Of Covenants and Conflicts— When "I Do" Means More Than It Used To, But Less Than You Thought

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Louisiana's recent passage of a "covenant marriage" law is the first successful attack on the no-fault divorce revolution of the Seventies. The law has been championed by supporters as a return to marriages that matter and attacked by detractors as a draconian interference in the private lives of Louisiana's citizens. This Note gives a detailed analysis of the law and concludes that the political uproar surrounding the law has obscured the purely legal issues raised by its passage.

This Note addresses several legal arguments against the law and concludes that its major flaw lies in its failure to take into account basic conflicts of law principles. The oversight proves to be one that renders the law ineffective in many situations.

I. INTRODUCTION

Even if marriage has never been easy, it has usually been simple—that is, when two people get married, it is generally understood that they are bound together not only by their vows to each other, but also by the laws of their state. Occasionally, though, things get more complicated—especially when there are questions about the legality of the marriage. In the past, those questions have usually centered on problems of validity—for example, if Jerry Lee and his thirteen-year-old third cousin marry[1] in one state, and that marriage would have been illegal under the laws of another state, is the marriage valid? In such cases, courts have generally held that if the marriage was valid when performed and legal in the state where performed, it should be deemed valid in all other states, even if it could never have been performed in those states. Likewise, divorce can raise similar thorny conflicts of law issues; questions in this area have generally turned on whether the party seeking a divorce was properly domiciled according

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* The author would like to thank all of those who pointed him in the right directions, including Professors Sanford Caust-Ellenbogen, Katherine Federle, David Goldberger, Arthur Greenbaum, Peter Swire, and Dean Nancy Rapoport. Special thanks to Stephen A. Silver, whose suggestions on the earlier drafts were invaluable, as well as to the staff of the *Ohio State Law Journal*. Most of all, though, the author would like to thank his parents.

This Note was the winner of the Rebecca Topper Memorial Award for outstanding writing contribution to the *Ohio State Law Journal* by a third-year student.

[1] *See generally* MYRA LEWIS & MURRAY SILVER, GREAT BALLS OF FIRE: THE UNCENSORED STORY OF JERRY LEE LEWIS (1982).

to the state's divorce laws.

On July 15, 1997, Louisiana adopted a law that defies the traditional conflicts of law analysis of marriage and divorce and became the first state in the union to create a new marriage institution—the *covenant marriage*.[2] A Louisiana covenant marriage is like a "normal" Louisiana marriage in all ways except one: a couple who enters a covenant marriage cannot end the marriage by a no-fault divorce . . . at least not in Louisiana.[3] And therein lies the rub.

Assume, for example, that Jack and Jill, two sweethearts who live in Baton Rouge, Louisiana, decide that they are going to get married. Jack, overpowered with emotion, suggests that they get a covenant marriage because they are deeply in love and want to be with each other forever. Jill agrees and after two weeks of counseling about the seriousness of the commitment into which they are entering, they move to Arkansas, proudly sporting a Louisiana covenant marriage certificate.

No one in Arkansas is going to contest the validity of the marriage—it is clear that Jack and Jill had every right to get married and the marriage is valid in Louisiana, so there is no reason that the marriage would be declared invalid in any other state. The problem is not the validity of the marriage; the problem comes six months down the road, when Jack and Jill have come to the mutual conclusion that their marriage was a mistake and want to get a divorce.

Clearly, if Jack and Jill tried to get a divorce in Louisiana, they could not obtain a divorce; the very "covenant" nature of their marriage precludes them from doing so. The question is, does Arkansas have to respect the "covenant" nature of their marriage? Should an Arkansas court defer to the Louisiana legislature? Does Louisiana law control?

To answer these questions, it is necessary to examine briefly the development of no-fault divorce and the recent attempts to roll back no-fault divorce of which covenant marriage is the most successful. This Note will discuss some of the policy debates surrounding covenant marriage and no-fault reform, will analyze some of the legal issues raised by covenant marriage, eventually focusing on the questions of conflicts of law raised by covenant marriage, and will analyze how marriage interacts with conflicts of law in general. It is also necessary to examine an alternative approach to the traditional marriage choice of law rules: the Full Faith and Credit Clause of the

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[2] *See* 1997 La. Sess. Law Serv. 1380 (West).

[3] While Louisiana was the first state to have passed a covenant marriage law, Arizona recently enacted a covenant law as well. *See* 1998 Ariz. Legis. Serv. 135 (West). Covenant marriage bills remain pending in several other states, may be introduced (or reintroduced) in others, and are likely to be passed in at least some of them. *See infra* note 21 and accompanying text.

Constitution. This Note will explain how covenant marriage presents a new twist on the choice of law issues and why states are not required to give effect to particular legal rights or disabilities found in the marital law of other states. This Note will also argue that although the Full Faith and Credit Clause may provide a means for giving effect to the "covenant" rights granted under a covenant marriage, interstate recognition of marriage via full faith and credit may also require interstate recognition of same-sex marriage, a result which most supporters of covenant marriage do not want. Finally, this Note will conclude that covenant marriage is an inadequate and poorly-planned means of placing limits on the no-fault regime because the conflicts of law problem is inherent in the covenant marriage institution and drastically limits the effect of the policy.

II. FAULT, NO-FAULT, AND ATTEMPTS TO RESTRICT NO-FAULT

Historically, divorce was regulated not by the state, but by the church.[4] By the late nineteenth century, however, it was universally accepted that the public had a significant interest in the maintenance of marriage and consequently that states should have the power to regulate divorce.[5] The vast majority of states passed laws allowing for judicial termination of marriage by the early part of the twentieth century. These laws allowed for a granting of divorce based upon "fault," that is, upon some wrongdoing by one of the partners. Fault grounds almost always included adultery,[6] abandonment,[7] and cruelty,[8] but many other grounds have also been included, which vary state by state.[9]

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[4] In the United States, however, divorce was treated as a "civil rather than ecclesiastical matter" as early as 1630. *See* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 11–12 (1991).

[5] *See* Maynard v. Hill, 125 U.S. 190, 210–11 (1888).

[6] *See, e.g.*, ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 1 (1992) (describing adultery as one of the grounds for a fault divorce). Adultery is generally defined as voluntary sexual intercourse by a married person with someone other than his or her spouse. *See* BLACK'S LAW DICTIONARY 51 (6th ed. 1990); *see also* Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 609 (1996).

[7] *See* PARKMAN, *supra* note 6, at 1.

[8] *See id.*

[9] Other "faults" in state laws include "unnatural sexual behavior before or after the marriage," alcoholism, drug abuse, long-term imprisonment, "lack of physical ability to consummate marriage," and a "wife['s] pregnan[cy] by another at the time of the marriage without the husband's knowledge." *See, e.g.*, DANIEL SITARZ, DIVORCE AND DISSOLUTION OF MARRIAGE LAWS OF THE UNITED STATES 5 (1990) (describing fault provisions of Alabama divorce law). Fault provisions have varied over time and by state, and a general canvassing of

This situation changed dramatically in 1969, when California adopted the nation's first no-fault divorce law.[10] This law not only eliminated fault as the required basis for a divorce, but also eliminated it as the basis for alimony and property division.[11] By the end of 1996, sixteen states had abolished all fault-based grounds for divorce,[12] thirty-two had added no-fault provisions to the existing fault grounds,[13] and all fifty states had adopted some no-fault provisions.[14]

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the historical grounds for fault is beyond the scope of this Note. For a discussion of the historical grounds for divorce in the United States, see RILEY, *supra* note 4.

[10] *See* CAL. CIV. CODE § 4350 (West 1983).

[11] California law actually roots the grounds for divorce in one of two places: "[i]rreconcilable differences, which have caused the irremediable breakdown of the marriage," or "[i]ncurable insanity." CAL. FAM. CODE § 2310 (West 1994). Because California is a "community property" state, "all community and quasi-community property is divided equally between the spouses" as a general matter, unless there is a prior agreement otherwise. *See* SITARZ, *supra* note 9, at 21; *see also* CAL. FAM. CODE §§ 4800-4800.3 (West 1997). As to alimony awards, the California code has enacted a ten-factor balancing test to determine the appropriateness and amount of such an award, but the courts do not normally consider "marital misconduct" in such analyses. *See* CAL. FAM. CODE § 4801 (West 1997); SITARZ, *supra* note 9, at 22.

[12] The states are Arizona, California, Colorado, Delaware, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming, as well as the District of Columbia. In addition, Nevada and Kansas have specified incompatibility as the only grounds for divorce in their respective states. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in the Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765 app. at tbl. 4 (1997).

[13] The states are Alabama, Alaska, Arkansas, Connecticut, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and, of course, Louisiana. *See id.*

[14] By 1978, fifteen states had abandoned fault altogether, reasoning that "irretrievable breakdown" should be the only ground for a divorce; sixteen others added "irretrievable breakdown" as a ground while also retaining historical fault. *See* RILEY, *supra* note 4, at 163 (citing Doris Jonas Freed & Henry H. Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297, 297–313 (1977) and Robert Raphael et al., *Divorce in America: The Erosion of Fault*, 81 DICK. L. REV. 719, 719–31 (1977). For a discussion of how divorce laws compared among the states in the late 1980s, see SITARZ, *supra* note 9. Ohio, for example, currently provides for divorce on any of the following grounds:

> (A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought; (B) Willful absence of the adverse party for one year; (C) Adultery; (D) Extreme cruelty; (E) Fraudulent contract; (F) Any gross neglect of duty; (G) Habitual drunkenness; (H) Imprisonment of the adverse party in a state or federal correctional

No-fault divorce was initially suggested as a panacea to correct what legal thinkers saw as major problems with the fault system: its expense and tendency to create bitterness between the parties, as well as the growing problem of fabrication of grounds for divorce.[15] Legislatively, no-fault was a huge success, but even early on, it began to engender problems that the legal reformers had not necessarily expected. In 1973, only four years after California had touched off the "no-fault revolution," the author of a divorce manual for women observed that the reform had created a dilemma for dependent wives and children who wished to protect themselves and their marriages.[16] By the mid-1980s, it had become apparent that no-fault impacted many women quite negatively in practice; many women who had placed their careers on hold to work in the home or at lower-paying jobs were left with little or no income when their wage-

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institution at the time of filing the complaint; (I) Procurement of a divorce outside this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while those obligations remain binding upon the other party; (J) On the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation; (K) *Incompatibility, unless denied by either party.*

OHIO REV. CODE ANN. § 3105.01 (West 1997) (emphasis added).

[15] *See, e.g.*, Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter DIVORCE REFORM AT THE CROSSROADS]. As Professor Weitzman observes:

> Over time, in actual practice, many divorcing couples privately agreed to an uncontested divorce whereby one party, usually the wife, would take the *pro forma* role of the innocent plaintiff. Supported by witnesses, she would attest to her husband's cruel conduct and he would not challenge her allegations. But even if the testimony was staged, it nevertheless reflected what the courts considered "appropriate violations" of the marriage contract—and thus reinforced what were seen as the sex-appropriate obligations of marriage itself.

LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 8 (1985).

[16] Barbara Hirsch writes:

> The young man who tires of the obligations of wife and children can simply dissolve the marriage and reduce his duties to writing a check once a month.... How can a woman defend her marriage from dissolution in a no-fault proceeding? Doesn't it seem fair that if one party seeks to preserve the marriage, the other should then be obliged to prove that because of her misconduct, he's won the right to leave her?

BARBARA B. HIRSCH, DIVORCE: WHAT A WOMAN NEEDS TO KNOW 73 (1973).

earning husbands were easily able to obtain divorces.[17] At the same time, many conservative thinkers began to express the belief that no-fault engendered a culture that devalued marriage in general.[18] By the mid-1990s, several states had attempted to roll back the no-fault reforms, but none of these efforts were particularly successful.[19]

III. COVENANT MARRIAGE

Louisiana's passage of 1997 House Bill 756[20] (perhaps the no-fault reform movement's first major victory) touched off a deluge of bills creating covenant marriages in other states, including Alabama, California, Nebraska, and Ohio.[21]

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[17] *Compare* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 36–52 (1991) (critiquing the "equality discourse" that has shaped the policies regarding the economic aspects of divorce), *and id.* at 79–94 (critiquing same as it shapes the laws of child custody), *with* Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, *in* DIVORCE REFORM AT THE CROSSROADS, *supra* note 15, at 100–01 (concluding, based on sociological data, that "it seems unlikely that the adoption of no-fault grounds for divorce played the dominant role in producing reduced awards to divorced wives").

[18] *See, e.g.*, MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE 143 (1996) (characterizing no-fault divorce as outlawing marriage).

[19] *See* Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POL'Y REV.: J. AM. CITIZENSHIP at 8–10 (May-June 1996) (describing introduction of no-fault reforms in several states in 1996).

[20] 1997 La. Sess. Law Serv. 1380 (West).

[21] On May 21, 1998, Arizona joined Louisiana and enacted its own covenant marriage law. *See* 1998 Ariz. Legis Serv. 135 (West). Several other states which have covenant marriage bills pending as of August, 1998, include: Michigan, *see* H.B. 5990, 89th Leg., Reg. Sess. (Mich. 1997); Ohio, *see* H.B. 567, 122d Leg., Reg. Sess. (Ohio 1997); South Carolina, *see* H.B. 961, 122d Leg. (S.C. 1997); and Virginia, *see* H.B. 1056 (Va. 1998), *available in* LEXIS.

Several other states contemplated enacting covenant marriage laws in 1997 and early 1998, but most of these bills died in committee or failed to pass both houses before the end of the year's session. *See* H.B. 30, Reg. Sess. (Ala. 1998) (passed Alabama House; 1998 Alabama Senate regular session adjourned April 27, 1998, not carried over); S.B. 1377, Reg. Sess. (Cal. 1997) (failed passage of California Senate Judiciary committee; reconsideration granted); S.B. 440, 144th Leg., Reg. Sess. (Ga. 1997) (passed Georgia Senate; 1998 Georgia House regular session adjourned March 19, 1998, not carried over); H.B. 1052, 110th Leg., 1st Reg. Sess. (Ind. 1998) (Indiana House regular session ended while bill in committee); H.B. 2839, 77th Leg., Reg. Sess. (Kan. 1997) (Kansas House regular session ended while bill in committee, not carried over); S.F. 2935, 80th Leg., Reg. Sess. (Minn. 1997) (Minnesota Senate regular session ended while bill in committee, not carried over) and H.F. 2760, 80th Leg., Reg. Sess. (Minn. 1997) (Minnesota House regular session ended while bill in committee, not carried over); H.B. 1201, 1222, 1645, Reg. Sess. (Miss. 1998) (All related bills died in the Mississippi House committee Judiciary A) and S.B. 2910, Reg. Sess. (Miss. 1998) (died in the Mississippi Senate

The law amends Louisiana's civil code, not to eliminate no-fault provisions,[22] but to restrict their application. For example, each of Louisiana's "divorce grounds" provisions is now preceded by the phrase "[e]xcept in the case of a covenant marriage."[23] The law defines a covenant marriage as follows:

> A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.[24]

A "complete and total breach of the marital covenant" is the language that

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Judiciary committee); L.B. 1214, 95th Leg., 2d Reg. Sess. (Neb. 1997) (indefinitely postponed by Nebraska Legislative Judiciary committee); H.B. 2208, 46th Leg., 2d Reg. Sess. (Okla. 1997) (passed Oklahoma House; 1998 Senate regular session while bill in committee, not carried over); H.B. 2101, 100th Leg. (Tenn. 1997) (Tennessee House regular session ended while bill in committee, not carried over); S.B. 6135, 55th Leg., Reg. Sess. (Wash. 1997) (Washington Senate regular session ended while bill in committee, not carried over); H.B. 4562, 73d Leg., 2d Reg. Sess. (W. Va. 1998) (West Virginia House regular session ended while bill in committee, not carried over).

The status of covenant marriage in these states is unclear; at least one legislator in Indiana has indicated that he will reintroduce a covenant marriage bill in the 1998–99 session. *See* Suzanne McBride, *Proposal Would Make Couples Look Before a Leap*, INDIANAPOLIS STAR, Aug. 13, 1998, at A1 (reporting that Rep. Dennis Kruse plans to introduce a covenant marriage bill in the next legislative session). It seems safe to say that, despite the setbacks covenant marriage faced in the 1997–1998 legislative session, the debate surrounding it is not nearly over.

[22] Title V of Louisiana's civil code deals with divorces and allows for divorce "upon proof that: . . . [t]he spouses have been living separate and apart continuously for a period of six months or more on the date the petition is filed . . . ." LA. CIV. CODE ANN. art. 103(1) (West Supp. 1998). Alternatively, Louisiana courts may grant a divorce:

> upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least one hundred eighty days prior to the filing of the rule to show cause.

LA. CIV. CODE ANN. art. 102 (West 1997).

[23] 1997 La. Sess. Law Serv. 1380 art. 102 (West) (amending LA. CIV. CODE ANN. art. 102–03 (West 1997)).

[24] 1997 La. Sess. Law Serv. 1380 § 3-272(A) (West).

returned marital fault to American law. Under a Louisiana covenant marriage, it is possible to obtain a divorce "*only* upon proof of any of the following:" (1) adultery, (2) commission of a felony and subsequent sentence of death or imprisonment "at hard labor," (3) one-year abandonment, (4) sexual abuse of the spouse or a child of one of the spouses, (5) separate habitation without reconcile for two years, or (6) separate cohabitation after a judgment of separation of bed and board, for: one year, if the marriage produced no children; eighteen months, if the marriage produced any minor children; or one year, if the judgment of separation was based on abuse of a minor child of one of the spouses.[25]

Describing conditions like one-year abandonment or separate habitation for two years as a "return to fault" may seem somewhat misleading, but compared to Louisiana's "regular" divorce statute (which requires only a six month separation), imposing such conditions is a major step.

In order to obtain a covenant marriage, a couple must not only procure a marriage license, but also execute a "declaration of intent" to contract a covenant marriage.[26] Such a declaration must include recitation of a special oath[27] and the

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[25] *See* 1997 La. Sess. Law Serv. 1380 § 4-307(A) (West) (emphasis added). The law allows for a judgement of separation from bed and board for most of the same "faults," but adds "habitual intemperance... or excesses, cruel treatment, or outrages... [if] such ill-treatment is of such a nature as to render their living together insupportable," and (of course) removes the references to divorce after judgment of separation from bed and board. *See* 1997 La. Sess. Law Serv. 1380 § 4-307(B) (West). Changes to the law of separation from bed and board, although a major provision of the Louisiana law, will be discussed only fleetingly in this Note.

[26] *See* 1997 La. Sess. Law Serv. 1380 § 3-272(B) (West).

[27] The suggested oath reads as follows:

> We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience martial [sic] difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.
>
> With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.

1997 La. Sess. Law Serv. 1380 § 3-273(A)(1) (West).

Several questions come to mind regarding this oath, including possible Establishment Clause violations. *See* discussion *infra* Part IV. A. However, this Note will deal primarily with

signing of an affidavit by the parties that they have received premarital counseling.[28] It must be accompanied by a notarized attestation by the counselor as to the nature of that counseling and also that the couple received an informational pamphlet which "provides a full explanation of the terms and conditions of a covenant marriage."[29] It must also include the notarized signature of both parties.[30] Covenant marriage bills pending in other states follow the same basic pattern, but sometimes modify the recognized "faults," adding different recognized bases for divorce[31] or other measures to harmonize the bill with the existing law in that state.

The motivations behind covenant marriage are many, but essentially boil down to a belief that no-fault divorce has had a detrimental effect on the American family[32] and created a culture in which marriage lacks commitment.[33]

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the conflicts of law issues, *see* discussion *infra* Part V, and the choice of law issues, *see* discussion *infra* Part VII.

[28] The counseling, according to the law, must be by "a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor," and must "include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life," a discussion of the obligation to seek counseling, and a discussion of the legal grounds for divorce in a covenant marriage. *See* 1997 La. Sess. Law Serv. 1380 § 3-273(A)(2)(a) (West). The fact that the law compels counselors to engage in a legal discussion of the ramifications of covenant marriage raises questions about the unauthorized practice of law. These questions will be addressed *infra* Part IV.B.

[29] 1997 La. Sess. Law Serv. 1380 § 3-273(A)(2)(b) (West).

[30] *See id.* § 3-273(A)(3)(a).

[31] Alabama's bill, for example, allows a judgement of divorce "[i]n favor of either party, when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." H.B. 30 6(1), Reg. Sess. (Ala. 1998) Indiana's bill allows divorce upon a showing of "impotence existing at the time of the marriage." H.B. 1052 § 4(b)(2), 110th Leg., Reg. Sess. (Ind. 1998). One covenant marriage bill actually removed no-fault grounds from the state's existing marriage laws, and establishes covenant marriage as a separate type of marriage where adultery is not available as a fault ground. *See* H.B. 1222 § 2, Reg. Sess. (Miss. 1998). This bill thankfully died in committee and another Mississippi bill tracks the Louisiana law more closely. *See* H.B. 2910 (Miss. 1998). Nebraska's bill tracks the Louisiana law, but adds a provision for ten hours of mandatory marriage counseling before a divorce can be granted. *See* L.B. 1214 § 7(2)(f), 95th Leg., 2d Reg. Sess. (Neb. 1997).

[32] Louisiana Representative Tony Perkins, who sponsored the covenant marriage law through the Louisiana House, puts it this way:

> I think we've come to a point in our culture that we realize that the no-fault divorce system has failed.... [D]ivorces between 1970 and 1990 increased by 34 percent.... [T]he issue of teen-age crime, violence, delinquency, teen-age pregnancy, all of that is tracing back to broken homes. And we have a vested interest in keeping children in stable, two-parent homes. And that's what this is about.

Interestingly, these beliefs are no longer the exclusive property of conservatives; both First Lady Hillary Rodham Clinton[34] and former Clinton campaign supervisor James Carville[35] have expressed support for the goals of the Louisiana law, and Amitai Etzioni's Communitarian Network has been advocating for reforms similar to covenant marriage since 1993.[36]

Today: Lynne Gold-Bikin and Tony Perkins, Representing Opposing Sides, Discuss the Proposed Covenant Marriage Law (NBC television broadcast, Aug. 15, 1997), *transcript available in* 1997 WL 11222538 (page numbers unavailable online).

[33] Louisiana State University Law Professor Katherine Spaht, one of the drafters of the Louisiana law, explains some of the reasoning for the law:

> The opportunity for seriously examining the meaning of marriage (mandated by the covenant marriage law) will help to prevent hasty and ill-advised marriages and it will impress upon couples that do marry the gravity of the marriage contract. It will provide them with a firmer foundation upon which to build a lifelong relationship and stable family.

Katherine Shaw Spaht, *Would Louisiana's 'Covenant Marriage' Be a Good Idea for America? Yes: Stop Sacrificing America's Children on the Cold Altar of Convenience for Divorcing Spouses*, INSIGHT, Oct. 6, 1997, at 24, *available in* 1997 WL 11444482.

[34] She states:

> When you're responsible for children, you have to put their interests at least equal with if not ahead of your own. There is a lot of evidence about the traumas and difficulties that divorced mothers face, financially and emotionally, and also about what happens to the children. I know there are many instances where a situation is intolerable. But what I would hope is that we would be more honest talking about the costs of divorce, and when parents seek a divorce, there would be a waiting or cooling-off period when counseling programs would be available, maybe even required.

Hillary Rodham Clinton, *quoted in* Walter Isaacson, *"We're Hoping That We Have Another Child": An Exclusive Interview with the First Lady*, TIME, June 3, 1996, at 28; *see also* Hillary Rodham Clinton, *Make Divorce Harder for Kids' Sake*, DET. NEWS, Jan. 28, 1996, at A11 (arguing that getting a divorce should be much harder when there are children involved).

[35] *See* James Carville, *It'll Make You Think Twice—Louisiana's New Covenant Marriage Law Ain't More Than Half Bad*, SALON (June 30, 1997) <http//www.salonmagazine.com/june 97/columnists/carville.html> (arguing that while the goals of Louisiana covenant marriage law are admirable, it is flawed in that it makes no distinction between marriages with children and those without children and asserting that once children are involved, *every* marriage should become a covenant marriage).

[36] *See* Amitai Etzioni & Peter Rubin, *Opportuning Virtue: Covenant Marriages, the Louisiana Experience, and Beyond*, *in* OPPORTUNING VIRTUE: LESSONS OF THE LOUISIANA COVENANT MARRIAGE LAW, A COMMUNITARIAN REPORT 1 (The Communitarian Network ed., 1997) [hereinafter OPPORTUNING VIRTUE].

Despite the recent groundswell of support for covenant marriage, it remains unclear how many couples are exercising that option. In the month after the Louisiana law was passed, only twenty-six couples opted to apply for covenant marriage licenses, compared to the more than three thousand "normal" marriage licenses granted in a typical summer month.[37]

IV. PROBLEMS WITH COVENANT MARRIAGE

Although both liberals and conservatives have praised the aims of covenant marriage, there remain skeptics. Sociologist Judith Stacey believes that covenant marriage is a no-fault repeal in disguise and "open[s] the door to going back to the bad old days of divorce, making divorce nastier, more expensive, [and] more harmful to children."[38] The Louisiana chapter of the ACLU, which lobbied against the law, believes that the law "involves the government in enforcing religious doctrine," and will "clog our already overcrowded court system with very acrimonious, lengthy divorces where one party has to prove that the other party did a despicable act in order to get the divorce."[39]

Actually, Etzioni's "supervows" proposal is somewhat more flexible than Louisiana's covenant marriage law:

> "Supervows" would send a powerful message. Such vows are premarital contracts in which those about to be betrothed declare that they are committing more to their marriage than the law requires. They may choose from a menu of items what they wish to incorporate in their voluntary agreement. For instance, if either spouse requests marital counseling, the other promises to participate. If one asks for a divorce, he or she promises to wait at least six months to see if differences can be worked out. Once the couple freely arrives at an agreement, the supervows become legal commitments between the spouses.

Amatai Etzioni, *How to Make Marriage Matter*, TIME, Sept. 6, 1993 at 76, *reprinted in* OPPORTUNING VIRTUE, *supra*.

Several other scholars have called for a similar "private contract" approach to marriage. *See, e.g.*, Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464–65 (1998) (arguing that "[w]ithin limits, couples should be authorized to legally define their own marriages").

[37] *See New Form of Marriage Not That Popular*, THE CHARLESTON DAILY MAIL, Oct. 15, 1997, at D3.

[38] *CBS This Morning: Louisiana State Representative Tony Perkins and Sociologist and Author Judith Stacey Discuss the Pros and Cons of Covenant Marriages* (CBS television broadcast, July 7, 1997), *transcript available in* 1997 WL 5627539, at *1.

[39] *The News: Analysis: Louisiana's Covenant Marriage Law* (MSNBC cable television, June 24, 1997), *transcript available in* 1997 WL 11863357, at *1.

A. *Establishment of Religion*

The religious freedom objections to covenant marriage are based in the Establishment Clause;[40] the basic argument is that the law involves the state in a religious enterprise.[41] The law mandates that all couples wishing to enter into a covenant marriage must sign a declaration containing language that tracks traditional marriage vows[42] and also that they must receive counseling from a "priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor."[43]

The drafters of the law, however, went to great pains to ensure that it would survive any Establishment Clause challenge. The oath, although it does suggest a particular view of marriage, makes no explicit reference to religion at all—it merely states that "marriage is a covenant between a man and a woman who

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[40] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. Although the Establishment Clause literally refers only to Congress, it has been interpreted to apply to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 690 (1994).

[41] The three-prong test for Establishment Clause violations was enunciated by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The test requires that a law have a "secular legislative purpose," that the primary effect of the law must "neither advance nor inhibit religion," and that the law "must not foster 'an excessive entanglement with religion.'" *Id.* at 612–13 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The *Lemon* test, however, has been much criticized and has fallen into disuse; the Court may simply stop using the test, without overruling *Lemon*. *See, e.g.*, *Grumet*, 512 U.S. at 704 (1994) (striking down New York law in part because it failed to exercise civil power in a neutral way, citing but not applying *Lemon*). *But see id.* at 710–11 (Blackmun, J., concurring) (describing *Grumet* as an application of the *Lemon* test). *See generally* John Kevin Moore, Casenote, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*: A Missed Opportunity for the Supreme Court to Clarify Establishment Clause Analysis*, 46 MERCER L. REV. 1189, 1195 (1995) (stating that, by "choosing to use both *Lemon* and strict neutrality principles, the Court rejected any notion that it might formulate a new analysis for Establishment Clause issues"); Stephanie E. Russell, Note, *Sorting Through the Establishment Clause Tests, Looking Past the* Lemon: Board of Education of Kiryas Joel Village School District v. Grumet, 60 MO. L. REV. 653, 676 (1995) (concluding that, although the Court virtually ignored the *Lemon* test in its analysis of *Grumet*, "*Lemon* will remain the standard until the proper Establishment Clause test(s) are made clear by a majority of the Court"). *See also* Lamb's Chapel v. Center Mouches Union Free Sch. Dist., 508 U.S. 384, 398 (1995) (Scalia, J., dissenting) (ridiculing the *Lemon* test). *But see* Agostini v. Felton, 521 U.S. 203 (1997) (applying aspects of the *Lemon* test regarding excessive entanglement).

[42] "We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live." 1997 La. Sess. Law Serv. 1380 § 3-273(A)(1) (West).

[43] *Id.* § 3-273(A)(2)(a).

agree to live together as husband and wife so long as they both may live."[44] Furthermore, the particular wording of the oath is not mandatory; the law requires only "[a] recitation by the parties to the... [oath's] effect."[45] No religious motivation is suggested in the law or in the oath; in fact, the supporters of the law have indicated that the primary motivation behind the law was pure social policy: divorce is harmful to children, families, and society as a whole, and as such divorces should be difficult to obtain.[46] Likewise, the law does not mandate religious counseling; it merely states that a couple must receive marriage counseling and suggests that religious leaders are well qualified to provide that counseling. If the couple wishes, they can receive that counseling from a secular professional.[47]

The Supreme Court's recent Establishment Clause jurisprudence indicates that merely because a law's goals coincide with the beliefs of religious groups does not mean that the law serves an impermissible religious purpose.[48] The Court has described a central idea of the Establishment Clause as the principle "that government should not prefer one religion to another, or religion to irreligion."[49] The clause, however, does not prevent the state from passing legislation that relates only incidentally to religion. In *Bowen v. Kendrick*,[50] for example, the Court upheld the constitutionality of the Adolescent Family Life Act, in part because even if the statute was partially motivated by improper concerns, it "was also motivated by other, entirely legitimate secular concerns."[51] Despite the fact that the Adolescent Family Life Act "enlists the involvement of religiously affiliated organizations in the federally subsidized programs,"[52] the Court concluded that "[n]othing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular

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[44] *Id.* § 3-273(A)(1).

[45] *Id.*

[46] *See supra* notes 34–35.

[47] 1997 La. Sess. Law Serv. 1380 § 3-273 (A)(2)(a).

[48] *See* Bowen v. Kendrick, 487 U.S. 589, 604 n.8 (1988) (finding "no reason to conclude that the... [act at issue] serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations").

[49] Board of Educ. v. Grumet, 512 U.S. 687, 703 (1994) (citing Wallace v. Jaffree, 472 U.S. 38, 52–54 (1985)).

[50] 487 U.S. 589 (1988).

[51] *Id.* at 603.

[52] *Id.* at 606.

problems."[53] This rationale seems particularly appropriate to Louisiana's covenant marriage law, which, like the act in question in *Bowen*, enlists a "wide spectrum of organizations,"[54] both religious and secular.[55] Based on the *Bowen* standard, it seems fair to conclude that despite the fact that the law contemplates that religious entities may be involved in its application, and notwithstanding that the law coincides squarely with the religious purpose of sanctifying marriage, it will likely survive any constitutional challenges based on establishment of religion.

B. *Practice of Law*

Louisiana's covenant marriage law requires that all couples wishing to enter into a covenant marriage receive counseling "as to the nature and purpose of the marriage and the grounds for termination thereof"[56] and that the counseling, conducted by "any clergyman of any religious sect, or a marriage counselor,"[57] include "a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board."[58] These requirements invite an investigation as to whether the law requires those clergy and marriage counselors who perform covenant marriage counseling to engage in the practice of law without benefit of a state license.[59]

As a preliminary matter, it seems obvious that even if covenant marriage laws do require clergy and marriage counselors to engage in behavior that could be considered the "practice of law," it is difficult to describe that behavior as "unauthorized" because the covenant marriage statute itself authorizes it![60] Notwithstanding, it is valuable to examine the statutory definitions of legal

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[53] *Id.* at 607.

[54] *Id.* at 608.

[55] Louisiana, however, seems to be having trouble enlisting some religious organizations; the state's Roman Catholic bishops have announced that Catholic Church officials will not perform the legal counseling required by the law, on the belief that the Catholic faith recognizes only one type of marriage. *See* Bruce Nolan, *Bishops Back Off Covenant Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1.

[56] 1997 La. Sess. Law Serv. 1380 § 3-273(A)(2)(b) (West).

[57] *Id.* § 3-273(A)(2)(a).

[58] *Id.*

[59] This discussion presumes that the clergy and counselors who engage in covenant marriage counseling will receive some sort of remuneration for providing that service. While this is by no means certain, it is likely that some benefit will flow unto them; marriage counselors, in particular, are unlikely to work for free.

[60] *But see infra* text accompanying notes 80–90.

practice and compare them with the duties that are required of counselors and clergy under the statute. While it is highly unlikely that clergy and lay counselors will be sanctioned for unauthorized legal practice, a wiser public policy choice may be to reserve some of the counseling mandated by the covenant marriage law to persons with legal training.[61]

There is no general consensus as to what constitutes "the practice of law."[62] Furthermore, each state regulates unauthorized practice in different ways, and some do not regulate it at all.[63] An American Law Institute initiative to adopt uniform rules in this area has been postponed,[64] and states have been left to their own devices to determine what constitutes "the practice of law," and whether or not activities that fall under that rubric should be reserved exclusively to lawyers.

In states that have a narrow definition of the practice of law, advising a couple on the legal ramifications of a decision to enter into a covenant marriage would seem to be permissible. For example, the Supreme Court of Minnesota has determined that:

> Generally speaking, whenever, as incidental to another transaction or calling, a layman, as part of his regular course of conduct, resolves legal questions for

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[61] The primary rationale advanced for prohibitions against unauthorized practice is "to protect the public from the consequences of inexpert legal services." CENTER FOR PROFESSIONAL RESPONSIBILITY OF THE AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 note at 464–65 (1992). While the practice of covenant marriage counseling may not be "unauthorized," *see supra* text accompanying note 60, if it involves counseling on complex legal issues and lay counselors are unequipped to deal with those issues, the policy rationale for unauthorized practice prohibitions would apply equally to this "authorized" practice.

[62] *See, e.g.*, 2 GEOFFREY C. HAZARD & W.W. HODES, THE LAW OF LAWYERING 814 (2d ed. 1990) (describing it as "practically impossible" to define what constitutes the outer limits of the practice of law).

[63] Arizona, for example, has no statute or court rule sanctioning unauthorized practice. *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE 63 (1996). Enforcement of rules forbidding unauthorized practice has been described as "inactive" or "non-existent" in at least eight states. *See id.* at 15. Forty states reported at least moderate enforcement of unauthorized practice prohibitions. *See id.* Louisiana, however, reported "active" enforcement of unauthorized practice of law violations. *See id.* at 18.

[64] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, TENTATIVE DRAFT NO. 8, REPORTER'S MEMORANDUM at xxix (1997), *available in* WESTLAW, Restatement database. Originally, § 9 of the Restatement, which was to include issues of unauthorized practice, was to be eliminated. That decision has been revisited in the most recent draft, and "[t]he present intent is to attempt a reduced draft of the Chapter." *Id.* at *17.

> another—at the latter's request and for a consideration—by giving him advice or by taking action for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind.[65]

Under this definition, a counselor giving advice about the obligations of a couple under the Louisiana covenant marriage law would not, at first glance, seem to be engaged in the practice of law. The statutory language employed regarding the obligations of a covenant marriage (under Louisiana law) is relatively clear[66] and probably does not require the "application of a trained legal mind" to explain;[67] the legal aspect of the counseling is "incidental" to the social one; and—because the legislature has placed its imprimatur on the counseling—"safeguard[ing] the public" does not seem to be a concern.

Minnesota's definition of legal practice is, however, uncommonly narrow. Other states have interpreted the practice of law much more broadly. Ohio is representative of the majority position and defines the practice of law to include "all advice to clients and all action taken for them in matters connected with the law."[68] Louisiana itself is notably broad in its definition of legal practice, including within its statutory definition "[t]he advising or counseling of another as to secular law."[69]

Louisiana's covenant marriage law certainly mandates that couples receive counseling as to secular law; the law requires that the couple attest that the counseling they received included "a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board."[70] While it may be argued that the provisions of the law itself are straightforward and do not require the services of

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[65] Gardner v. Conway, 48 N.W.2d 788, 796 (Minn. 1951).

[66] That is, as far as statutory language goes.

[67] *But see infra* text accompanying notes 70–78.

[68] Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 650 (Ohio 1934). Other states have defined legal practice in similar ways. *See, e.g.*, ALA. CODE § 34-3-6(b)(2) (1997) (defining practice of law to include advising or counseling another as to secular law); Arkansas Bar Ass'n v. Block, 323 S.W.2d 912, 915 (Ark. 1959) (defining practice of law to include "all advice . . . in matters connected with the law"), *modified and limited by* Creekmore v. Izard, 367 S.W.2d 419 (Ark. 1963); Gallagher v. First Dependable Mortgage Co., 605 A.2d 785, 786 (N.J. 1992) (stating that law is practiced "whenever and wherever legal knowledge, training, skill and ability are required."); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 417 (Okla. 1972) (holding that when activity includes giving advice or opinion of legal effect, it is practice of law).

[69] LA. REV. STAT. ANN. § 37:212 (West 1996).

[70] 1997 La. Sess. Law Serv. 1380 § 273(A)(2)(a) (West).

a lawyer to explain, the various legal issues raised by covenant marriage may well be beyond the training of those who are responsible for the counseling required by the law. For example, the "Declaration of Intent" that must be filed by a couple seeking a covenant marriage includes the phrase, "we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages."[71] While this phrase seems innocuous to the non-legally trained eye, a competent attorney would surely recognize it to be a choice of law clause and would immediately seek guidance in the applicable law as to its validity.[72] If the choice of law clause is invalid, it may be that Louisiana law does not necessarily control the termination of a covenant marriage, with the effect that the counselor's "discussion of the exclusive grounds for legally terminating a covenant marriage" is not only legal advice, but bad legal advice. In addition, while the term "divorce" is commonly understood by the layperson, it is not clear that a "judgment of separation from bed and board" is as widely understood. The covenant marriage law, by its terms, does not require counselors to discuss when a judgment of separation is obtainable,[73] and for good reason: one wanders into murkier legal waters when discussing the effects of such a judgment. The covenant marriage law has special provisions detailing when subject-matter jurisdiction for a judgment of separation is proper,[74] special venue rules apply,[75] and such a judgment creates new rights of suit between the parties.[76] Furthermore, the law seems to instruct that a temporary reconciliation between the parties after a judgment of separation can nullify that judgment "unless the spouses execute prior to the reconciliation a matrimonial agreement that the community shall not be reestablished upon reconciliation."[77]

The ramifications of a judgment of separation, therefore, seem well beyond the expertise of the clergy or counselors who are by law required to refer to it. While the law requires only that counselors sign a "notarized attestation . . . confirming that the parties were counseled as to the nature and purpose of the marriage and the grounds for termination thereof,"[78] the parties

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[71] STATE OF LOUISIANA, DECLARATION OF INTENT, COVENANT MARRIAGE (1997) [hereinafter DECLARATION OF INTENT] (copy on file with the author).

[72] For a discussion of the validity of the choice of law provision, see discussion *infra* Part VII.

[73] *See* 1997 La. Sess. Law Serv. 1380 § 273 (West).

[74] *See id.* § 308(B)(1).

[75] *See id.* § 308(B)(2)-(3).

[76] *See id.* § 308(A).

[77] *Id.* § 309(B)(2).

[78] 1997 La. Sess. Law Serv. § 273(A)(2)(b) (West).

are required to affirm that the counseling included "a discussion of the exclusive grounds for legally terminating a covenant marriage... after a judgment of separation from bed and board."[79] It seems unlikely that a counselor or member of the clergy would be aware that a judgment of separation can be nullified by a temporary reconciliation, effectively rendering that judgment useless and placing that portion of the premarital counseling in error.

Louisiana courts have chosen, in other contexts, to give a very broad interpretation to the concept of legal practice.[80] In this instance, however, the Louisiana legislature has effectively exempted the activities of covenant marriage counselors from that broad definition. While this activity is not unprecedented in Louisiana law,[81] there is some debate as to the ability of the legislature to regulate the legal profession in this manner. In *Alco Collections, Inc. v. Poirer*,[82] a Louisiana court of appeals discussed the issue:

> [T]he legislature cannot enact laws defining or regulating the practice of law in any aspect without the [Louisiana] supreme court's approval or acquiescence because that power properly belongs to the supreme court and is reserved to it by the constitutional separation of powers. Accordingly, a legislative act purporting to regulate the practice of law has commendatory effect only until it is approved by the supreme court as a provision in aid of its inherent judicial power. Moreover, the supreme court will ratify legislative acts that are useful or necessary to the exercise of its inherent judicial power, but it will strike down

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[79] *Id.* § 272(A)(2)(a).

[80] *See, e.g.*, Croker v. Levy, 615 So. 2d 918, 921 (La. Ct. App. 1993) (accountant's written agreement to render "business, financial and other assistance, including securing for [client] reputable legal counsel" in exchange for large contingency fee based on legality of will, was void as unauthorized practice of law); Pisarello v. Administrator's Serv. Corp., 464 So. 2d 917 (La. Ct. App. 1985) (counseling regarding prescription of claims constitutes the practice of law); Andrus v. Guillot, 160 So. 2d 804 (La. Ct. App. 1964) (collection agency engaged in practice of law when it gave legal advice to clients); La. Op. Att'y. Gen., No. 91-539 (1991) (giving legal advice and preparing, notarizing, and recording legal document for trust is practice of law). *But see* State v. Kaltenbach, 587 So. 2d 779, 786 (La. Ct. App. 1991) (defendant who assisted students in their studies in course on "common law" and owned a "law library" did not engage in the practice of law); Aycock v. Miller, 18 So. 2d 335 (La. Ct. App. 1944) (action of clerk in reading application of counsel for preliminary default was ministerial duty required by court rule).

[81] *See* Collection Agency Regulation Act, LA. REV. STAT. ANN. § 9:3576.19 (West) (purporting to authorize certain non-lawyers to institute lawsuits on behalf of clients to collect debts); *see also* Alco Collections, Inc. v. Poirer, 680 So. 2d 735, 744 (La. Ct. App. 1996) (noting interpretation of Collection Agency Regulation Act that authorizes non-lawyers to institute lawsuits).

[82] 680 So. 2d 735 (La. Ct. App. 1996).

statutes which tend to impede or frustrate its authority.[83]

The Louisiana Supreme Court struck down just such a law in *Succession of Wallace*.[84] In that case, the legislature adopted a statute providing that an attorney designated by a testator in the testator's will could be dismissed only for just cause.[85] The court determined that the statute was in conflict with Louisiana's Rules of Professional Conduct, which required an attorney to withdraw when discharged, with or without cause.[86] As such, the court relied on its state constitutional authority to regulate the legal profession and struck down the statute, which it determined "would degrade this court, weaken the profession, and impede the administration of justice."[87]

Based on *Succession of Wallace*, it is possible that, despite the legislature's "authorization" of covenant marriage legal counseling by non-lawyers, those counselors could *still* be engaging in the "unauthorized practice of law," because regulation of the practice is reserved to the judiciary. If, upon review, the Louisiana Supreme Court determines that the covenant marriage law impedes its efforts to regulate the practice of law, the statute's authorization of covenant marriage counseling will be struck down.[88] Given the complex legal questions that may arise based on the law,[89] such a result may well be the soundest public policy choice.[90]

C. *Policy Debates*

The public debates surrounding covenant marriage have largely overlooked purely legal issues—instead, they have focused on practical effects and policy choices. Supporters of covenant marriage have focused on the skyrocketing divorce rate of the past three decades, and have placed the blame for that

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[83] *Id.* at 746 (citations omitted).

[84] 574 So. 2d 348 (La. 1991).

[85] *See id.* at 354–55.

[86] *See id.* at 355.

[87] *Id.*

[88] *See, e.g., id.* at 350.

[89] Including the ramifications of a judgment of separation, discussed *supra* at notes 70–79 and accompanying text, as well as the conflicts of law issues, see discussion *infra* Part VII.

[90] Other states that are considering covenant marriage laws would do well to examine their own laws as to this issue; if there is a question as to the legislature's power to regulate the practice of law, and the jurisdiction has a broad definition of legal practice, it would be folly to adopt covenant marriage without making any modifications.

phenomenon squarely on the shoulders of no-fault divorce.[91] Critics of the law point out that the correlation between the two events is largely anecdotal and is not supported by statistics.[92] Some have asserted that the choice between marriage licenses offered by the law is no choice at all—that the existence of the covenant marriage option will, through social pressure, "force" couples into entering into a marriage that is more difficult to dissolve.[93]

Katherine Spaht, the Louisiana State University law professor who helped draft the law, believes that the law's real focus is to protect women and children from the negative consequences of divorce:

> Restoration of power to the innocent spouse provides important protection for women and children, particularly where the wife has chosen to forego or to interrupt her career for the purpose of bearing and rearing children. A woman undoubtedly risks more by assuming her marriage is a lifelong relationship.... [And] [i]n the final analysis, Louisiana's covenant marriage experiment is about nourishing our children by strengthening marriage as an institution.[94]

Opponents of covenant marriage have attacked this view: "[To] suggest that [covenant marriage] is better for children . . . is to close one's eyes to the fact that there was juvenile crime long before no-fault divorce.... Divorce is not the

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[91] *See generally* Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998).

[92] "[T]here never has been any correlation between the incidence of divorce and the laws on the books. The surge in divorces in the 1960s well preceded no-fault legislation." Ashton Applewhite, *Q: Would Louisiana's 'Covenant Marriage' Be a Good Idea For America? No: It Won't Lower the Divorce Rate and Will Raise the Human and Economic Cost of Divorce*, INSIGHT, Oct. 6, 1997, at 25, 25.

[93] *Compare* Editorial, *Covenant Marriage: State Should Stay Out of "Fixing" Institution*, COLUMBUS DISPATCH, Sept. 6, 1997, at A8 ("What self-respecting newlywed wants to think of his or her commitment as only 'standard'?"), *with* Amatai Etzioni, *Covenant Marriage in Context*, *in* OPPORTUNING VIRTUE, *supra* note 36, at 18 ("Most people would agree that allowing individuals to make choices is the exact opposite of coercion.").

[94] Katherine Shaw Spaht, *Q: Would Louisiana's "Covenant Marriage" Be a Good Idea for America? Yes: Stop Sacrificing America's Children on the Cold Altar of Convenience for Divorcing Spouses*, INSIGHT, Oct. 6, 1997, at 24, 24.

Professor Spaht has indicated that the law was inspired in part by the research of psychologist Judith Wallerstein, who has concluded that the impact of a divorce during childhood increases as children grow older. *See id.* at 24–25. Dr. Wallerstein's study has been attacked for failing to follow accepted research methodologies. *See* Katha Pollit, *What's Right About Divorce?*, N.Y. TIMES, June 27, 1997, at A29.

issue; parents and parenting skills is the issue."[95]

Critics of the law have noted that the mere existence of covenant marriage as an option furthers the problem it is meant to address (the devaluation of marriage) by trivializing all marriages that are not "covenant" in nature; one observer complained that "from now on, my marriage—and yours and that of every other hitched person you know—will be considered an ordinary, grade-B matrimony, regardless of our tear-jerking vows."[96] Another described covenant marriage as a "Trojan Horse" that "cheapens marriage by suggesting that you and I were not serious when we exchanged our vows."[97] Louisiana's Catholic and Episcopal Bishops seem to have been persuaded by this argument: Catholic Bishops have stated that their employees will not engage in covenant marriage counseling, and Episcopal Bishop Charles Jenkins has strongly condemned the law as a step into a flawed past.[98]

The raging policy debates have been entertaining,[99] but one thing is clear: despite the good intentions of its supporters, only a small number of couples getting married in Louisiana have opted to enter covenant marriages.[100] A good

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[95] Lynne Z. Gold-Bikin, Editorial, *Let's Eliminate the Idea of Covenant Marriage*, CHI. TRIB., Sept. 7, 1997, § 13, at 9.

[96] Daniel Radosh, *Covenant Marriage: Tightening the Ties That Bind*, PLAYBOY, Dec. 1997, at 59.

[97] Gold-Bikin, *supra* note 95, at 9.

[98] *See* Nolan, *supra* note 55, at A1.

[99] Take, for example, interviewer Daniel Radosh's discussion with Louisiana State Representative Tony Perkins, the Covenant Marriage bill's principal sponsor:

> What if, I asked, a husband announced that he was gay?
>
> "Um. Well. Again, there is no . . . ." Then he saw the loophole: "Obviously if he is gay and engaging in the homosexual lifestyle and engaged in sex with others, that would be adultery."
>
> How about if the husband was going to leather bars and dancing with men but not getting laid? "That is not a breach of contract," Perkins admitted. "It would be as if a husband went out dancing with other women."
>
> I threw out a few more scenarios: a wife gets an abortion behind her husband's back; a wife burns an American flag; a wife burns an American flag in front of the children; a husband announces that the family must begin worshipping Satan.
>
> Suddenly, Perkins was displaying considerably less pride of authorship.

Radosh, *supra* note 96, at 59.

[100] "A total of 26 covenant [marriage] licenses were sold in the month after the law took effect Aug. 15 [1997]; in a typical summer month, Louisiana sells more than 3,000 marriage licenses." Janet McConnaughey, *Covenant Marriages Slow-Going in State*, NEW ORLEANS TIMES-PICAYUNE, Oct. 19, 1997, at A4.

thing, too—once news gets out that divorce could be just across the state line, those couples who *did* get a covenant marriage will be a little less secure in their relationships.

V. INTERSTATE MARRIAGE RECOGNITION AND STATE LAW

Marriage has raised conflicts of law problems throughout modern history and throughout the world.[101] In the United States, these problems have tended to center around the validity of the marriage. United States law in this area has evolved primarily around the English legal principle of the *lex loci celebrationis*—the idea that if a marriage is valid in the celebratory jurisdiction at the time it is entered into, then it will under most circumstances be deemed valid in other jurisdictions. The *lex loci* principle is a matter of state law, and its application varies from state to state.[102] There is, however, near-universal

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[101] *See generally* SEYMOUR E. KARMINSKI, SOME ASPECTS OF THE DEVELOPMENT OF ENGLISH PERSONAL LAW IN THE LAST CENTURY (1963); LENNART PALSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS: SUBSTANTIVE CONDITIONS (1981) [hereinafter PALSSON, SUBSTANTIVE CONDITIONS]; LENNART PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS (1974); Colloquium, THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS (Richard B. Lillich, ed., 1981).

[102] *See* PALSSON, SUBSTANTIVE CONDITIONS, *supra* note 101, at 7–10 (discussing application of *lex loci* rule in the United States). The Restatement (Second) of Conflicts of Law has added a twist to the general application of the *lex loci* rule, designed to avoid migratory marriages. Section 283 of the Restatement (Second) reads as follows:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283 (1971) [hereinafter R.2D CONFLICTS]. Subsection (1) of the rule adopts a "most significant relationship" test to determine which law should apply, in accordance with the general thrust of the Restatement (Second), which is full of such rules. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 195–98 (2d ed. 1993) ("For most issues . . . the Restatement [Second] prescribes that the law of the state with the 'most significant relationship' to that issue should be applied."). Subsection (2) restates the familiar *lex loci* principle, subject to a public policy exception. Although the section states the two principles in conjunction, they are most often used as alternatives to one another because the result of applying subsection (1) would not

acceptance of the principle, and observers who are familiar with the law of the celebratory state can confidently predict how a particular case will turn out in any given factual circumstance. A common example in American law is the marriage between relatives. In the famous case *In re May's Estate*,[103] the New York Court of Appeals addressed the validity of a marriage between an uncle and his niece.[104] Such a marriage would have been illegal if celebrated in New York, but the court upheld its validity, relying on the principle of the *lex loci celebrationis*; the marriage had been celebrated in Rhode Island and was legal under Rhode Island law.[105]

The *lex loci* principle applies the law of the jurisdiction of celebration to determine the validity of a marriage, and a sound public policy supports the application of this choice of law provision. The tendency of all American jurisprudence is to preserve the validity of a marriage entered into by the consent of the parties; the *lex loci* rule provides stability and does not disrupt the expectations of the parties entering into a marriage. The rule, furthermore, completely avoids the "potentially hideous problems that would arise if the legality of a marriage varied from state to state."[106]

The downside of the principle, however, is that a forum state must often suppress its own legitimate interest in the recognition of a marriage and confer marital rights upon a couple that would otherwise not be entitled to them.[107] This problem recently received a great deal of attention when the Hawaii Supreme Court issued its decision in *Baehr v. Lewin*,[108] indicating that the Hawaii practice

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necessarily be the same as the result obtained by applying subsection (2). It should also be noted that despite the Restatement's suggestion, the overwhelming majority of jurisdictions continue to apply only the *lex loci* principle. *See, e.g.*, EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 13.5 n.1 (Lawyer's ed. 1984) (citing R.2D CONFLICTS), *supra*, § 283(2), which collects cases applying *lex loci celebrationis*.

[103] 114 N.E.2d 4 (N.Y. 1953).

[104] *See id.* at 4.

[105] *See id.*

[106] RICHMAN & REYNOLDS, *supra* note 102, at 362.

[107] Such a result necessarily follows when the *lex loci* is used to validate a marriage—if the marriage would not normally be recognized under forum law, but a court applies the law of the state of celebration to validate it, that marriage would be entitled to all the benefits of a marriage contracted in the forum state. *See, e.g.*, Allen v. Storer, 600 N.E.2d 1263 (Ill. 1992) (holding that where common-law marriage would be recognized in the celebratory state, the forum state must deem the marriage valid and confer a right to sue for loss of consortium as a local-law incident of a valid marriage); *cf.* ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 219 (3d ed. 1977) (describing incidents of marriage as controlled by local law).

[108] 852 P.2d 44 (Haw. 1993).

of not allowing same-sex marriages should be subject to strict scrutiny.[109] The subsequent federal enactment of the Defense of Marriage Act[110] was motivated in part by the fear that the rules of *lex loci celebrationis* would require recognition of same-sex marriages in other states.

Despite the consensus behind the rule of *lex loci*, not all marriages are valid everywhere. A well-recognized exception to the *lex loci* rule exists when a marriage performed in one state violates a clearly established public policy of another state.[111] For example, suppose state A allows marriage between different-sex first cousins—that is, a male and female who are the offspring of siblings.[112] State B, on the other hand, forbids such marriages, which it specifically describes by statute as incestuous and contrary to public policy. If a first-cousin couple from state B goes to state A and gets married, state B is not bound to recognize the marriage under the *lex loci* rule because the marriage violates state B's "strong public policy."[113] Note, however, that this rule is

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[109] *See id.* at 67. On remand, the trial court determined that the state had failed to satisfy the strict scrutiny standard and that the Hawaii law restricting marriage to different-sex couples was unconstitutional. *See* Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *21–22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd mem.*, 950 P.2d 1234 (Haw. 1997).

[110] Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C. (§ 1738C (Supp. II 1996))).

[111] The Restatement (Second) rule indicates that a marriage, valid when performed, will be deemed valid "unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." R.2D CONFLICTS, *supra* note 102, § 283(2).

A question of definition arises as to what constitutes a "strong public policy," but the common rule is that marriages which are defined by statute as being voidable (as opposed to void) do not violate a "strong" public policy of a state. This question has been discussed elsewhere. *See* PALSSON, SUBSTANTIVE CONDITIONS, *supra* note 101, at 20–26; *see also* R.2D CONFLICTS, *supra* note 102, § 283, cmt. k (discussing what constitutes a "strong public policy" for conflicts purposes).

[112] "Kindred in the fourth degree, being the issue (male or female) of the brother or sister of one's father or mother.... First cousins [are]... the children of one's uncle or aunt." BLACK'S LAW DICTIONARY 362 (6th ed. 1990).

[113] *See* LEFLAR, *supra* note 107, at 448:

> Many states prohibit the marriage of first cousins, while other states do not.... Most states which prohibit such marriages do not view them with much social alarm, and say that the validity of the marriage is governed by the law of the place where it was performed. Some states of domicile, however, take the opposite view, deeming such marriages contrary to the "law of nature" or revealed religion, [and] therefore void. The domicile can take whichever view it prefers on the matter, and the view taken is decisive.

Id. The Restatement (Second) indicates that the first place that a court should look for a strong

restricted in application—it does not invalidate all marriages that violate the public policy of a state because it only reaches those marriages that were obtained by a couple who were married in a state not of their own domicile.[114] For example, if the first-cousin couple were domiciled in state B and went to state A to obtain a marriage, that marriage would be invalid in state B. Conversely, if they were domiciled and married in state A and then moved to state B, the marriage would be recognized, despite the fact that it violates state B's public policy.[115]

It seems unlikely, however, that the mere fact that a couple, absent any other impediments, entered into a covenant marriage is a sufficient reason to invalidate the marriage. Returning to the Jack and Jill hypothetical, it is difficult to see any reason why Arkansas, their new home state, would find their marriage invalid. Following the general rule of *lex loci*, the state should uphold the validity of their marriage. Merely because Arkansas law is silent on the issue of covenant marriages, it hardly follows that Arkansas has a strong public policy against the recognition of such marriages. Absent the passage of specific state statutes to the contrary, it is a *fait accompli* that a covenant marriage performed in Louisiana will be deemed valid in every other state.[116]

VI. INTERSTATE RECOGNITION OF DIVORCE AND THE CONSTITUTION

Variance among the divorce laws of the states was recognized as a problem long before California's adoption of no-fault divorce.[117] Although divorce itself

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public policy is the statutes of the state in question. *See* R.2D CONFLICTS, *supra* note 102, § 283, cmt. k. If there is no statute, the court should determine if the marriage would be invalid in the state of celebration by its own choice of law rules. *See id.* "If, however, no clear answer can be obtained from the statute or from the decisions of the courts of the state of most significant relationship, the forum must use its own judgment . . . " to determine if the state rule violated is "strong public policy." *Id.*

[114] The Restatement (Second) rule will deem a marriage valid "unless it violates the strong public policy of another state *which had the most significant relationship to the spouses and the marriage at the time of the marriage.*" R2D, CONFLICTS, *supra* note 102, § 283(2) (emphasis added). This caveat restricts the application of the rule to situations where a couple leaves their home jurisdiction because that jurisdiction's public policy forbids their marriage. *See id.*

[115] *See id.* at cmt. k, illus. 1.

[116] *See id.* at cmt. k.

[117] The discussion in this section assumes, unless specifically noted, that the law being applied in any given situation is the law of the state where the divorce proceedings were brought—the forum state. For choice of law questions raised by variance in state divorce laws, see discussion *infra* Part VIII.

has existed in the United States since Puritan times,[118] it had never been a common occurrence, and migratory divorce—where the divorce-seeker leaves his or her jurisdiction because of its strict divorce laws and establishes residence in a more permissive jurisdiction in order to obtain a divorce[119]—had always been frowned upon.

In 1942, in the landmark case of *Williams v. North Carolina (Williams I)*[120] the Supreme Court dealt with the validity, in North Carolina, of two divorces obtained in Nevada, which had very liberal divorce laws for the time.[121] In so doing, the Court determined that due to the nature of divorce, constitutional issues of full faith and credit were involved.[122]

The Full Faith and Credit Clause has been famously described as "the lawyer's clause of the Constitution."[123] It provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[124] The clause is an important instrument of federalism because it "restricts a State in preferring its own interests to the point where no other State can cooperate with it in a mutually satisfactory union."[125] In the present context, the clause controls the extent to which one state's judgment of divorce (a "judicial proceeding" within the clause) will be given effect in other states.

The State of Nevada had, over the first half of the twentieth century, gained a well-deserved reputation as a "divorce mill,"[126] and the defendants in *Williams I*

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[118] The first known divorce in colonial America was granted in the Massachusetts Bay Colony in 1639, on the grounds of bigamy. *See* RILEY, *supra* note 4, at 12.

[119] *See id.* at 4.

[120] 317 U.S. 287 (1942).

[121] *See* RILEY, *supra* note 4, at 135–43.

[122] *See Williams I*, 317 U.S. at 291.

[123] Justice Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

[124] U.S. CONST. art. IV, § 1.

[125] THE VIRGINIA COMMISSION OF CONSTITUTIONAL GOVERNMENT, THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, AN INSTRUMENT OF FEDERALISM 4 (1966).

[126] In 1905, Nevada had a residency requirement of only six months and a broad "cruelty" fault provision that allowed for easy divorces. *See* RILEY, *supra* note 4, at 135–36. In 1913, the Nevada legislature raised the residency requirement to one year, but it was lowered back to six months in 1915, under pressure from Nevada businesses that had lost revenue from the subsequent fall-off of divorce-seekers. *See id.* at 136–37. In 1927, Nevada lowered its residency requirement to three months, and, in 1931, it lowered the residency requirement to

had each left their respective spouses in North Carolina to obtain Nevada divorces so that they could be married to each other.[127] After the two defendants satisfied the six-week domicile requirement in Nevada, they each obtained a divorce and were married in Nevada. They then moved back to North Carolina, where they were arrested and prosecuted under that state's bigamous cohabitation statute.

Justice Douglas, writing for the Court, determined that the basic issue was whether the Nevada judgment of divorce was entitled to full faith and credit by North Carolina.[128] The Court held that such judgments are indeed entitled to full faith and credit and remanded the case back to the Supreme Court of North Carolina.[129] In reaching its decision, the Court assumed (but did not decide) that the Nevada domicile was "bona fide"[130] and held that the Nevada courts had jurisdiction to decide the issue by virtue of that domicile.[131] Thus, the only question left before the Court was a pure conflicts of law issue: whether or not judgments of divorce in state A are entitled to full faith and credit in state B, if state A is the domicile of one of the divorcing spouses.[132] The Court answered this question in the affirmative, overruling its previous controlling decision in *Haddock v. Haddock*.[133]

On remand, the *Williams I* defendants were re-tried and re-convicted, and

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six weeks. *See id.* at 137.

[127] *See Williams I*, 317 U.S. at 291.

[128] *See id.* at 291.

[129] *See id.* at 304.

[130] *See id.* at 302.

[131] *See id.* at 298–99.

[132] *See* RICHMAN & REYNOLDS, *supra* note 102, at 365.

[133] 201 U.S. 562 (1906), *overruled by* Williams v. North Carolina (*Williams I*), 317 U.S. 287, 304 (1942). *Haddock* had held that domicile within a state of one of the parties to a marriage does not give that state jurisdiction to render a judgment of divorce enforceable in another state. *See Haddock*, 210 U.S. at 606. *Haddock* primarily turned on a question of jurisdiction and was decided as a question of *in personam* jurisdiction under the doctrine of *Pennoyer v. Neff*, 95 U.S. 714 (1877). In *Williams I*, the Court concluded that divorce was not in fact "a mere *in personam* action" because domicile of the plaintiff is crucial to a divorce, but is immaterial to actions *in personam*. *Williams I*, 317 U.S. at 297. Because the entire *Pennoyer* scheme of jurisdiction was superseded by *International Shoe v. Washington*, 326 U.S. 310 (1945), personal jurisdiction over both parties is no longer a significant concern in migratory divorce litigation. *Cf.* Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 1 (1997) (arguing that "even if the court has *in personam* jurisdiction over *both* spouses, the [divorce] decree violates due process and is not entitled to full faith and credit unless one of the spouses is domiciled in the rendering state." (citing *Williams I*, 325 U.S. at 236–37)).

when the case reached the Supreme Court a second time, it was sustained.[134] In *Williams II*, the Court held "[a] decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact."[135] Thus, although *Williams I* had held that a decree of divorce in state A is entitled to full faith and credit in state B, under *Williams II*, state B could examine whether or not *domicile* was adequate to support the initial decree of divorce.[136] In so holding, the Court noted that:

> Divorce, like marriage, is of concern not merely to the immediate parties. . . . It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises. . . . As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.[137]

The effect of *Williams II* was to create a compromise over how states were to treat determinations of divorce: domicile of one spouse may permit state A to grant a divorce, but state B, where the absent spouse is domiciled, can re-examine state A's finding of domicile.[138] This rule remains the law, even after the "no-fault revolution," although the general harmonization of the several states' divorce laws brought on by no-fault has made *Williams II* largely irrelevant.[139] With the passage of the Louisiana covenant marriage law, however, migratory divorce may again become an issue,[140] and *Williams I* and *Williams II* may return to the place of importance they once held in American divorce law.

The leading Louisiana case in this area, *Navarrette v. Joseph Laughlin,*

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[134] *See* Williams v. North Carolina (*Williams II*), 325 U.S. 226 (1945).

[135] *Id.* at 232.

[136] *See id.* at 236.

[137] *Id.* at 230.

[138] *See* RICHMAN & REYNOLDS, *supra* note 102, at 369.

[139] There has been little cause to engage in examination of domicile in part because no-fault has removed some of the incentives that encouraged migratory divorce. *See generally* Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501 (1980).

[140] *See infra* notes 173–76, 180–84 and accompanying text (discussing the work of Professor Wasserman).

Inc.,[141] creates a strong presumption against overturning foreign findings of proper domicile:[142] "[T]he burden of undermining the verity of the . . . [domicile's] decree rests heavily upon [the party challenging the decree] . . . . This Court will give full faith and credit to divorce decrees rendered by courts of other states except where it has been conclusively shown by sufficient proof" that the jurisdictional requirement of domicile was not met.[143] The majority of other states share this presumption against overturning domicile.[144]

In addition, the United States Supreme Court has limited the application of *Williams II* in *Sherrer v. Sherrer*.[145] The Court held that where both parties appeared in court at the time the divorce was granted, the issue of domicile could not be reopened by collateral attack.[146] Lower courts in Louisiana following *Navarette* have expanded on the *Sherrer* ruling, concluding that any collateral attack on a foreign divorce is waived if both of the parties acquiesced, participated in, or waived their rights to contest the divorce.[147]

Applying these general rules to Jack and Jill's situation, however, does not seem particularly fruitful. Assume that Arkansas allows one or both of them to file for divorce: they are both domiciliaries of the state because each has lived in the state for six months and presumably they plan to remain there.[148] If,

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[141] 24 So. 2d 672 (La. 1946).

[142] *See id.* at 674 (citing *Williams II*, 325 U.S. at 226).

[143] *Id.* While most states have adopted such a strong presumption, not all have:

> While most of the . . . cases place the burden of showing the invalidity of the foreign decree upon the party who assails its validity, there are some cases in which the view seems to have been taken that no presumption as to the validity of the foreign decree exists and that the burden rests upon the party seeking to avail himself of the foreign decree to prove its validity by alleging and proving the jurisdictional fact of residence at the divorce forum . . . .

Annotation, *Recognition as to Marital Status of Foreign Divorce Decree Attacked on Ground of Lack of Domicil, Since Williams Decision*, 1 A.L.R.2d 1385 (1948).

[144] *See id.*

[145] 334 U.S. 343 (1948).

[146] *See id.* at 351–52.

[147] *See also* Tjaden v. Tjaden, 294 So. 2d 846, 849–50 (La. 1974) (noting that defendant was able to attack the validity of a Nevada divorce "as he did not make an appearance, execute a waiver, or otherwise participate in or acquiesce in the Nevada proceedings").

[148] The Arkansas divorce statute is dependent not on domicile, but on residency, and requires that petitioners be a resident in the state for sixty days before the commencement of a divorce action. *See* ARK. CODE. ANN. § 9-12-307(a)(1) (Michie 1998). The statute further

however, the Arkansas domicile is a sham, and Jack has every intention of returning to Louisiana immediately after the divorce becomes final, then a challenge to the divorce in Louisiana (if heard) might succeed, based upon *Williams II*.[149] But if the Arkansas domicile is real, and a divorce is granted, it would be entitled to full faith and credit in every state, based upon *Williams I*.[150] But such speculation is moot—even if Jack had no intention of retaining his domicile in Arkansas, courts would refuse to question a finding of domicile because he acquiesced and participated in the proceedings of the divorce. It does not matter *who* challenges the divorce; it could be Jack, Jill, or any other party—because Jack and Jill both acquiesced to the proceedings, any attack on the divorce by questioning domicile would be waived.[151]

Surveying the cases where foreign divorce judgments were not given full faith and credit in Louisiana, one court observed:

> It is to be noted that in most of the cases in which recognition of an out-of-state divorce has been refused, the party either never physically resided in the other state, or never actually severed his ties with Louisiana, or went to the other state solely for the purpose of getting a divorce with no other reason for going and promptly returned to Louisiana after obtaining the divorce.[152]

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states that residence "is defined to mean actual presence and upon proof of such, the party alleging and offering the proof shall be considered domiciled in the state." *Id.* § 9-12-307(b). While there is some dispute over the validity of substituting residency for domicile, *see infra* note 153, the Arkansas courts have determined that the substitution passes constitutional muster. *See* Wheat v. Wheat, 318 S.W.2d 793, 796–97 (Ark. 1958).

[149] *But see infra* Part VII.

[150] *See supra* notes 124–32 and accompanying text.

[151] Following the rule of *Sherrer v. Sherrer*, 334 U.S. 343 (1948), the presence of the nominal "defendant" at the divorce proceedings precludes a later attack on the validity of those proceedings.

While the *Sherrer* rule applies to Jack and Jill's situation, it does not apply to the "runaway spouse" situation where one spouse travels to a foreign jurisdiction and obtains an *ex parte* divorce. Assume that another hypothetical couple, Lois and Clark, both Louisiana domiciliaries, get a covenant marriage. After six months, Lois decides she has had enough of Clark and their marriage and changes her domicile to Arkansas, where she rents an apartment, gets a new job, and files for divorce. If Clark acquiesces in the proceedings, he is barred from collaterally attacking the proceedings by the line of Louisiana cases following *Sherrer*. *See, e.g.*, *Tjaden*, 294 So. 2d at 849–50. If he makes no appearance and otherwise remains aloof from the proceedings, however, he *can* bring a collateral attack on the validity of Lois's new domicile under the doctrine of *Williams II*.

[152] *Tjaden*, 294 So. 2d at 854; *see, e.g.*, Juneau v. Juneau, 80 So. 2d 864, 866 (La. 1955) (justifying court's failure to accord full faith and credit to a Nevada finding of domicile where

Given the strong presumptions in favor of upholding domicile and the limitations case law has placed on collaterally attacking domicile, it is probably fair to conclude that in most situations, if a Louisiana covenant marriage is dissolved by divorce in another state, that judgment of divorce will be entitled to full faith and credit in Louisiana.[153] The problem comes in getting that decree in the first place. If Jack and Jill file for divorce in Arkansas, even though an Arkansas court would have jurisdiction over the divorce proceedings, that court still must determine if Jack and Jill have the *capacity* to divorce—that is, which law applies, Arkansas's or Louisiana's.[154]

VII. DOMICILE, CONFLICTS OF LAW, AND COVENANT MARRIAGE

The Restatement (Second) of Conflicts of Law has announced the general rule governing capacity to divorce: "[T]he local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce."[155]

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the wife went to Nevada immediately after a Louisiana divorce suit was dismissed and returned to Louisiana as soon as possible upon obtaining a Nevada divorce); Eaton v. Eaton, 81 So. 2d 371, 374 (La. 1955) (stating no Arkansas domicile existed when husband lived in Louisiana during the time of the divorce action).

[153] The only situation where the state of Louisiana may deny full faith and credit to such a decree is when the domicile of the spouse in the second jurisdiction is phony and even then, only where the other spouse did not in any way participate in the proceedings and further chooses to collaterally attack those proceedings. The number of cases where all of these conditions are satisfied is bound to be very small, especially considering the relative unpopularity of covenant marriage thus far.

[154] "[O]nce the power to decide the case is based merely upon personal jurisdiction a court must decide as a separate question upon what basis, if any, the local substantive law of divorce can properly be applied to determine whether the plaintiff is entitled to the relief sought." Alton v. Alton, 207 F.2d 667, 685 (3d Cir. 1953) (Hastie, J., dissenting), *vacated as moot*, 347 U.S. 610 (1954). Arkansas, it must be observed, is one of three states that has abandoned domicile as the fount of divorce jurisdiction, replacing it with personal jurisdiction. *See* Wasserman, *supra* note 133, at 21–24 (describing Arkansas, Illinois, and New York as "outlaw states" for replacing domicile with residency; advocating elimination of domicile rule and its "choice of law corollary"). This places Arkansas in exactly the situation Judge Hastie describes in his *Alton* dissent—the state has replaced domicile with residency (thus making the source of the court's power to hear the case personal jurisdiction rather than domicile) and should face the choice of law question. *But see* Wheat v. Wheat, 318 S.W.2d 793, 796–97 (Ark. 1958) (upholding a statute substituting residency for domicile, but failing to address the choice of law issue).

[155] R.2D CONFLICTS, *supra* note 102, § 285. This rule re-phrases the general rule found in the original restatement: "[T]he law of the forum governs the right to divorce." RESTATEMENT OF THE CONFLICTS OF LAW § 135 (1934) [hereinafter RESTATEMENT]. Both rules assume that subject-matter jurisdiction to divorce is founded upon domicile. *See* R.2D CONFLICTS, *supra*

An application of the rule is illustrated in the official comments:

> A and B are married in state X and make that state their home for several years. A then abandons B and goes to state Y, where he acquires a domicil, and there brings suit against B for divorce on the grounds of mental cruelty. The Y court will apply its own local law, rather that the local law of X, in determining whether A is entitled to the divorce.[156]

This rule is accepted so uniformly amongst the several American jurisdictions that it receives virtually no attention in case law; courts simply apply the law of their own state to decide divorces, hardly ever analyzing why.[157]

In *Alton v. Alton*,[158] the domicile choice of law rule received its only extended treatment in the case law—in a dissent.[159] The *Alton* case examined the

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note 102, § 285; RESTATEMENT, *supra*, § 135 cmt. a. While it is a disputed question whether domicile is the only jurisdictional foundation for divorce, *see, e.g.*, SCOLES & HAY, *supra* note 102, §§ 15.4–7, as the law presently stands, domicile seems to be the sole source of a court's power to grant a divorce. *See* Sosna v. Iowa, 419 U.S. 393, 407 (1975) (quoting Williams v. North Carolina (*Williams II*) 325 U.S. 226, 229 (1945)) ("This Court has often stated that 'judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil.'"). *Sosna*, however, made this statement only in dictum; the issue before the Court did not concern an alternative basis for jurisdiction, but rather an additional durational residency requirement added in addition to Iowa's domicile requirement:

> Read narrowly, *Sosna* only upholds as reasonable the state's imposition of the additional *state* requirement of one-year's duration residence . . . both the majority and one of the dissents . . . *assumed* that domicile is *a* jurisdictional requirement but do not address the question whether some other criterion might not also establish a "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."

SCOLES & HAY, *supra* note 102, § 15.7 (quoting *Williams II*, 325 U.S. at 229). For an argument that domicile should be discarded as the jurisdictional predicate for divorce, see generally Wasserman, *supra* note 133, at 1 (arguing that jurisdictional rules in divorce cases produce absurd results and should be abandoned).

156 R.2D CONFLICTS, *supra* note 102, § 285, cmt. a, illus. 1.

157 *But see* Alton v. Alton, 207 F.2d 667, 684–85 (Hastie, J., dissenting). If the forum choice of law rule were retained (without the requirement of domicile) in divorce cases, a divorce system based on personal jurisdiction might make a spouse reluctant to travel to Nevada to gamble! In *Alton*, Hastie believed the law of Connecticut, the marital domicile, would most likely be applied, rather than the law of the Virgin Islands, where the action commenced. *See* RICHMAN & REYNOLDS, *supra* note 102, at 188 n.8.

158 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954).

159 *See id.* at 684–85 (Hastie, J., dissenting).

validity of a Virgin Islands statute which allowed six weeks continuous residence in the territory to be "'prima facie evidence of domicile'" for purposes of divorce and granted Virgin Islands courts jurisdiction over divorce "'without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose.'"[160] Essentially, the law allowed courts to grant divorce decrees "solely on the basis of the residence of [one party in the Virgin Islands] and personal jurisdiction over [the other]."[161]

Domicile, as a general matter, has been a consistent source of controversy and confusion in the law.[162] The *Alton* opinion is notable because it offered two very different interpretations of the necessity of domicile to divorce jurisdiction,[163] from two very notable conflicts thinkers.[164] For present purposes, however, only a small portion of the divorce/domicile problem will be discussed: what has been termed the "choice-of-law corollary."[165]

The primary reason that courts have been able to avoid addressing the choice of law question in relation to divorce is the fact that divorce is based on domicile—that is, one of the parties is physically present in the forum state and has an intent to "make that place his home for the time at least."[166] If these two

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[160] *Id.* at 669 (footnote omitted).

[161] RICHMAN & REYNOLDS, *supra* note 102, at 367.

[162] *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 2.16 (3d ed. 1986) (describing the debate over the meaning of domicile during the drafting of the Restatement of the Conflict of Laws).

[163] *Compare* Alton, 207 F.2d at 676–77 (Goodrich, J., majority opinion), *with id.* at 681–83 (Hastie, J., dissenting).

[164] Judge Goodrich authored a treatise on the conflict of laws, *see* HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS (2d ed. 1938). Judge Hastie's dissenting opinion in *Alton* has received considerable attention in the literature. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 102, at 367–68 (describing Hastie's opinion as "forward-looking" and "well known to conflicts students"); SCOLES & HAY, *supra* note 102, § 15.14; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.2G, n.61 (3d ed. 1986).

[165] Wasserman, *supra* note 133, at 38–41.

[166] R.2D CONFLICTS, *supra* note 102, §§ 15–18. While the two general requirements for a finding of domicile are universally agreed upon, the specific formulation of each prong has varied widely. *See* BLACK'S LAW DICTIONARY 484 (6th ed. 1990) (defining domicile as "physical presence within a state and the intention to make it one's home"); *see also* GOODRICH, *supra* note 164, at 38–41 (physical presence required; intent is "sufficient if the intended stay is of sufficient permanence to make the place in question 'home,' although there may be a probability or even a certainty that the home will subsequently be changed."); LEFLAR, *supra* note 107, at 15–16 ("physical presence . . . coinciding with the state of mind of regarding the new place as one's present home"); RICHMAN & REYNOLDS, *supra* note 102, at 5 ("physical presence in the jurisdiction and the intent 'to make that place his home for the time

conditions are satisfied, then the individual is domiciled in that state. In his dissent in *Alton*, Judge Hastie observed that it is this finding of domicile that allows divorce courts to bypass a choice of law analysis, which would be proper in any other type of case:[167]

> So long as one of the spouses has had a domiciliary relationship to the forum it has been conventional theory that the forum has sufficient connection with the domestic relation which is the subject matter of suit to justify not only the exercise of its judicial power to decide the controversy, but also the application of its own substantive law of divorce as well. It is quite possible that some of the difficulties which have arisen in this field are the result of failure to keep in view that these are distinct problems although the existence of a domiciliary relationship is thought to solve both.[168]

Thus, it is the *finding of domicile* that grants to courts the inherent power to apply the *forum state's own substantive law of divorce* to the case at bar; any divorce law, such as the one at issue in *Alton*, which eliminates domicile as a requirement for divorce should force courts to engage in a standard choice of law analysis:[169]

> [O]nce the power to decide the case is based merely upon personal jurisdiction a court must decide as a separate question upon what basis, if any, the local substantive law of divorce can properly be applied to determine whether the plaintiff is entitled to the relief sought.... [I]f it should appear that [the two spouses] were both domiciled in [another state] at the time of suit... it may well be that under correct application of conflict of laws doctrine... it is encumbent [*sic*] upon the [forum state], lacking connection with the subject matter, to apply

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at least'").

[167] "In addition to shielding state courts from the difficulty of *choosing* the law to govern transient divorce actions, the choice-of-law corollary spares courts the challenge of *applying* another state's law." Wasserman, *supra* note 133, at 38.

[168] *Alton*, 207 F.2d at 684–85 (3d Cir. 1953) (Hastie, J., dissenting) (citation omitted), *vacated as moot*, 347 U.S. 610 (1954).

[169] Given the heated debates over what theories and rules should drive choice of law analysis, it may be disingenuous to describe any choice of law analysis as "standard." Professor Wasserman, in arguing for the abandonment of the domicile "choice-of-law corollary," has put forth several choice of law rules, based on different theories, to replace it.

No particular choice of law theory has dominated legal thought during the past century; instead, commentators have continued to advocate, and courts have continued to apply, various theories and sometimes even a mish-mash analysis. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 102, at 241–42 (describing current choice of law theory as being in "a state of disarray").

> the divorce law of some state that has such connection. . . .[170]

Judge Hastie, therefore, determined that domicile was not the only basis for jurisdiction; however, his opinion was a dissent. Judge Goodrich, writing for the majority, surveyed the case law and reached a very different conclusion:

> We think that the premise that divorce jurisdiction is founded on domicile is still the law. It was reiterated by the Supreme Court in unequivocal language . . . . If that premise is to disappear in the light of real or supposed change in social concepts, its disappearance should be the result of the action of higher authority than ours. . . . We think that adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens . . . . Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question.[171]

Judge Goodrich's opinion, upholding the domicile requirement for divorce jurisdiction, never reached the interesting choice of law question Judge Hastie's dissent proposed. Domicile remains the foundation for divorce jurisdiction, and courts continue to bypass choice of law analysis in divorce litigation. The rule of the Restatement (Second), that "[t]he local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce,"[172] remains controlling in every American jurisdiction.[173]

Professor Rhonda Wasserman has lately taken up Judge Hastie's cause; in a recent article, she advocates "permitting the states to abolish the domicile rule and its choice of law corollary"[174] and replacing them with a requirement of personal jurisdiction over the defending spouse and a standard choice of law analysis to determine which state's law should control the dissolution of the marriage.[175] Professor Wasserman has indicated that the major rationale for the domicile rule, which is state sovereignty, "lost much of its force with the advent of no-fault divorce in the 1960s and 1970s," because "unhappily married people

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[170] *Alton*, 207 F.2d at 685 (Hastie, J., dissenting).

[171] *Id.* at 676–77.

[172] R.2D CONFLICTS, *supra* note 102, § 285.

[173] "[O]nly *three* states authorize their courts to assert divorce jurisdiction in the absence of a domiciliary connection to the state . . . . [And] [e]ven these 'outlaw' states continue to treat divorce as a local action and apply forum law to all divorce actions filed in their courts." Wasserman, *supra* note 133, at 20–24.

[174] *Id.* at 5.

[175] *See id.* at 38–41.

no longer have reason to evade their home state's divorce law."[176]

However diminished the role of forum shopping may have been before covenant marriage, it is no longer so trivial—at least not in Louisiana. Jack and Jill have every reason to evade the divorce laws of Louisiana because they are unable to obtain a divorce under those laws. Professor Wasserman's solution, furthermore, requires the passage of a federal statute or uniform state legislation to ensure compatibility with the Constitution and uniform enforcement.[177] Whatever logic this solution has, it creates practical problems for both couples wishing to obtain divorces and for the states attempting to clarify their divorce laws.

A possible criticism of the standard choice of law rule is that it unfairly impacts couples who are unable to travel to other jurisdictions to obtain divorces—that is, low-income couples. Conflicts scholar Robert Leflar alludes to this problem: "[T]here have been two sets of grounds for divorce in the law of a conservative divorce state, one written officially in its own law books and the other available under its conflicts rules to local spouses who could afford the expense and inconvenience of going to an easy divorce state. . . ."[178] Clearly this presents a problem for poorer couples looking to divorce, but the problem is with the "conservative" state's divorce law rather than its choice of law rules, which are the same as those of almost every other state.[179]

Judge Goodrich, in his *Alton* opinion, offered an eloquent defense of the domicile requirement for divorce jurisdiction and, by implication, the "choice of law corollary" that Judge Hastie and Professor Wasserman critique:

> [A]dherence to the domicilliary requirement is necessary if our states are really to have control over the domestic relations of their citizens. . . . In the Virgin Islands incompatibility of temperament constitutes grounds for divorce. In Connecticut it does not. We take it that it is all very well for the Virgin Islands to provide for whatever matrimonial regime it pleases for people who live there. But the same privilege should be afforded to those who control affairs in Connecticut.[180]

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[176] *Id.* at 27.

[177] *See id.* at 57–62.

[178] LEFLAR, *supra* note 107, at 459.

[179] At this early stage, it remains unclear whether the covenant marriage laws adopted in Louisiana and Arizona will have a disproportionate impact on the poor, who cannot afford to travel across state lines to get a divorce. This question may be a fruitful topic for future social science research.

[180] Alton v. Alton, 207 F.2d 667, 676–77 (3d Cir. 1953) (citations omitted), *vacated as*

Judge Goodrich's argument is persuasive: states should have the ability to control the affairs of their own citizens and should not have to subjugate that control to another state whose interest in those affairs is not as great. Jack and Jill are Arkansas domiciliaries—should Arkansas law on divorce defer to Louisiana law just because their marriage was performed in Louisiana?

In all fairness to Judge Hastie, the choice of law analysis that he and Professor Wasserman advocate would most often lead to the application of forum law anyway.[181] In *Alton* itself, Judge Hastie suggests that non-forum law could properly be applied only "if it should appear that Mr. and Mrs. Alton were both *domiciled* in [state A] at the time of the suit in [state B] and that their estrangement had resulted from conduct" in state A.[182] Because Jack and Jill are both domiciled in Arkansas, Arkansas law would control their divorce even under Judge Hastie's analysis. This becomes slightly more tricky in the context of a migratory divorce, but according to Judge Hastie's rule, the forum state should apply its own law if that state's domicile rules are satisfied.[183]

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moot, 347 U.S. 610 (1954).

[181] Professor Wasserman observes:

> Regardless of the choice-of-law theory adopted, in many if not most cases, the forum properly would choose its own divorce law to govern the dispute. Because the petitioning spouse likely would file in a state with a substantial connection to one or both of the parties, the forum state would have sound reasons for choosing its own law.

Wasserman, *supra* note 133, at 41; *see also Alton*, 207 F.2d at 685 (Hastie, J., dissenting) (discussing when choice of law of non-forum state might be appropriate).

[182] *Alton*, 207 F. 2d at 685 (Hastie, J., dissenting) (emphasis added).

[183] Professor Wasserman suggests:

> [I]t would not be particularly difficult to draft a choice-of-law rule, similar to many of the *Restatement (Second) of Conflicts of Laws* rules, to govern transient divorce actions.... Nor would it be difficult to apply governmental interest analysis to divorce actions. Nor would it be difficult to draft a territorial rule, similar to many of *Restatement (First) of Conflicts of Laws* rules.... None of these rules or approaches would be completely free from criticism, but neither is any choice-of-law rule or approach. The point is, it should be no more difficult to choose the law to govern divorce than any other interstate case.

Wasserman, *supra* note 133, at 40–41 (citations omitted). While Professor Wasserman's analysis is sound, it should be noted that there are strong public policy reasons to favor the traditional rule and continue applying the law of the forum state. Professor Robert Leflar has observed that the choice of forum law in divorce:

> [the choice of forum law in divorce] furnished the safety valve that enabled states with

While Professor Wasserman does not advocate any specific choice of law proposal in conjunction with her suggestion that domicile considerations be removed from divorce law,[184] she admits that in most cases "the forum state would have sound reasons for choosing its own law."[185] Thus, even those who advocate a choice of law analysis would tend to defer to the law of the forum state. This discussion, of course, is purely academic—the law continues to tie divorce to domicile, and the law of the domiciliary state (*i.e.*, the forum state) still controls. Someone, however, evidently failed to inform the drafters of the Louisiana covenant marriage law.

VIII. INCIDENTS OF MARRIAGE, COVENANT MARRIAGE, CHOICE OF LAW, AND FULL FAITH AND CREDIT FOR MARRIAGE

Despite the universal rule applying forum law to divorce, there may be other ways to give extraterritorial effect to a Louisiana covenant marriage: one possible way is to construe the covenant marriage "declaration of intent" to include a choice of law clause,[186] and the other is to grant marriage recognition in every state via the Constitution's Full Faith and Credit Clause.[187] Both methods, however, require that the restrictions on no-fault divorce, which are the heart of the law, be re-characterized as "marital rights" or "incidents" of marriage.

While the Restatement (Second) of Conflicts of Law has one provision

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> limited grounds for divorce to retain laws that were apparently required by local political expediency but which were realistically impractical for many of their citizens.... The rule is justifiable primarily by the fact that it best served the multi-state needs of our federal system in the troubled social and mixed-up legal field in which divorce laws had to operate.

LEFLAR, *supra* note 107, at 460. The advent of covenant marriage and the variance amongst the states' substantive laws of divorce reinforce Professor Leflar's argument. Thus, even if Professor Wasserman's suggestion to "sever the knot" between divorce and domicile is accepted, the choice of law rule that is adopted should be one which favors application of the law of the forum state.

[184] *See* Wasserman, *supra* note 133, at 39–46.

[185] *Id.* at 41.

[186] The declaration of intent concludes with the sentence: "With full knowledge of what this commitment means, *we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages* and we promise to love, honor, and care for one another as husband and wife for the rest of our lives." DECLARATION OF INTENT, *supra* note 71 (emphasis added).

[187] *See* U.S. CONST. art. IV, § 1.

dealing with the "Law Governing Right to Divorce,"[188] it has a completely separate provision addressing the "Incidents of Foreign Marriage."[189] The official comment to the rule defines its scope:

> A marriage, like any other status, is important primarily on account of the incidents which arise therefrom. Among the normal incidents of a marriage are that the spouses may lawfully cohabit as man and wife and that the issue of their marriage will be legitimate. Other important incidents are the marital property interests which each spouse may have in the other's assets and the forced share or intestate share which the surviving spouse has in the estate of the deceased spouse. Still another incident is that a party to the marriage is the "spouse" of the other, or as the case may be, the "husband," "wife" or "widow" of the other within the meaning of these terms when used in a will, trust or other instrument.[190]

Thus, the "incidents" of marriage might properly be construed to include all the legal benefits that flow from the marriage status.[191] A case could therefore be made that the "benefit" of fault in a divorce is an incident of a covenant marriage because one spouse seeking to prevent a divorce could assert the covenant nature of the marriage as a defense to the divorce action of the other spouse.

The law applied in determining a grant of incident has traditionally been the law of the forum state,[192] which would preclude covenant rights from being

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188 *See* R.2D CONFLICTS, *supra* note 102, § 285.

189 *See id.* § 284.

190 *Id.* § 285 cmt. a (citations omitted).

191 Examples of "rights acquired by marriage" include the right to sue for alienation of affection (when the right is recognized by state law), *see* Van Ellen v. Meyer, 207 N.W.2d 552, 553 (Iowa 1973), and the right to maintain an action for loss of consortium, *see* Michael v. Harrison Rural Elec. Coop., 292 N.W.2d 417, 420 (Iowa 1980). Other states have used the term "marital rights" to include the right to a specified share in the spouse's personal estate upon the spouse's death. *See, e.g.*, *In re* Dean's Estate, 166 S.W.2d 529, 535 (Mo. 1942). For a discussion on the right of sexual cohabitation, see Kelley v. Kelley, 77 Cal. Rptr. 358, 360 (Ct. App. 1969) ("rights pertinent to companionate aspects of marriage" and "enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations"); Hawkins v. Hawkins, 286 P. 747, 748 (Cal. Ct. App. 1930). Despite the fact that most married couples might think that *Hawkins* presents a somewhat idyllic view of the institution of marriage, it remains good law and has been repeatedly cited for its definition of "marital rights."

192 "A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in § 283, that it gives to a marriage contracted within its territory." R.2D CONFLICTS, *supra* note 102, § 284.

granted in non-covenant marriage states.[193] Unless the forum state's law happens to recognize covenant marriage, that state will not grant the incident of a fault requirement to divorce. This outcome might be reversed, however, if a covenant marriage "declaration of intent" were deemed to include a valid choice of Louisiana law to govern the marriage or if marriage is granted full faith and credit under Article IV of the United States Constitution. Either way, the law governing the marriage would become the law of the state of celebration; the *lex loci celebrationis* would not only govern the validity of marriage, but also the "incidents which arise therefrom."[194] This rule has the benefit of certainty and foreseeability because the parties to the marriage could determine prior to the nuptials exactly how getting married will effect them, and those effects would not change even if they moved to a state with vastly different laws.

It would, however, take a tremendous change in the law to achieve this outcome. As an initial matter, it should be noted that the Louisiana Civil Code specifically describes the "Incidents and Effects of Marriage," and covenant rights are not among those described.[195] Assuming, however, that the characterization of "covenant rights" as an incident of marriage is correct, that is only half the battle.[196] A change in the law would have to be made to ensure that

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[193] Robert Leflar describes the current state of the law as follows:

> Once the status comes into existence by the law of the domicile of the parties, its existence should be recognized everywhere.... That does not mean, however, that all the incidents of the status may be exercised to the same extent, or at all, at every place at which they are sought to be exercised. Thus, a wife does not cease to be a wife by removal of the family domicile from Iowa to Arizona. But while domiciled in Iowa she was entitled to a portion of her husband's personal property as dower on his death, yet on removal of the domicile to Arizona she may cease to be entitled to any dower whatever. The right to dower is a local incident of the marital status, and may be controlled by local law without affecting the existence of the status.

LEFLAR, *supra* note 107, at 443 (citation omitted).

[194] R.2D CONFLICTS, *supra* note 102, § 284 cmt. a.

[195] "Incidents of marriage," under Louisiana law include fidelity, support, and assistance. *See* LA. CIV. CODE ANN. art. 98 (West 1993). Additionally, "[s]pouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting therefrom," LA. CIV. CODE ANN. art. 99 (West 1993), and "a married person may use the surname of either or both spouses as a surname." *Id.* at art. 100.

[196] This assumption is for analytical purposes only; no cases have been found which indicate that that such rights would in fact be an incident. For other definitions of incidents, see *supra* note 192. In fact, there may be good reasons why covenant rights are *not* an incident of marriage: other such incidents usually coincide with a private right of suit. While covenant rights might be an affirmative defense *against* divorce, it does not seem that the Louisiana

those covenant rights followed a couple from state to state.

One way to accomplish this goal would be to construe the covenant marriage "declaration of intent" as a valid choice of law clause. The pertinent language reads: "[w]ith full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages...."[197] This language arguably creates a choice of law provision whereby the couple agrees to bind themselves by Louisiana law no matter where they move or what might happen.

If part of the declaration is construed as a choice of law provision it seems fair to construe the rest of the agreement as contractual in nature as well—the bottom line being that the declaration would be a prenuptial agreement. Even though the declaration makes no mention of property division, which is generally the primary subject of a prenuptial agreement, it fits the bill in almost every other aspect: the declaration certainly constitutes "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage,"[198] which is the Uniform Premarital Agreement Act's definition of the term.

While neither the Uniform Act nor Louisiana's Code has previously allowed

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legislature intended that spouses attempting to assert those rights should be able to recover damages or other remedy independent of a divorce action. *See, e.g.*, 1997 La. Sess. Law Serv. 1380 § 4 (West). For example, the covenant marriage law does not create a legal or equitable right of suit for abandonment; that is, Jack could not sue Jill with the intent of forcing her to come home or pay damages.

197 DECLARATION OF INTENT, *supra* note 71.

198 UNIFORM PREMARITAL AGREEMENT ACT § 1(1), 9B U.L.A. 371 (1987). This is the definition of a premarital agreement accepted by a majority of states. It is not, however, the Louisiana definition—Louisiana, it should be recalled, is unique amongst American states in that it follows a form of the civil law. As such, Louisiana has "matrimonial regimes" outlined in its code which govern the dispensation of marital property. Louisiana defines a "contractual regime" (or "matrimonial agreement," a.k.a. prenuptial agreement) as follows:

> A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime. Spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law. The provisions of the legal regime that have not been excluded or modified by agreement retain their force and effect.

LA. CIV. CODE ANN. art. 2328 (West 1985). Thus, Louisiana couples are free to enter into contracts disposing of marital property, except that they may not "renounce or alter the marital portion or the established order of succession. Nor may the spouses limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property." *Id.* art. 2330.

contractual modification of the non-property incidents of marriage,[199] the covenant marriage law purports to do just that. If the declaration is accepted as a contract, one question presents itself quite insistently: is it enforceable?[200]

In the past, contracts which purported to alter the obligations of the marital relation were uniformly deemed unenforceable.[201] This has changed dramatically in recent years—the adoption of no-fault divorce is one facet of this change, the wide acceptance of prenuptial agreements is another. However, despite these modifications, the default rule remains. It also remains true today, as it was in the last century, that marriage "is something more than a mere contract."[202] The covenant marriage agreement, by contrast, seems to be merely a premarital contract—traditionally, it would have been unenforceable. Even in the era of covenant marriage, premarital agreements must be very limited in scope to be deemed reasonable, fair, and enforceable. While Louisiana has taken the step of enshrining covenant marriages into its own public policy, other states are likely to determine that the declaration of intent is merely hortatory[203] as exceeding the proper bounds of premarital agreements.

However, there is at least one other way of enforcing "covenant" rights: granting marriage full faith and credit.[204] However, even assuming that marriage

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199 *See* UNIFORM PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1987); LA. CIV. CODE ANN. art. 2330 (West 1985).

200 "An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification." RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 8 (1979).

201 *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456–58 (describing historical prohibition against contractual alteration of marriage relation).

202 Maynard v. Hill, 125 U.S. 190, 210–11 (1888).

203 *See* Singer, *supra* note 201, at 1461 (describing "contracting" as a method of detailing the obligations within a marriage; stating that such contracts are generally not enforceable).

204 Interstate marriage recognition has recently resurfaced as a hotly contested issue on the national scene. Since the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which determined that strict scrutiny should be applied to that state's policy of restricting the issuance of marriage licenses to different-sex couples, a movement has been afoot nationwide to prevent recognition of same-sex marriages performed in one state from compulsory recognition in other states. The federal government became involved in the debate by enacting into law the Defense of Marriage Act ("DOMA"), 110 Stat. 2419 (1996), which purports to allow states to deny recognition of such marriages.

The validity of DOMA, however, is questionable. While many have argued that DOMA violates the Equal Protection Clause of the United States Constitution, it is perhaps more problematic that the DOMA legislation acts in an area that has been traditionally reserved to the states, arguably violating the Tenth Amendment.

determinations are granted full faith and credit, it seems likely that the secondary effects of such recognition will cause the option to not be pursued by covenant marriage proponents; such recognition could open the door to universal recognition of same-sex marriages, a result which the largely conservative and religious supporters of covenant marriage most definitely do not want.

Granting full faith and credit to decrees of marriage is a tricky business and

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Marriage recognition, and domestic law generally, is an area in which Congress has no proven authority to legislate. Congress premised its action in enacting DOMA upon the second sentence of the Full Faith and Credit Clause, which states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. Leaving aside for the moment the textual argument that this grant of authority does not extend to the actions taken by DOMA, it is unclear that the Full Faith and Credit Clause is even an issue in play when discussing interstate marriage recognition. The purpose of DOMA, according to the House Report, was to remove the Full Faith and Credit Clause from the recognition inquiry: "By taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation, Congress will to that extent protect the ability of the elected officials in each state to deliberate on this important policy issue free from the threat of federal constitutional compulsion." H.R. REP. NO. 104–664, at 17 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2921.

Given that it is state, not federal, law that controls marriage recognition, it is puzzling that Congress believed that it had the authority to enact the DOMA. Congressional authority to legislate under the Full Faith and Credit Clause is preconditioned upon the assumption that the Clause actually controls the subject of such legislation—the "Acts, Records and Proceedings" which authorizes Congress to "prescribe the Manner . . . and the Effect thereof" are the same Acts, Records, and Judicial Proceedings to which "Full Faith and Credit shall be given." If Congress was aware that marriage is a domestic relations matter reserved to the states (and it seems to have been, *see* H.R. REP. NO. 104-664, at 6–8), it must also have been aware that it was beyond its own powers in that area. *See generally* Julie L.B. Johnson, Comment, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997) (arguing that DOMA exceeds Congress's authority to enact "General Laws" under the Full Faith and Credit Clause); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1999–2007 (1997) (arguing that DOMA exceeds the authority of Congress under the "Effects Clause" of the Full Faith and Credit Clause); Melissa A. Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157 (1997) (arguing that DOMA violates the Full Faith and Credit Clause, the Equal Protection Clause, and the Supremacy Clause); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997) (arguing that DOMA is antithetical to the Full Faith and Credit Clause). *But see* Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998) (arguing that Congress has wide latitude under the Effects Clause and that DOMA is constitutional).

would have effects far beyond giving covenant marriage laws effect outside of Louisiana. It would require, at least as the law currently stands, the abandonment of the public policy exception to the *lex loci* rule and would also require states to recognize marriages that are contrary to their respective public policies. While it has been argued that the Full Faith and Credit Clause contains a public policy exception,[205] the Supreme Court has not yet recognized such an exception and has in fact recently suggested that no such exception exists.[206] Without a public policy exception, full faith and credit may be granted not only to covenant marriages, but to same-sex and first-cousin marriages as well.

Only two courts, however, have ever held that marriage must be recognized under the Full Faith and Credit Clause.[207] One was the Supreme Court of Arkansas, which stated, without citation or comment: "While Arkansas recognizes a valid common law marriage—that is, one consummated in a state authorizing that procedure—the recognition is accorded because, to do otherwise, there would inevitably be involved a denial of full faith and credit."[208] The court never explained why it thought full faith and credit was involved, and it did not indicate whether its application was a matter of state or federal law.[209] The other court was a New York trial court;[210] that case was never appealed, and the trial court provided no case authority for its determination that the Full Faith and Credit Clause was implicated.[211] Furthermore, both cases actually dealt with a choice of law issue: whether a state that had abolished common-law marriage could recognize the existence of such a marriage if it would be valid under

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[205] *See* Crane, *supra* note 205, at 315 n. 40 (discussing Professor Lawrence Tribe's argument that there is a "public policy exception" to the Full Faith and Credit Clause); *see also* H.R. REP. NO. 104-664, at 28 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2932 (describing Professor Tribe's belief that the Full Faith and Credit Clause contains a public policy exception).

[206] "[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*." Baker By Thomas v. General Motors Corp., 118 S. Ct. 657, 664 (1998).

[207] *See* Ram v. Ramharack, 571 N.Y.S.2d 190 (N.Y. Sup. Ct. 1991):

> Common-law marriages in New York State were outlawed by statute in 1933. However, a common-law marriage validly consummated in another state or jurisdiction (for example, Washington, D.C.) can be recognized in New York under the doctrine of full faith and credit if the other state recognizes the validation of a common-law marriage.

Id. at 191 (citations omitted); *see also* Orsburn v. Graves, 210 S.W.2d 496 (Ark. 1948).

[208] *Orsburn*, 210 S.W.2d at 498.

[209] *See id.*

[210] *See Ram*, 571 N.Y.S.2d at 190.

[211] *See id.*

another interested jurisdiction's law.[212] This is, clearly, a thin basis for an argument that full faith and credit is implicated in interstate marriage recognition.

The vast weight of precedent, in fact, points in the other direction—recognition of interstate marriage is a matter reserved to state law in which the Full Faith and Credit Clause has only a limited role.[213] While many commentators have argued that full faith and credit should be given to decrees of marriage,[214] this has not been, and is not now, the law.

Without the Full Faith and Credit Clause, the defenders of covenant marriage are left only with the uncertain argument that covenant rights are an incident of marriage (even though they are not so described in Louisiana law) and that the couple chose that the incidents of their marriage would be governed by Louisiana law (even though that promise is likely unenforceable). Armed with such a thin argument, up against the weight of a rule that has withstood time without so much as being questioned in the courts,[215] it is near-certain that the effect of covenant marriage will be confined to the states that adopt it. As a result, couples like Jack and Jill will be able to divorce in any other state.

IX. CONCLUSION

Covenant marriage or no, the debate over no-fault divorce reform will

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[212] *See id* at 191; *Orsburn*, 210 S.W.2d at 498.

[213] *See, e.g.*, Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 193 (1996) (describing the distinction between acts and judgments in the Supreme Court's Full Faith and Credit jurisprudence; explaining why divorce is granted full faith and credit while marriage is not).

[214] *See, e.g.*, Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 415 (1995) (arguing that the rationale behind the application of the Full Faith and Credit Clause to divorce decrees applies just as forcefully to declarations of marriage); Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 501–04 (1995) (arguing that marriage is covered under the Full Faith and Credit Clause). *But see* David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 207 (1997) (stating that it would be "wondrous strange" if the Full Faith and Credit Clause required interstate recognition of same-sex marriage).

[215] While Judge Hastie and his followers argue that choice of law analysis should be applied to determine what law controls a divorce, no such champion has emerged to argue that choice of law analysis should determine what law applies in the granting of marital rights. States, after all, should be able to control the rights of their own domiciliaries, and who else but their domiciliaries can be granted the privileges of marriage?

continue to rage. However, those lawmakers who believe in no-fault divorce reform should be aware that covenant marriage is not a viable solution. By contrast, those who continue to believe in the viability of a reformed no-fault divorce may take comfort in the unpopularity of the covenant marriage option in Louisiana, but they cannot expect that option to remain confined to one small southern state.[216]

While the passage of the Louisiana covenant marriage law may represent a victory for the no-fault divorce reform movement, it is a small victory. A fundamental problem with the law—its passage against a legal background where capacity to divorce is governed by the law of the forum state, rather than the state where the marriage was celebrated—renders it ineffective against anyone who can afford to move out of Louisiana. As a result, covenant marriage will have an unfair impact on Louisiana's poorest citizens. The only question that remains is how great that impact will be.

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[216] *See supra* note 21.