitutional in the past.[240] Moreover, a person cannot get married to a new party while not yet legally divorced from a former partner.[241] This is compelled speech in that it compels a person to not speak (through a new expressive/intimate association) on a matter they otherwise would.

3. Speech of a Separated Spouse is the Speech of the Other

Hurley provides an interesting thought experiment, especially in light of recent political turmoil. If the above analysis is accepted—that marriage is some form of expressive association—can the State compel parties to remain married even if one is publicly sharing views the other refutes? The Court asserted in *Hurley* that simply by requiring organizers to admit the homosexual group to the parade roster, organizers were then compelled to speak on a matter they chose not to.[242] The Court's analysis, in essence, was that mere inclusion in a group meant adoption of—or at least acquiescence to—an individual member's message.[243] This framework is important in light of divorce during politically and racially polarized times. What would the court make of a husband who files for divorce from a spouse who participated in the insurrection of the Capitol? Or in a Black Lives Matter protest? By forcing the couple to remain married, the husband could claim the State is compelling him to speak in the same way the Court found inclusion of GLIB to be compelled speech; one spouse is assumed to adopt or affirm the views of the other by the association between the two.[244]

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[240] Reno v. Am. C.L. Union, 521 U.S. 844, 849, 872, 882-83, (1997) (holding a federal statute unconstitutional because the heavy burden for transmission of what was vaguely defined as "obscene or indecent" content amounted to an impermissible chilling effect).

[241] N.C. GEN. STAT. ANN. § 51-2(a)(West 2021)("All *unmarried* persons of 18 years, or older, may lawfully marry . . . .") (emphasis added).

[242] *Hurley*, 515 U.S. at 575.

[243] *Id.* at 572–73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the [public accommodations] statute produced an order essentially requiring petitioners to alter the expressive content of their parade.").

[244] This is not an abstract idea. A lawyer in Arizona suffered professional ramifications after patrons at a gas station videoed his wife berating a person of color in the store. The wife can be heard in the video telling the other customer to "go back to your country." As a result of this viral, racist video, the husband's law firm received an onslaught of one-star reviews on Google along with negative press, phone calls, and e-mails. Joshua Bowling, *Husband of woman in viral video apologizes for her racist scene in phoenix convenience store*,

WHAT STANDARD OF SCRUTINY IS APPROPRIATE TO APPLY TO CONSTITUTIONAL CHALLENGES TO DIVORCE LAWS?

AN ALTERNATE SOLUTION TO NORTH CAROLINA'S CURRENT SEPARATION REQUIREMENT

The above discussion focused on the issues with North Carolina's divorce scheme as it relates to heightened constitutional scrutiny. But defining the issue is only part of the process in addressing a problem. This section lays out various ways North Carolina could amend its current one-year separation requirement to meet not only the constitutional burden imposed by the First Amendment, but it also highlights how these proposed changes better achieve the State's policy objectives.

Before offering any solutions, it is vital to remember that the government's role in regulating who may get *married* is limited to age restrictions, familial connections, and verification both parties are legally able to marry. This limited role means the government relies on other social programs, initiatives, and benefits to encourage marriage among citizens. However, these government initiatives aimed at strengthening the institution of marriage traditionally do not perform the way policy makers hoped. A study in 2014 on the effects of the Healthy Marriage Initiative promulgated by President George W. Bush found that despite nearly $600 million in spending, divorce rates didn't move while marriage rates actually declined.[282] Some argue that abandoning the traditional nuclear family model all together and focusing instead on strengthening parenting skills would yield better results.[283] But this approach ignores the other ways in which marriage is part of the fabric of our society; promoting healthy marriages is important even absent the parental roles many married partners assume. The reasons people enter into a marriage relationship are vast and can be somewhat complicated. The reasons people divorce perhaps are even more numerous and complex. However, the complexities in the divorce decision-making paradigm do not justify a blanket rule; the State can adopt different

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AZCENTRAL (Jun. 9, 2020, 8:24 PM), https://www.azcentral.com/story/news/local/phoenix/2020/06/09/viral-racist-video-robert-harrian-apologizes-wife-rant-phoenix-convenience-store/5331110002/.

[282] PORTER, *supra* note 257.

[283] *Id.*

policies to promote marriage, deter divorce, *and* afford individuals their constitutional protections.

First, the State should view the divorce problem through the lens of the age-old adage: an ounce of prevention is worth a pound of cure. While it is difficult to distill the reasons couples divorce into statistics and figures, there are some common threads that lead to divorce such as the inability to resolve conflict, financial problems, addiction, abuse, and infidelity.[284] Some of these commonalities provide room for the State to support the pre-marital individual so that they are better prepared for marriage.

Inability to resolve conflict: Of all the education American children receive in school, almost none of the curriculum is focused on conflict resolution.[285] That learning curve tends to happen on the playground, or even now on social media platforms. Moreover, the training children receive at home on how to resolve conflict is wholly dependent on the example parents set. If a child has adults at home that don't have these tools themselves, it is unlikely the child will learn any better strategies unless they pursue counseling later in life. If conflict resolution skills are central to navigating marriage successfully and reducing divorce rates, the State could consider preventative measures in the form of education at school or community classes for adults.

Financial problems: Difficulties around money in a marriage are a derivative of conflict resolution issues. A lack of money, or different philosophies on how to manage money, are in some ways independent of communication issues. One idea is to offer money management classes as part of a life skills curriculum to teach individuals how to better

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[284] Shellie R. Warren, *10 Most Common Reasons for Divorce*, MARRIAGE.COM (Jan. 14, 2021), https://www.marriage.com/advice/divorce/10-most-common-reasons-for-divorce/.

[285] This isn't to say there isn't any curriculum on effective communication. It can be found under the State's education category of "healthful living." But this particular set of curriculum includes categories about mental health, nutrition, physical changes during puberty, and alcohol / tobacco use. Only one educational objective includes conflict resolution, which is listed as part of the high school health education curriculum. Perhaps the most troubling part is the objective is to provide students with "strategies for resolving interpersonal conflict without harming self or others." Merely preventing physical harm to one of the parties in conflict sets the bar entirely too low. *See North Carolina Essential Standards: Health Education – High School*, N.C. DEP'T OF PUB. INSTRUCTION, https://www.dpi.nc.gov/media/3963/open (last visited Apr. 10, 2022) (emphasis on Clarifying Objective 9.ICR.1.3).

manage their money before ever becoming spouses. These same classes can be offered as part of a community initiative to help couples feel more secure in their financial decision making, or at least offer a better forum in which to discuss finances.[286]

Addiction: This is an issue that affects not just marriages, but so many other facets of society. Addressing addiction at a state-level can change not just divorce rates, but employment, law enforcement issues, and public safety.[287] State-run addiction treatment facilities sufficient to address the addiction issues of the general public would be extremely burdensome and not easily implemented.[288] Although these types of solutions have found success in other parts of the world, a realistic approach for North Carolina might be an economic incentive to attend a rehabilitation program. Whether the State offered a tax credit for successful completion or some kind of stipend to promote attendance, there are ways to encourage citizens to seek treatment.[289]

Next, and arguably the most significant, is the State's interest in regulating marriage to ensure better outcomes for children. But having married parents is just one factor in evaluating childhood outcomes. Instead of an arbitrary separation period to try and enforce marriage, the State could adopt a holistic approach to addressing how parents affect childhood outcomes—married or unmarried. Moreover, this would account for the reality that many Americans are choosing to cohabitate instead of getting married.[290] From 1960 to 2007, the number of cohabitating couples increased fourteen-fold, while the marriage rate fell by more than 14% across genders. This co-habitation outside of marriage increased the number of children born out of wedlock, from 11% in 1970 to 41% in 2010.[291] By addressing parenthood outside the context of marriage, the State can still promote child development. With these mechanisms in place, the State could relax the separation period

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[286] None of the state curriculum in the "Healthful Living" programming includes personal finance management. *See Healthful Living*, N.C. DEP'T OF PUB. INSTRUCTION, https://www.dpi.nc.gov/teach-nc/curriculum-instruction/standard-course-study/healthful-living (last visited Apr. 10, 2022).

[287] Meredith Watkins, *State-Funded Drug and Alcohol Rehab Centers Near Me*, AM. ADDICTION CTR. (Feb. 20, 2021), https://americanaddictioncenters.org/rehab-guide/state-funded.

[288] *Id*.

[289] *Id*.

[290] WILCOX, *supra* note 31, at 87.

[291] HASKINS, *supra* note 17, at 55.

requirement because of the lessened impact divorce would have on childhood outcomes.

Reduce unwanted pregnancy and teen pregnancy: The fact is that more children are born out of wedlock today than ever before; and these births are to single women, not wives who later seek a divorce.[292] The statistics associated with children growing up in single-parent homes are equally grim to those for children growing up in divorced-parent homes. One way to avoid the issue altogether is to ensure women have access to birth control through education and medical care. While there are some objections to birth control as a matter of morals or religious beliefs, the statistics don't lie. Where women have access to birth control, there are fewer unwanted pregnancies and abortions.[293]

Promote education and sentencing reform: One of the reasons women remain unwed mothers, especially in low-income situations, is because they do not view the fathers of their children as "marriage material."[294] This means everything from physical violence to an inability to provide financially. There are two meaningful approaches to address this problem of helping men become more available for marriage: decrease incarceration rates for non-violent offenders and increase educational opportunities.[295] Education and employment initiatives have already had great success in achieving the State's apparent aims. Young men who participated in academic *and* technical skills education during high school were 33% more likely to be married, 30% more likely to live with their partners and children, and made more money than their control group counterparts—$30,000 more on average.[296]

Finally, in order to change North Carolina's separation period such that the regulation is either the least restrictive on a citizen's First Amendment rights or not an undue burden, the State needs to offer a graduated system for obtaining a divorce that accounts for the various

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[292] Elizabeth Wildsmith et al., *Dramatic increase in the proportion of births outside of marriage in the United States from 1990 to 2016*, CHILD TRENDS (Aug. 8, 2018), https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels#:~:text=Recent%20estimates%20show%20that%20about,worldwide%20(Chamie%2C%202017).

[293] HASKINS, *supra* note 17, at 62–63.

[294] *Id.* at 66–67.

[295] *Id.* at 67.

[296] *Id.* at 67–68.

State interests more particularly. This kind of system would amount to a factors-based approach that moves the separation period depending on the couple and their justification for seeking divorce. These kinds of considerations are not totally unheard of; Louisiana already alters the separation period required depending upon whether the couple has children.[297] Below is a list of potential factors the State could adopt to implement a factors-based approach.[298]

Violence: The State can make no rational claim that it has an interest in promoting a marriage that involves violence. This is the kind of relationship that fails to promote societal good; in fact, it has a negative return for communities.[299] As such, where a party can make a showing of violence or abuse, the State should place the least restrictions on a citizen seeking absolute divorce. A much shorter waiting period—perhaps one week—better protects the abused spouse *and* the State's interests.

Children: The State could easily make a clear, blanket rule where children are involved. If a couple does not have children, the State's interest in preserving that marriage is much lower for two reasons. First, the need to promote better childhood outcomes does not exist. Second, allowing the couple to divorce sooner affords them the opportunity to enter into potentially more healthy, stable marriages. The State could keep the one-year separation period if a couple has children to ensure parents fully consider their choice. Then, the State could adopt a three-month separation period for childless couples to offer a more efficient means of dissolving the marriage.

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[297] LA. CIV. CODE ANN. ART. 103.1 (2020).

[298] These kinds of factors have application in other areas of law; sentencing guidelines, for example, take into account the individual before the court before doling out punishment by considering prior criminal records. *See* W. Erwin Spainhour & Susan Katzenelson, *A CITIZEN'S GUIDE TO STRUCTURED SENTENCING*, THE N.C. SENT'G & POL'Y ADVISORY COMM'N (2014), https://www.nccourts.gov/assets/documents/publications/citizenguide2014.pdf?QUy2UMcGsNAKtUWMbLQnK004OLlEsYwd. Courts also weigh various factors when determining custody for children. *See Child Custody*, N.C. JUD. BRANCH, https://www.nccourts.gov/help-topics/family-and-children/child-custody (last visited Apr. 10, 2022).

[299] Maggie Germano, *Domestic Violence Has a Financial Impact Too*, FORBES (Oct. 17, 2019, 3:33 PM), https://www.forbes.com/sites/maggiegermano/2019/10/17/domestic-violence-has-a-financial-impact-too/?sh=22374f959d04.

Infidelity: Most marriages come with the expectation of monogamy. Where that is the case and a spouse can make a showing of adultery, the State's interest again is lowered and the spouse's liberty interest is higher. Although many marriage counseling professionals are skilled at helping couples come back from adultery, the choice to attempt to do so is ultimately up to the individuals in the relationship.[300] If a spouse can show their partner failed to uphold the expectation of monogamy, the State should allow for a shorter separation period—something closer to the three-month mark.

Counseling: The State's adoption of a no-fault divorce scheme came in an era where counseling generally was not as widely accepted as it is today. Seeking counseling for marital issues no longer carries the same stigma it once had, as evidenced by references to marriage counseling in pop culture.[301] The State's separation period ostensibly serves the purpose of ensuring the couple is not able to reconcile. But this fails to account for the couple that genuinely participated in marriage counseling during the marriage in an effort to make the relationship work. If the couple can show they sought counseling for a period of time and were unable to reconcile, then the State's purpose of enforcing a separation period no longer applies. The State should provide some evidence-based approach to allow a couple to comply with a much shorter separation period because they already attempted reconciliation and a one-year separation will serve no reconciliatory purpose.

Financial stability and property disbursement: One of the difficulties in dissolving a marriage is accounting for the property interests of each spouse as well as the financial impact divorce may have where one spouse is dependent on the other's financial provision. However, the prevalence of pre- and post-nuptial agreements as well as separation agreements provide an avenue for couples to make these types of disbursements with little input from the courts. The State might argue that the one-year separation period ensures parties to a divorce have time to think about or prepare for the division of assets or change in finances. But where parties are able to abide by the terms of a pre- or post-nuptial agreement, or where the parties agree to a separation agreement, the one-year separation period does little to aid in this divisional process. The

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[300] Brandon Leuangpasueth, *What to Do After an Affair (part 1)*, THE GOTTMAN INST. (Jan. 16, 2020), https://www.gottman.com/blog/what-to-do-after-an-affair/.

[301] *Armchair Expert EP 83*: *John Gottman,* (Feb. 28, 2019) (downloaded using iTunes).

State could lower the separation period for those couples who have all of their financial ducks in a row, so to speak.

Uncontested: Arguably the violation of a citizen's constitutional rights is highest when both parties to the divorce agree to the divorce but cannot obtain one because of the State's separation hurdle. If both parties want a divorce, then the State's interest is least served by enforcing a lengthy separation. The State should consider a significant reduction in the separation period when both parties affirm their desire to divorce.

CONCLUSION

The First Amendment protects a citizen's freedom of expressive association, freedom of intimate association, and freedom from compelled speech. North Carolina's current separation requirement violates those protections because it is neither narrowly tailored nor free of undue burden. Moreover, the current scheme fails to truly promote North Carolina's objective of protecting and promoting marriage. There are less restrictive means for the State to pursue these objectives that would likely produce a better result by addressing those common problems that cause couples to divorce, without violating a divorcing couples' First Amendment rights.